REVISION OF TITLE 8 OF THE CODE OF VIRGINIA

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REPORT OF THE
VIRGINIA CODE COMMISSION
To
THE GOVERNOR
And
THE GENERAL ASSEMBLY OF VIRGINIA

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Richmond, Virginia

November 17, 1976

To: Honorable Mills E. Godwin, Jr., Governor of Virginia

and

The General Assembly of Virginia

The General Assembly at its Regular Session of 1972 directed the Virginia Code Commission, by House Joint Resolution No. 31, to make a study of Title 8 of the Code of Virginia and to report its findings in the form of a recodification of such title.

T. Munford Boyd, Esquire, of the Charlottesville Bar, and a former faculty member at the University of Virginia Law School, was retained as Consultant to assist in the Revision of Title 8. Leigh B. Middleditch, Jr., Esquire, of the Charlottesville Bar, who teaches Virginia Procedure at the University of Virginia Law School, and Edward S. Graves, Esquire, of the Lynchburg Bar, who teaches the same subject at the Washington and Lee University Law School, were associated with Mr. Boyd to assist in the Revision.

The Code Commission and its Consultants perceived their assignment as being the preparation of a modern system for the trial of civil actions in Virginia courts. While easily stated, there are certain inherent problems in approaching this goal. Early in the revision the possibility of codifying the rules of the Supreme Court was addressed and rejected; inherent in this rejection was the recognition of the dual responsibility of the judiciary and legislature in the development and maintenance of any system of civil procedure since such a system will involve both statutes and Rules of Court. It is apparent that, given the dual responsibilities of the judicial and legislative branches, cooperation and coordination between these bodies is mandatory for Virginia to maintain a modern and cohesive system of civil procedure.

The Consultants were primarily concerned with the revision of the statutory component of that system as set forth in Title 8; however, it was understood that it was the Code Commission's desire that recommendations regarding rule changes also be addressed to the end that the overall system be reviewed.

The Consultants approached their task by initially surveying states that had recently revised their civil procedure. [See Appendix I] It is noted that an increasing number of states have adopted, in

whole or in part, the Federal Rules of Civil Procedure. While this trend was recognized, the Consultants proceeded under instructions from the Code Commission to devise the best procedural system conceivable without doing violence to that portion of the existing system which has proved, on the basis of experience, to be of value in Virginia.

A continuous effort was made to obtain advice from the bench and bar. Recommendations were solicited, reviewed, and brought to the Code Commission's attention. The Consultants also contacted the Court Procedure Committees of the Virginia State Bar, State Bar Association, and Virginia Trial Lawyers Association. Liaison was effected with the Supreme Court, and a special committee of the Court met with the Consultants on several occasions. The Code Commission and the Consultants also believed it important to keep the bench and bar informed of the progress of the revision and of the proposals being considered. This has been done by the distribution of three interim reports - the first in April, 1975, the second in April, 1976, and the third in October of this year. Copies of these reports were distributed to the aforementioned Court Procedures Committees. Also, copies were made available to local bars or individual attorneys through the office of the Executive Director of the Virginia State Bar.

Additionally, the Consultants have attended meetings of various Statewide legal groups to explain proposals being forwarded and to respond to questions. Appendix II lists those groups and meetings attended.

Highlights of the revisions to Title 8 follow. This summary is not intended as a substitution for the Reviser's Notes which accompany the recommended changes.

HIGHLIGHTS OF THE REVISION OF TITLE 8

Chapter 1 - General Provisions as to Civil Cases. This chapter was revised so that it deals primarily with the framework forming the system of rules of practice and pleading in Virginia. Extraneous material appearing in the present chapter was eliminated by deletion or relocation.

Section 8.01-2 defines several terms used throughout the Title. They are: (1) action and suit, (2) decree and judgment, (3) fiduciary, (4) rendition of a judgment, (5) person, (6) person under a disability and (7) sheriff. Other terms applicable only to a particular chapter in the Title are defined in that chapter.

The mandate of § 5 of Article VI of the Constitution of Virginia has been followed. Thus the Supreme Court is recognized as having the overall responsibility for the preparation of rules governing the course of appeals and the practice and procedures in our courts, while recognition is given to the power of the General Assembly to affect such rules by the enactment of general laws. Section 8.01-3 follows existing law calling for coordination between the judiciary

and legislative branches in the formulation of rules of practice and procedure, e.g., present § 17-116.4 provides that the Supreme Court shall formulate rules of practice and procedure for the circuit courts following consultation with the chairmen of the House and Senate Courts of Justice Committees and the Executive Committee of the Judicial Conference of Virginia.

To permit the practicing bar an opportunity to digest new rules prior to their effective date, subsection B. of § 8.01-3 provides that new rules and amendments shall not become effective until 60 days from their adoption by the Supreme Court. The same subsection provides for a system of distribution of the rules to various state agencies and the maintenance of the rules by courts to which they are distributed.

Section 8.01-1 provides that the provisions of Title 8 shall apply to causes of action which arose prior to the effective date of any such provision, but the trial court is empowered to apply any predecessor provision if the new provision may materially change the substantive rights of a party or may cause miscarriage of justice.

Section 8.01-4 recognizes the power of the district and circuit courts to provide for local rules but restricts their applicability to the promotion of proper order and decorum and the efficient use of courthouses and clerks' offices.

Chapter 2 - Parties . As with the chapters on Limitations of Actions and Venue, the Revisers have attempted to consolidate into a single chapter the provisions relating to parties to a civil action. Article 2 of present Chapter 5 ("Parties"), present Chapter 7 (Death or change of parties;...), and several other sections (e.g., § 8-129 - When court may add new parties to suit) have been combined in Chapter 2 - Parties .

Section 8.01-5 (Effect of nonjoinder or misjoinder ...) adopts the policy of present § 8-96 by providing that parties may be added to or dropped from an action without prejudice until all parties necessary for the just disposition of the case are before the court. However, the provisions of present § 8-96 which exempt a party from being added for various reasons has been deleted. The substance and functional effect of these provisions are better implemented under Rule of Court 3:9A (Joinder of Additional Parties).

Present §§ 8-88 (Guardian ad litem for infant or insane defendant) and 8-88.1 (When guardian ad litem need not be appointed for infant, insane person, or convict) have been combined in § 8.01-9. The proposal utilizes the term "person under a disability" in lieu of infant and requires a guardian ad litem to be appointed when such a person is a defendant. A guardian must also be appointed if one is required to file an answer for such a person. The proposal permits the court to appoint as the guardian ad litem the attorney of record for the person under a disability. However, the section specifically requires that the attorney be licensed to practice in the Commonwealth.

Present § 8-91 (Suing in the name of persons who are dead) is a holdover from the days when Virginia's third party beneficiary statute did not apply to sealed instruments and is to be repealed.

Section 8.01-15 is the first sentence of present § 8-66 (Suits by and against unincorporated associations or orders). The second sentence of the present section has been incorporated into the proposed Process chapter.

Section 8.01-22 establishes the procedure to be utilized when death, etc. occurs as to any of several plaintiffs or defendants. Present § 8-146 has been amended to give the court discretion either to halt the entire proceeding pending the appointment of a successor (See Rules 2:16 and 3:15), or to permit the action to proceed against the living parties, severing the decedent and preserving a separate action as to him.

The final major change in this chapter is the abolition of the writ of scire facias (§ 8.01-24). The Revisers believe scire facias to be a cumbersome, obsolete writ which is little understood and whose objectives can be better served by the more direct pleading of a motion.

Chapter 3 - Actions . This proposed chapter consolidates into one chapter those provisions in present Title 8 that recognize a cause of action. Generally, either an entire present chapter or a present article of a chapter appears as a separate article of this new chapter.

Comporting with the effort to consolidate venue and limitation of action provisions into proposed Chapters 5 and 4 respectively, such provisions have generally been deleted from the proposed section in this chapter. Also, minor language changes have been made in many present sections without altering the substance. This was done to clarify the section or to conform its language and provisions with modern practice. The more significant changes are summarized below.

Article I - "Survival and Assignment of Cause of Action"

Section 8.01-25 (Survival ...) revises present § 8-628.1 (No action lost by death of person liable or person having right of action; ...) by providing that all causes of action will survive the death of any actual or potential party. Also, an amendment to present § 64.1-145 (Action for goods carried away, waste, or damage to estate of or by decedent) has been proposed to eliminate the distinction that has grown up between direct and indirect injuries to property.

The proposed section has two provisos. One recognizes the preemption of the wrongful death action when the decedent's death is caused by the alleged injury. The other precludes the awarding of punitive damages after the death of the person liable.

Proposed § 8.01-26 (Assignment ...) separates the issue of assignability from that of survival. No longer will an action be assignable simply because it survives. Instead, only an action ex

contractu or an action for damage to real or personal property - whether such damage be direct or indirect - will be assignable.

Article 2 - "Actions on Contracts Generally"

The repeal of present § 8-510 (When account to be filed with motion for judgment) is recommended, and present §§ 8-511.1 (When plaintiff entitled to less than twenty dollars, judgment for defendant) and 8-512 (Promise after bankruptcy must be in writing) are to be transferred to Title 17 and Title 11 respectively. The dollar amount in § 8-511 (When judgment to be given in action upon contract) has been increased from $20 to $100.

Articles 3, 4, 6, and 7 - "Injury to Person or Property", "Defamation", "Injury to Railroad Employees", and "Motor Vehicle Accidents".

These articles respectively incorporate Articles 1, 2, 4 and 5 of present Chapter 29 - Injuries. Present §§ 8-628.1 and 8-628.2 have been omitted from Article 3. The significant provisions of § 8-628.1 have been incorporated into § 8.01-243 of the Limitations chapter (Chapter 4) and in §§ 8.01-25 and 8.01-26 of this chapter. Present § 8-628.2 pertains to evidentiary matter and is to be relocated in Chapter 14 - Evidence . (See § 8.01-417)

The only change made to present Article 2 is in § 8-632.1 (Defamatory statements in radio broadcasts). There the language has been altered to clearly indicate that the statute applies to both radio and television broadcasts. (See § 8.01-49)

The modern day value of present Article 4 was seriously questioned in light of federal railroad legislation. However, it was determined that the statutes are valuable on occasion when the federal legislation affords no relief to Virginia citizens. Therefore, the present provisions have been retained.

The Revisers recommend the deletion of present §§ 8-646.3 through 8-646.7 from present Article 5 - "Motor Vehicle Accidents". These statutes appear to be potentially violative of Constitutional due process requirements.

Article 5 - "Death by Wrongful Act"

Article 3 of present Chapter 29 (§§ 8-633 through 8-640) contains the wrongful death provisions. This material received considerable attention, and in this article many of those provisions are redrafted and consolidated . Additionally, the sequence of the present provisions has been altered so that they are more logically ordered.

Present § 8-633 defines the action for wrongful death. Section 8.01-50 generally adopts these provisions. However, the survival provisions in this section have been embraced in § 8.01-25; therefore, they have been deleted here. Also, the final paragraph of the present section regarding actions arising prior to July 1, 1958, has been deleted as being unnecessary.

Present § 8-634 specifies how and when such an action is to be brought. The procedural provisions are adopted in subsection B. of § 8.01-50. However, the limitations provisions have been deleted; the limitations period for wrongful death actions is specified in § 8.01-244.

Section 8.01-51 adopts present § 8-635 (No action when deceased has compromised claim) without change.

Present §§ 8-636.1 (Amount and distribution of damages) and 8-638 (Judgment to distribute recovery when verdict fails to do so) contain, inter alia, duplicate provisions as to beneficiaries, fail to denote when these beneficiaries are to be determined, and are unclear as to the specification of the damages. Sections 8.01-52 (Amount of damages), 8.01-53 (Class and beneficiaries; when determined), and 8.01-54 (Judgment to distribute recovery when verdict fails to do so) amend and reorder the provisions of the present sections to present them more logically and to clarify the procedures.

Section 8.01-52 modifies present § 8-636.1. The material defining the class and beneficiaries has been incorporated into § 8.01-53. Inserted is a proviso prohibiting the award of punitive damages in wrongful death actions. This codifies case law.

The third paragraph of the present section addresses the apportioning of damages awarded for medical treatment and funeral expenses. To this paragraph has been added language which requires the court or the jury, as the case may be, to specifically set out such damages.

Section 8.01-53 defines the class and beneficiaries to receive the damages awarded and states when they are to be determined. Set forth in (i) and (ii) of subsection A. are the first two classes eligible to receive damages and the beneficiaries are delineated within each. Similar provisions are in present §§ 8-636.1 and 8-638.

The final proviso of present § 8-638 is (iii) of subsection A. with one important exception. The present language speaks of "surviving spouse and parent". Referring to present § 1-13.15 (Number), the words "parent" could also be read "parents". However, the history of this section indicates that "parent" replaced the earlier language "widow or widower". Thus it appears that the present section includes as beneficiaries within this third class only the mother or father of the decedent, and not both. The revisers have altered the present language so that the third class will now include as beneficiaries both living parents or either surviving one.

Subsection B. of § 8.01-53 sets the time when the class and beneficiaries who may receive the awarded damages will be fixed. This proposal codifies present Virginia case law.

Section 8.01-54 is based on present § 8-638 (Judgment to distribute recovery when verdict fails to do so) and clarifies the procedure for the specification of the damages awarded under proposed § 8.01-52 and their distribution to these beneficiaries

determined under proposed § 8.01-52. Subsection B. requires the court, upon request of either party, to instruct the jury to specify the distribution of the award among the beneficiaries. This paragraph also clarifies the court's authority to apportion the award. The damages awarded are to be paid and distributed according to existing law.

Present § 8-637 (New Trials) is to be deleted. No one could be misled to think that the court could be deprived of its power to grant new trials.

Present § 8-639 is the compromise provision for a wrongful death action. Section 8.01-55 adopts this section with one major substantive change. The phrase not requiring grandchildren to be made parties to these proceedings has been deleted. The petition must show that "notice" has been given "to all persons who might be interested".

Present § 8-640 (When right of action not to determine nor action to abate) has been adopted without substantive change in § 8.01-56. The second clause of the present section has been changed so as to eliminate redundant materials. Also, the term "death" has been defined to encompass the "dissolution or other termination" of a defendant.

Article 8 - "Actions for the Sale, Lease, Exchange, Redemption and Other Disposition of Lands of Persons under a Disability"

Chapter 30, Article 2 (Lands of Persons under Disabilities) has been simplified. However, the substantive law has generally been retained. The term "person under a disability" has been defined for Title 8.01 in § 8.01-2.

Section 8.01-68 - (Jurisdiction) covers present §§ 8-675, 8-677, 8-681, 8-682 and 8-683. The thrust of present § 8-675 with its numerous provisions designed to protect the person under a disability has been preserved. After taking into consideration the rights of any other party interested in the land of such person, the proposal authorizes a circuit court, in the exercise of its ancient equity jurisdiction, to order the sale, exchange, lease, encumbrance, redemption or other disposition of such person's property if it is satisfied by competent evidence, independent of admissions in the pleadings, that such relief will promote the interest of such person. The circuit court shall be governed by the established practice for judicial sales. With the adoption of this proposed section, the Revisers recommend the deletion of present §§ 8-675, 8-677, 8-681, 8-682 and 8-683.

Present § 8-676 (see §§ 8.01-69 and 8.01-70) (Verification and parties defendant to such bill) has been rewritten. The revision retains the provisions as to necessary parties found in the present section and adopts verbatim the 1973 amendment to the section. This amendment bars the contingent right of a wife or husband whose spouse is a person under a disability. The deletion of present §§ 8-686 (Spouse of insane etc. may release dower or curtesy ...) and 8-687 (Same rights in proceeds of sale to be secured or

compensation made), which pertain to a release of the right of dower and curtesy, were apparently overlooked since these statutes that are irreconcilable with this 1973 amendment to present § 8-676. The Revisers therefore recommend the deletion of present §§ 8-686 and 8-687.

Present §§ 8-679 (Guardians ad litem to be appointed) and 8-680 (Failure to answer in person and as guardian ad litem) pertain to the appointment of a guardian ad litem for persons under a disability. Section 8-679 has been rewritten (see § 8.01-73) and § 8-680 has been deleted. Deleted is the provision regarding an answer by infants over the age of fourteen years. This provision is relatively meaningless since the infant need not answer if he so chooses. Also, a guardian ad litem must be appointed for all persons proceeded against by an order of publication under the designation of "parties unknown." The mandatory provision that the guaridan ad litem, as such, shall file an answer has been retained.

Present § 8-674, (see § 8.01-74) provides a summary procedure for the renewal of leases, surrender of leases, and the making of new leases on behalf of persons under a disability. The present section has been expanded to include new leases where no prior lease existed. Obviously a lease is less dispositive than a sale, and except in the extraordinary cases, the formal requirements of sale and exchange need not be required. Thus, a less complicated procedure was adopted. Added was the safeguard that the court be required to consider both the probable length of the disability and the duration of the lease before ordering a new lease executed. Finally the revision adopts the provisions of present § 8-674 that the lease be allowed only if it promotes the interest of the disabled person and that reasonable notice be given to parties having a present interest in the land to be leased.

The alternate procedure for the disposition of property for certain persons under a disability as contained in present § 8-689.1 et seq., and as restricted to the provisions of Title 37.1, has been retained with minor language changes. (See §§ 8.01-78, 8.01-79 and 8.01-80.)

Article 9. "Partition"

The deletion of present § 8-697 (Validation of sales when stock has been taken instead of cash) is recommended because it has no utility in modern practice. The term "person under a disability" is used throughout this article.

Article 10. "Sale, Lease, or Exchange of Certain Estates in Property"

No substantive changes have been made in present §§ 8-703.1 and 8-703.2 which relate to certain sales involving future interests in property. (See §§ 8.01-94 and 8.01-95.)

Article 11. "General Provisions for Judicial Sales"

Present § 8-658 (Bond required of commissioner of sale or

deposits of proceeds in bank) (see § 8.01-99) has been amended to empower the court to determine "such portion of the rent as the court deems appropriate" in assessing the penalty bond prescribed by the present statute. The recommendation is made so as to allow the court to prevent certain estates, such as an estate of a person under a disability, from having to expend a considerable amount of money to pay out a heavy bond premium when the property produces substantial annual rent. The term "a person under a disability" has been substituted in place of any statutory enumeration of persons under a disability. Also, the deletion of present § 8-668 (When sheriff or sergeant to execute decree or order of sale) has been recommended as unnecessary in modern practice.

Article 12. "Detinue"

A change to present § 8-593 regarding final judgment in a detinue action has been recommended. (See § 8.01-121.) Case law is modified to allow the plaintiff a deficiency judgment when the defendant, at his election, surrenders used or damaged property. Under existing law, the defendant can elect to pay the amount or surrender the property within a reasonable time set by the court. If the defendant elects to surrender the property, the plaintiff, by case law, is barred from a deficiency judgment even if the value of the property has depreciated substantially from damage or use. The recommendation forces the defendant to make an election within 30 days. Additionally, if the defendant elects to surrender the property and that property is deficient in value to satisfy the judgment, the plaintiff may then resort to the applicable provisions of the Uniform Commercial Code for satisfaction. See §§ 8.9-501 through 8.9-507.

Article 13. "Unlawful Entry and Detainer"

The phrase "with sufficient corporate or cash security" has been deleted from present § 8-791.1 (Removal of Actions). (See § 8.01-127.) This will allow the court full discretion in determining the type and adequacy of the security required.

Present § 8-792 (When summons under § 8-791 returnable to court; ...) (see § 8.01-125) has been altered so that it will only apply to actions commenced in a circuit court. The provisions granting precedence on the civil dockets to unlawful entry and detainer actions has been deleted in this section and in § 8.01-332 (see present § 8-162).

Article 17. "Declaratory Judgments"

The Revisers rewrote present § 8-579 (see § 8.01-185) to comport with provisions in proposed Chapter 5, Venue and the deletion of present § 8-580 (Procedure) is recommended as unnecessary.

Article 18. "Recovery of Claims Against the Commonwealth of Virginia"

The statute of limitations in present §§ 8-752 (Where and when

claims to be prosecuted) (see §§ 8.01-192 and 8.01-255) and 8-757 (When suits may not be brought) (see § 8.01-255) are irreconcilable. Pursuant to the consolidation of statutes of limitations into proposed Chapter 4, "Limitations of Actions", the Revisers extracted from present § 8-752 and § 8-757 the respective statute of limitations and wrote a new statute of limitations that changed the overall period from 10 to 8 years. The remainder of § 8-752 restricts its application to pecuniary claims against the Commonwealth pursuant to Article 5, Chapter 14, of Title 2.1 - "Claims against the Commonwealth". The sentence pertaining to "any other claim" against the Commonwealth has been deleted since research revealed that the impact of the statute and the legislative purpose was designed to cover only pecuniary claims. Also, the requirement of present § 8-752 to present a claim only in the Circuit Court of the City of Richmond has been changed so that a claim may be brought "in an appropriate circuit court."

Provisions of present § 8-757 pertaining to taxes and fees paid the Commonwealth on account of charters is outdated, and their deletion is recommended.

Also, the deletion of present § 8-755 (Facts to be certified) is recommended.

Article 20. "Change of Name"

The penal provision of present § 8-577.1 (see § 8.01-217) has been recommended for transferral to Title 18.2.

Article 21. "Miscellaneous Provisions"

Located in this proposed article are those statutes that have no other logical place in this Chapter of Title 8.01. No substantive changes are recommended for the sections placed therein.

Chapter 4 - Limitations of Actions. A primary objective was to bring within the scope of this chapter present statute of limitations that are scattered throughout the Code. While not abolishing the principle of laches in equity suits, the chapter recognizes the long established Virginia principle that legal claims, when appropriately adjudicated in equity, will by analogy be governed by the applicable statute of limitations.

Section 8.01-229 consolidates in one section all situations which have the general effect of tolling or suspending the running of the statutes of limitations. Thus tolling is provided in case of disability, death, injunction, prevention, dismissal, nonsuit or abatement, devise for payment of debts, new promises, and debts proved in creditors suits. Since § 8.01-25 provides that all actions will survive, this concept has been eliminated as a criterion for determining the period of limitations.

While § 8.01-230 generally follows present law in providing that a cause of action accrues when the wrongful act or breach of contract or duty occurs and not when the resulting damage is discovered, exceptions are made which are primarily set forth in

proposed § 8.01-249. This latter section provides that certain causes of action do not accrue until the damage or injury is discoverable by the plaintiff, e.g., in cases of fraud, mistake, undue influence, professional malpractice, and certain products liability actions. Also excepted are actions in which only equitable relief is sought. Most of the exceptions follow existing Virginia statutory or case law.

Section 8.01-235 provides that the bar of a statute of limitations can only be raised as an affirmative defense specifically set forth in a responsive pleading. This changes present Virginia case law which requires that where a statute creates a right unknown at common law and provides a limitation therefor, the plaintiff must plead that he is within the period of limitation (e.g., in wrongful death actions).

Section 8.01-243 generally follows present law by providing for a two year statute of limitations for personal injuries, whatever the theory of recovery, and for actions for property damage where the theory of recovery is other than in contract. However, if the injury results in death, the limitation for wrongful death actions in § 8.01-244 is applicable.

With respect to personal actions based on contract, proposed § 8.01-246 consolidates all the limitations in present Chapter 2 of Title 8 into a single section. Subdivision 2. of this section applies a 5 year limitation to all written contracts regardless of whether such contracts be under seal.

Section 8.01-248 is a catchall section which provides for a 1 year statute of limitations for every personal action for which no other statutory limitation is prescribed.

Section 8.01-251 consolidates present §§ 8-393, 8-394, 8-396, and 8-397 on limitations on enforcement of judgments. The major substantive change is the reduction of the five year period for extending a judgment against a personal representative to two years.

Chapter 5 - Venue. The major thrust in this chapter was to make the provisions relate to venue in its classical sense, i.e., as a fair and convenient place of trial, and not in any jurisdictional sense. Thus there is a departure from present sections of the Virginia Code where venue is mandatory, i.e., jurisdictional (e.g., § 8-38(9) involving suits against the Commonwealth). Similarly, the chapter eliminates the use of the term "jurisdiction" when "venue" is actually meant (e.g., present §§ 8-42 and 8-133). Section 8.01-259 provides generally that venue shall be in accordance with the provisions of the chapter and in case of conflict, provisions outside of the chapter are superseded. In conjunction, there has been an effort to incorporate all venue provisions within the chapter. However, exceptions have been made for actions involving quo warranto, proceedings for suspension or disbarment of attorneys, proceedings concerning children in juvenile and domestic relations district courts, habeas corpus proceedings, certain tax proceedings, domestic relations proceedings, adoptions, and injunctions. These actions are deemed to be sufficiently unique so that the place of trial should remain associated with the particular subjects rather than

incorporated in the general venue chapter for Title 8.01.

Alternative places of trial have been divided into two major categories: (1) "Preferred venue or Category A" - proposed § 8.01-261 generally lists those actions where venue is mandatory under the present Virginia Code; although generally designating the same forums as places of proper venue, as is done under the present Code, Category A does not have jurisdictional effect, so that even if venue is "improper" it is waived if not affirmatively pleaded.

(2) "Permissible venue or Category B" - proposed § 8.01-262 lists those forums in which venue is proper in actions other than those listed in Category A. Thus, Category B will be applicable to the vast majority of Virginia actions.

Section 8.01-264 makes transfer rather than dismissal the remedy for improperly laid venue, but provides that improper venue, whether "preferred" or "permissible" is waived if the defendant does not make timely objection. The result is that improper venue is not a fatal defect. Thus, § 8.01-265 provides that venue may be transferred by the trial court if it is improperly laid under the provisions of proposed §§ 8.01-260, 8.01-261 and 8.01-262, and objection is properly made pursuant to proposed § 8.01-264; or even if properly laid under proposed §§ 8.01-260, 8.01-261 and 8.01-262, venue may be transferred by the court on the basis of forum non conveniens.

Section 8.01-266 provides sanctions where there is a transfer of venue such that the court shall award an amount necessary to compensate a party for inconvenience, expense, and delay that he may have been caused by the commencement of the suit in a forum which is neither preferred or permissible or by the bringing of a frivolous motion to transfer. In addition, the court may award reasonable attorney's fees.

Section 8.01-267 makes it clear that the decision of the court in transferring or refusing to transfer an action or with respect to costs awarded shall be within the sound discretion of the trial judge.

Chapter 6 - Notice of Lis Pendens or Attachment. Present §§ 8-142 (When and how docketed and indexed) and 8-143 (Dismissal or satisfaction of same) have been adopted without change. (See §§ 8.01-268 and 8.01-269.)

Chapter 7 - Pleading. This chapter includes the majority of the provisions found in Articles 3 through 8 of present Chapter 5.

In an initial proposal, the Consultants recommended the procedural merger of law and equity by the adoption of a single form of action. (See Federal Rule of Civil Procedure 2.) Accompanying this proposal was the recommendation that the initial pleading in a civil action, whether at law or in equity, be the complaint.

The pros and cons of these proposals were discussed at length with the Code Commission at several meetings. Ultimately the

Commission rejected the proposal unanimously. The Commission's rationale is set forth in Appendix III.

Section 8.01-272 adopts the provisions of present § 8-134 (Pleading several matters; how pleas filed; which tried first). The proposal expressly overrules the long-standing prohibition against the joinder of tort and contract claims. However, such joinder is permitted only when the claims arise out of the same transaction or occurrence.

Under present § 8-99 (Forms of demurrer ...) a demurrant does not have to state the specific grounds of a demurrer unless a party, by motion, or the court requires it. Section 8.01-273A. requires the demurrant to do so and only those specific grounds stated in writing will be considered by the court.

Section 8.01-276 abolishes the demurrer to the evidence and the plea in abatement. The objective of these two pleadings can be better served by simpler and more direct forms of pleading. They are replaced, respectively, by the motion to strike the evidence and by an appropriate written motion. Reference to the abolished pleadings also has been omitted in other sections.

Present § 8-118 (Defects availed of by plea in abatement ; ...) makes it difficult to distinguish between defective process and invalid process and requires a different pleading to challenge such process - i.e. plea in abatement when process is defective and motion to quash when invalid. The Revisers believe that only one procedure is needed to bring process questions before the court and have recommended in § 8.01-277 that a motion to quash be utilized.

Present § 8-96.1 (Alternative allegations allowed in certain actions) restricts pleading in the alternative to actions arising out of a motor vehicle accident. Section 8.01-281 removes this restriction and permits a party in any civil action to join alternative claims or defenses. However, as with the joinder of tort and contract claims, these alternative claims or defenses must arise out of the same transaction or occurrence.

Chapter 8 - Process. A uniform system for service of process is set forth. Applicability of the rules of court is recognized (see e.g., § 8.01-287).

Section 8.01-292 modifies present law to allow unrestricted Statewide service of process. Present § 8-44 permits such service generally, but where venue is based on where the cause of action arises, present § 8-39, together with present § 8-47, in certain cases restricts process to the bailiwick of the court wherein the action is filed. This restriction is anachronistic, illogical, and has been eliminated.

Section 8.01-295 expands the territorial limits within which a sheriff may serve process in his official capacity to include not only his own political subdivision but any contiguous political subdivision. This represents an expansion of present § 8-50.

While the present manner of serving process on natural persons has essentially been retained, in an effort to provide additional due process protection to defendants who are served by posting, subdivision 2b of § 8.01-296 provides that in such instances, not less than 10 days before a default judgment may be entered, the party who causes service on the defendant by posting must also mail to him a copy of the pleading and file with the clerk of the trial court a certificate of such mailing.

Section 8.01-297 expands present § 8-55 (Service on Convicts in Divorce Actions) by providing for service on incarcerated felons in all actions.

The present provisions regarding service on corporations and other organizations have been tightened up to provide a general pattern for service on various agents of these organizations. Also, the current process traps inherent in present § 8-59, where service is attempted on a corporate officer outside the bailiwick where the action is brought, or with respect to an insurance company when such officer is outside the bailiwick where the chief office of the company is located, have both been eliminated.

An improvement has been made where service is by order of publication. Under present law there is no date certain by which the defendant knows that he must file a pleading or otherwise be in default. Section 8.01-317 requires that there be a date stated in the order of publication which shall be no sooner than 40 days after entry of the order. The method and manner of publishing the order is retained, but the duties of the clerk are clarified in that he is required to cause copies of the order to be posted, mailed and transmitted to the designated newspaper and to file a certificate that these requirements have been compiled with. Section 8.01-324 makes minor changes to the type of newspaper which may be used for publishing legal notices.

A significant change has been made to the "verity" rule of existing law whereby a sheriff's return is conclusive. Section 8.01-326 provides that no return shall be conclusive proof as to service of process, but the sheriff's return shall be prima facie evidence of the facts stated therein, and the return of other qualified individuals shall be merely evidentiary of such facts.

Present § 8-4.1 providing for privilege from arrest under civil process has never been clearly understood. Sections 8.01-327.1 and 8.01-327.2 define arrest under civil process and detail those individuals who are exempt.

Chapter 10 - Dockets. Several sections within present Chapter 9 have been rewritten and consolidated for clarity. Also, present § 8-154 (Certain cases struck from docket after certain period; reinstatement) has been relocated within this chapter.

Present § 8-162 (Calling the current law docket) has been amended in several ways. The proposal requires the court to provide notice for a hearing or for the calling of the docket if such is to take place on a date other than the first day of the term. Also, present §

8-163 (Calling dockets in cities of one hundred thousand inhabitants) permits court located in a city of more than 100,000 people to call the docket "at such intervals as may be directed by an order of court". The proposal removes the population standard and extends that privilege to all circuit courts.

Chapter 11 - Juries. Present § 19.2-260 (Provisions of Title 8 apply except as provided in this article) provides that trial by jury in criminal cases shall be regulated by the provisions of Title 8 unless specifically provided otherwise in Article 4 of Title 19.2. Thus, references to criminal cases are found throughout the present chapter. Also, because of duplicate provisions in Title 19.2, present §§ 8-208.20 (Charging grand jury in presence of person selected as juror), 8-208.30 (Separate juries for separate trials of persons jointly indicted), and 8-208.31 (When jury need not be kept together in felony case) have been deleted in the proposed title.

Section 8.01-336 seeks to define the role of the jury trial in a civil action. It draws upon provisions of present §§ 8-211 (When, in an action at law, there may be trial by jury), 8-212 (Trial of issues, or inquiry of damages, by jury), 8-208.21 (Waiver of jury trial), 8-213 (Trial by jury of plea in equity), and 8-214 (Issue out of chancery), as well as Federal Rule of Civil Procedure 38 (Jury trial of right).

Subsection A. of § 8.01-336 cites § 11, Article I, of the Virginia Constitution and thereby recognizes the historical standard for the right to trial by jury. Basically, if an issue was tried by jury at common law in 1776 when Virginia adopted its first constitution, the right to jury trial of that issue is preserved. Any change in this right can only be made by the legislature; thus the reference in the proposal to statutes of the Commonwealth.

Subsection B. of § 8.01-336 combines present § 8-211 with § 8-208.21. If a civil action or a particular issue is triable of right by jury under subsection A., a person waives that right unless he requests that the action or issue by so tried. The $20 amount in present § 8-211 has been increased to $100.

Subsections C., D. and E. of § 8.01-336 incorporate present §§ 8-212, 8-213, and 8-214. These subsections accomplish everything that now can be accomplished under the present sections.

Present §§ 8-208.7 (Restrictions on amount of jury service permitted), 8-208.27 (Effect of irregularities), and 8-208.29 (When exception to juror not allowed) each contain provisions as to how and when objections to the jury's selection or make-up should be made. The proposal consolidates these provisions so that any objection to an irregularity in the jury list etc., or to any legal disability must be made before the jury is sworn. (See §§ 8.01-342, 8.01-352 and 8.01-353.) Thereafter, such objections may be made only with leave of court.

Present §§ 8-208.33 through 8-208.38 pertain to the compensation and reinbursement of jurors. These provisions are to be relocated in Title 14.1 (Costs, Fees, Salaries and Allowances).

Chapter 12 - Interpleader; Claims of Third Parties to Property Levied on, etc. Section 8.01-364 (Interpleader) is modeled after FRCP 22 and is designed to give Virginia a modern interpleader practice. Although this statute does not expressly replace the equitable remedy of interpleader, it does remove certain technical limitations to that remedy. The only equity limitation retained is that of identity of claims, i.e. the claims must relate to or affect the same property or fund. Thus, while both equitable and statutory interpleader will be available, it is envisioned that the former will fall into disuse.

The proposed statute expressly recognizes the discretionary power of the court to grant injunctions, discharge parties, etc. and thereby tailor the course of the interpleader proceeding. Also, the interpleading party is given the right to deposit the property into the court, or the court may so order.

Chapter 13 - Certain Incidents of Trial. Present § 8-220 (When nonsuit not allowed; proceeding after nonsuit) received particular attention. A draft quite similar to FRCP 41 (Dismissal of Actions) which would have greatly altered the nonsuit procedure was initially proposed and rejected. The proposal adopted, § 8.01-380, combines present §§ 8-220 and 8-244 (When action deemed brought on counter-claim; statute of limitations, defendant's dismissal). Basically, the provisions of § 8-220 have been adopted, but the number of nonsuits which may be taken in an action by a party as a matter of right is restricted to one. Additional nonsuits may be allowed by the court or agreed to by the parties. Also, where multiple causes are alleged, the nonsuit procedure is made to apply to the dismissal of a particular cause of action.

The provisions of § 8-244 requiring a counterclaiming defendant's consent for dismissal have been expanded in § 8.01-380 to cover cross-claims and third-party claims. Additionally, even if the adverse party who has filed such a claim does not consent to the dismissal, a nonsuit can be taken if such claim can remain pending for adjudication on its own.

Closely related to this nonsuit provision is a section in the Limitation of Actions chapter - § 8.01-229 (Suspension or tolling of statute of limitations; ...nonsuit...). This section provides that if the new proceeding is instituted within six months of the nonsuit, the time between the commencement of the nonsuited action and this new proceeding will not be computed as part of the period within which such action must be brought.

Present § 8-257 (When cause heard on report) requires that the commissioner's report lie in the clerk's office for ten days before there can be a hearing. Proposed § 8.01-615 abolishes this requirement. Instead, the court is to provide reasonable notice of a hearing.

While present § 8-261 (Book entitled "Settlements of Receivers and Commissioners") calls for the filing of the commissioner's report in the "Settlements of Receivers and Commissioners Book", many clerk's offices do not have such a book. Section 8.01-619

alters the present section by requiring the recording and indexing of these reports in a fiduciary book.

Chapter 14 - Evidence. The chapter on Evidence contains extensive changes in those provisions pertaining to judicial notice and discovery.

The first three articles of the present Evidence chapter (Chapter 16 - §§ 8-263 to 8-279.2) pertain generally to the evidentiary status of laws and records of this Commonwealth, the United States, other states and other countries. Article 1 (§§ 8.01-386 to 8.01-391) extensively amends these present provisions. Generally, the laws and the official publications of these jurisdictions and their political subdivisions are to be given judicial notice. Judicial and non-judicial records of these jurisdictions are to be received as prima facie evidence provided they are properly authenticated.

Articles 7, 8, and 9 of the present Evidence chapter pertain to discovery. Many of these provisions are duplicated in Part 4 of the Rules of Court. Desiring to avoid duplication and assuming that the rules governing these subjects may be given general application, the Revisers, at the request of a special liaison committee designated by the Supreme Court, have submitted to that committee a proposed revision to certain rules in Part 4. On the assumption that the proposal will be favorably received, the Revisers have recommended the deletion of various statutes relating to discovery. If adopted by the Supreme Court, the result will be that Part 4 of the Rules will include the substance of the present rules and statutes on discovery. With the exception of § 8-315.1 (Depositions as basis for motion for summary judgment or to strike evidence), which will be retained in the Code as § 8.01-420, the statutory provisions of present Articles 7, 8, and 9 are to be deleted. Similarly, §§ 8-301 to 8-303 pertaining to subpoena duces tecum have been deleted.

Other noteworthy changes made in the Evidence chapter include Articles 3 and 4 on witnesses and the compelling of their attendance. Present §§ 8-286 (Corroboration required and evidence receivable when one party incapable of testifying), 8-287 (Competency of husband and wife to testify), 8-289 (Communications between husband and wife), and 8-296 (How summons for witness issued and to whom directed) each have been amended. (See §§ 8.01-397, 8.01-398 and 8.01-407.) Of particular note is the abrogation of the privileged status of communications between husband and wife if by Virginia law one is permitted to sue the other. See § 8.01-398. Finally, § 8.01-418 (When plea of guilty or nolo contendere or forfeiture in criminal proceedings admissible in civil action, proof of such plea) broadens present § 8-267.1 by including parties that plead nolo contendere or have suffered a forfeiture.

Chapter 15 - Payment and Set-Off. The deletion of many of the present provisions is recommended because they are either now covered by rules of court or are obsolete. These are §§ 8-239 (Right of setoff recognized ;...); 8-240 (When in action on contract surety may counterclaim on claim of principal against plaintiff); 8-420.1 (When plaintiff allowed counter set-off ;...); 8-245 (Procedure on

defendant's claim; excess); and 8-247 (Effect of chapter on voluntary bonds). Additionally, present § 8-244 (When action deemed brought on counterclaim or crossclaim;...) has been deleted in that its provisions have been incorporated into proposed §§ 8.01-233 and 8.01-380. Also, present §§ 8-239.1 (Counterclaims in proceedings before trial justices) and 8-239.2 (Cross-claims in proceedings before trial justices) are to be relocated in Title 16.1.

This leaves present §§ 8-236 (Payment may be pleaded), 8-237 (Payment into court of part of claim), and 8-238 (Proceedings thereupon). These three sections have been combined into proposed § 8.01-421. While minor language changes have been made, the substance remains unaltered. Also retained without change are present §§ 8-241 (Pleading equitable defenses) and 8-246 (Procedure on defendant's claim; when plaintiff claims as assignee or transferee).

Chapter 16 - Compromises . The major changes in present Chapter 10 have been made to present §§ 8-169 (Approval of compromises on behalf of infants or insane persons in suits to which they are parties) and 8-170 (Compromise of claims for personal injury to infants or insane persons). Also, these two sections have been combined in proposed § 8.01-424. In the chapter the new term "person under a disability" has been used. Thus, the proposal applies to persons besides the infant or the insane.

Present § 8-169 gives an infant, upon the coming of age, six months to attack a compromise made on his behalf. The Revisers do not believe that the infant needs this additional leeway any more than any other person under a disability. Also, proposed Subsection B. of § 8.01-424 requires that all such person's interest be protected by a guardian ad litem. Therefore, the six month provision in the present section has been deleted.

Present § 8-170 has been completely rewritten to simplify the procedure for compromising personal injury and property claims of persons under a disability. As noted above, in all instances a guardian ad litem must be appointed to represent the interests of such persons. Also, the present provision making it unnecessary to join as a party to such proceedings any person whose whereabouts are unknown has been deleted, and the provisions proscribing the venue for motions for compromise have been altered. (See § 8.01-424.)

Chapter 17 - Judgments and Decrees Generally. Three changes in this chapter deserve special mention. Present § 8-348 (Correction of certain errors) is a statute that is not clearly understood. The Revisers recommend that this section be deleted and that proposed § 8.01-428 (Setting aside default judgments, clerical mistakes, other judgments, decrees, orders or proceedings; grounds and time limitations) be adopted. The proposal is an adaptation of FRCP 55 and 60 and is designed to be more definitive and practical than the present section.

The last sentence of present § 8-368 (Joint wrongdoers; effect of judgment against one) presents a problem in terms of the

plaintiff making an irrevocable election when one of multiple judgments can only be partially satisfied. The proposal changes the present law such that discharge of all joint tortfeasors, except as to cost, occurs only when one of multiple judgments has been fully satisfied and accepted as such by the plaintiff. (See § 8.01-443.)

Present §§ 8-370 to 8-372 pertain to powers, etc. of courts and judges "in vacation". The Revisers recommend deletion of these sections and the adoption of § 8.01-445. Throughout Title 8 references to "in vacation" have been eliminated, and this proposed section empowers a court to operate in vacation as it does in term.

Chapter 18 - Executions. Only two major changes have been made in this chapter. Sections 8.01-478 and 8.01-481 change the time the lien becomes effective on tangible personal property to the time when the writ is levied.

Present § 8-441 is erroneous because it suggests that the judgment debtor may be proceeded against by order of publication. Section 8.01-511 alters these provisions for service on the judgment debtor.

Chapter 19 - Forthcoming Bonds. Present § 8-451 (If bond forfeited, where returned ...) has been amended to require that the officer return the bond forthwith instead of the present 30 days. (See § 8.01-527.)

The Revisers recommend that the removal of a case under present § 8-457 (When a general district court may give judgment on forthcoming bond; removal of case) should be substantially the same as it is under § 16.1-92 relating to the general district courts. Therefore the section as amended to accomplish this end will be transferred to Title 16.1.

Chapter 20 - Attachments and Bail in Civil Cases. Present § 8-519 (Who may sue out an attachment) is to be amended by inserting the language "including rent" after the present language "claim to any debt". (See § 8.01-533.) This change comports with the recommended deletion of Article 5, §§ 8-566 to 8-568, which presently deals separately with attachment for rent. Also, present Articles 4 (For small claims or by suit in equity) and 6 (Capias ad respondendum) are to be deleted.

Present § 8-545 (Lien of attachment; priority of holder in due course) distinguishes between real and personal property as to when a lien arises thereon. Section 8.01-557 abolishes this distinction and provides that all liens arise only when the attachment has been levied.

A final sentence has been added to present § 8-556 (Quashing attachments or rendering judgments for defendant). This sentence specifies that the plaintiff is to have the burden of proof in the proceedings under this section. (See § 8.01-568.)

Present § 8-562 permits a rehearing when judgment has been rendered after service by publication. Section 8.01-575 reduces the

present 5 year period of limitation to 2 years.

Chapter 21 - Arbitration and Award. The Consultants and the Code Commission gave considerable attention to the present chapter. The Uniform Arbitration Act was studied and its adoption considered. However, it is recommended that the present provisions be retained without substantial change except for a requirement that an agreement to arbitrate be in writing. (See Subsection B. of § 8.01-577.)

Chapter 22 - Receivers, General and Special. The only major changes in this chapter are to present §§ 8-739 (Preparation of list of creditors; notice to them) and 8-749 (How person entitled to the money may recover). (See §§ 8.01-595 and 8.01-605.) Each of these sections has been amended in several ways, e.g., § 8-739 has been made applicable to "any other legal or commercial entity"; and proposed § 8.01-605 has no dollar amount restriction on the recovery, the venue in such proceedings is no longer required to be in Richmond (see § 8.01-192), and no statute of limitation bars any claim presented under the section.

Chapter 23 - Commissioners in Chancery. Generally, the provisions of the present chapter have only been revised to reflect the amendments to Title 17 (Courts of Record) and to incorporate applicable rules of court. Also, present § 8-256 (How report to be made out; what to be returned with it; when liable for costs) is to be deleted as the matters set forth therein are largely addressed in the rules. (See Rule 2:18.)

Section 8.01-611 updates present § 8-251 (When publication of notice equivalent to personal service) by removing the constitutionally suspect clause that publication shall be equivalent to personal service. Also, the notice provisions have been altered to better insure that notice will be adequate and timely.

Section 8.01-612 (Commissioner may summon witnesses) gives the court sole responsibility for the punishment of witnesses who fail to respond to a summons initiated by a commissioner in chancery. This alters present § 8-252.

Chapter 24 - Injunctions. Section 8.01-621 pertains to venue in injunction proceedings. Because these proceedings are unique, this venue provision has not been transferred into the proposed venue chapter. Also, proceedings in juvenile and domestice relations district courts may be enjoined.

Section 8.01-626 (When court grants or refuses injunction, justice of Supreme Court may review it) has altered present § 8-618 in two major respects. First, the presentation of a petition to a single justice shall be within 15 days of the circuit court's order respecting an injunction. No time limitation is provided by the present section. Secondly, the present section is expanded to provide that a petition may be with respect to an injunction granted by the circuit court (as well as the present provisions regarding an order refusing or granting an injunction or an order dissolving or refusing to enlarge a temporary injunction). A conforming change

has been made in § 8.01-670 (In what cases awarded) of the appeals chapter.

Chapter 25 - Article 1 - Quo Warranto. There has been confusion in present law regarding the distinction between the common law writ and the statutory proceeding ("Information in the Nature of a Writ of Quo Warranto"). The proposed chapter abolishes the predecessors and the substituted statute is intended to provide the same relief as possible under the former writs.

Chapter 25 - Article 2 - Mandamus and Prohibition. Existing statutes and rules of court adequately treat these ancient writs. No substantive statutory changes have been proposed.

Chapter 25 - Article 3 - Habeas Corpus. No substantive changes are recommended.

Chapter 26 - Appeals. A new Article 1 defines "judgment", "petitioner", and "appellant". Also "appeal" is the generic term used in this chapter in lieu of the present "appeal, writ of error or supersedeas". This is appropriate because the revised appeal procedure set forth in this chapter operates as the supersedeas.

Present § 8-462 (In what cases awarded) has been reordered and shortened. The references to appeals from actions of the State Corporation Commission has been deleted because § 12.1-39 (Appeals generally) covers such appeals. Similarly, § 65.1-98 covers appeals from awards of the Industrial Commission and references to that Commission have been deleted in various sections (e.g. present § 8-463). Also, a new paragraph has been added to present § 8-463 (Time within which petition must be presented) to specify within what time petitions for an appeal an interlocutory order must be presented. Proposed § 8.01-672 (Jurisdictional amount) increases the minimum dollar amount for an appeal from certain cases from $300 to $500.

The major change in the Appeals chapter is found in § 8.01-676 (Appeal bond; how party desiring to present such petition may procure suspension of execution; suspension of execution; exceptions; changes and penalty by Trial Court or by Supreme Court on appeal; appeals from State Corporation Commission). This section combines and replaces present §§ 8-465, 8-477, and 8-478. This provision establishes an "appeal bond" - the generic term used to include bonds for "costs", "suspending", and "supersedeas" - in lieu of the suspending bond of present § 8-465 and the supercedeas bond of present § 8-477. Also, the time for the filing of the petition for appeal and for the suspension of a judgment has been made uniform - i.e., 30 days. Provision for the review in the penalty of the appeal bond has also been changed.

APPENDIX I (a)

Influence of Federal Rules of

Civil Procedure of State Procedural Reform

The following states have adopted rules similar to, and patterned after, the Federal Rules:

Alabama	Montana
Alaska	Nevada
Arizona	New Jersey
Colorado	New Mexico
Delaware	North Carolina
Georgia	North Dakota
Hawaii	Ohio
Indiana	Rhode Island
Idaho	Tennessee
Kentucky	Utah
Maine	Washington
Minnesota	West Virginia
Missouri	Wyoming

The following states have been stimulated by the Federal Rules to revise their rules and now largely follow the Federal Rules:

Florida	Nebraska
Iowa	New York
Kansas	Pennsylvania
Michigan	Oklahoma
	Oregon
	Texas

The following jurisdictions have made limited and partial steps toward adopting the Federal Rules (e.g., the adoption of federal discovery or third-party practice rules):

Arkansas	Massachusetts
California	New Hampshire
Connecticut	South Carolina (Revision in Progress)
Illinois	South Dakota
Louisiana	Vermont
Maryland	Virginia

The following states have not been affected in a substantial way by the federal rules and have undertaken no procedural modernization:

Mississippi	Wisconsin

References

(1) Letter of August 16, 1972, from Mr. Christopher Manning of the American Judicature Society to Mr. Leigh B. Middleditch, Jr.

(2) Alabama Rules of Civil Procedure (1972).

(3) Telephone conservation by Title 8 Revision Staff on September 28, 1973, with Miss Francis Smith, Clerk of the South Carolina Supreme Court and Member of the South Carolina Commission on Judicial Reform.

(4) Tennessee Rules of Court 1970.

(5) Vernon's Annotated Missouri Rules, Introduction to Volume (1969).

(6) Civil Procedure States, Rules of Court, or Rules of Practice nd Procedure of all states listed.

APPENDIX I (b)

Survey of Procedural Reform Efforts

Throughout the United States

State	Date of Last Major Revision	Adoption of Disc. Procedures	Merger of Law and Equity	Locus of Rule-Making Power
Alabama	1972	Yes	Yes	Supreme Court by Statute
Alaska	1959	Yes	Yes	Supreme Court by Constitution
Arizona	1956	Yes	Yes	Supreme Court by Statute
Arkansas	1961	Yes	Yes	Legislature
California	1966	Yes	Yes	Constitutional Judicial Council
Colorado	1970	Yes	Yes	Supreme Court by Statute
Connecticut	1954	Yes	Yes	Supreme Court and Legislature by Statute
Delaware	1970	Yes	Yes	Supreme Court by Statute
Florida	1954	Yes	Yes	Supreme Court by Statute
Georgia	1964	Yes	Yes	Legislature adopted Federal Rules
Hawaii	1953	Yes	Yes	Supreme Court by Statute
Idaho	1957	Yes	Yes	State Code Commission and Supreme Court by Statute
Illinois	1972	Yes	Yes	Legislature
Indiana	1969	Yes	Yes	Supreme Court Inherent and by Statute
Iowa	1957	Yes	Yes	Supreme Court Inherent and by Statute
Kansas	1964	Yes	Yes	Supreme Court by Statute
Kentucky	1953	Yes	Yes	Court of Appeals by Statute
Louisiana	1968	Yes	Yes	Supreme Court by Statute
Maine	1962	Yes	Yes	Supreme Court by Statute

Maryland	1956	Yes	No	Court of Appeals and Legislature by Statute
Massachusetts	1967	Yes	Yes	Supreme Court Inherent and by Statute
Michigan	1963	Yes	Yes	Supreme Court by Constitution
Minnesota	1959	Yes	Yes	Supreme Court by Statute
Missouri	1969	Yes	Yes	Supreme Court by Constitution
Mississippi	In Progress	Yes	No	Supreme Court and Legislature
Montana	1962	Yes	Yes	Constitution says Legislature upon recommendation by Supreme Court
Nebraska	1971	Yes	Yes	Supreme Court by Constitution
Nevada	1953	Yes	Yes	Supreme Court Inherent and by Statute
New Hampshire	1971	Yes	No	Legislature
New Jersey	1972	Yes	Yes	Supreme Court Inherent and by Constitution
New Mexico	1955	Yes	Yes	Supreme Court by Statute
New York	1962	Yes	Yes	Court of Appeals by Statute
North Carolina	1967	Yes	Yes	Constitution says Supreme Court as delegated by Legislature
North Dakota	1957	Yes	Yes	Supreme Court by Statute
Ohio	1972	Yes	Yes	Supreme Court by Constitution
Oklahoma	1967	Yes	Yes	Supreme Court by Statute
Oregon	1961	Yes	Yes	Legislature
Pennsylvania	1972	Yes	No	Legislature
Rhode Island	1965	Yes	Yes	Supreme Court by Statute
South Carolina	In Progress	Yes	Yes	Judicial Conference by Constitution
South Dakota	1967	Yes	Yes	Supreme Court by Statute
Tennessee	1970	Yes	Yes	Supreme Court by Statute
Texas	1972	Yes	Yes	Supreme Court by Statute

Utah	1953	Yes	Yes	Supreme Court Inherent and by Statute
Vermont	1959	Yes	Yes	Legislature
Virginia	In Progress	Yes	No	Supreme Court by Constitution
Washington	1960	Yes	Yes	Supreme Court by Statute
West Virginia	1959	Yes	Yes	Supreme Court of Appeals by Statute
Wisconsin	1942	Yes	Yes	Legislature
Wyoming	1957	Yes	Yes	Supreme Court by Statute

References

(1) Letter of August 16, 1972 from Mr. Christopher Manning of the American Judicature Society to Mr. Leigh B. Middleditch, Jr.

(2) Report of the Judicial Study Commission of the State of Indiana (1966).

(3) Constitutions, Codes, and Rules of States listed.

APPENDIX II

List of Meetings Attended by Consultants

1972

April 19 - Richmond

August 21 - Richmond

October 13 - Charlottesville

1973

August 1 and 2 - Richmond

1974

May 14 - Richmond

August 5, 6, and 7 - Groundhog Mountain

September 28 and 29 - Charlottesville

October - Meeting with Supreme Court on liaison between Court and Code Commission, Richmond

October 11 - Virginia State Bar Committee on State and Federal Rules of Procedure, Richmond

November 1 and 2 - Richmond

November 15 - Virginia Bar Association, Committee on Court Procedure, Richmond

December 6 - Richmond

1975

February 25 - Virginia State Bar and Virginia State Bar Association Joint Meeting of Committee on State and Federal Rules of Procedure and Committee on Court Procedure, Richmond

April 3 and 4 - Richmond

April 29 - Virginia State Bar and Virginia State Bar Association, Joint Meeting of Committee on State and Federal Rules of Procedure and Committee on Court Procedure with Representatives from Virginia Trial Lawyers Association, Richmond

July 14 - Virginia Trial Lawyers Council Meeting, Virginia Beach

July 24 and 25 - Williamsburg

August 1 - Virginia Bar Association Committee on Court Procedure, Greenbrier, West Virginia

August 15 - Special Liaison Committee with Supreme Court, Charlottesville

September 12 and 13 - Charlottesville

October 1, 2, and 3 - Charlottesville

October 11 - Virginia State Bar Committee on State and Federal Rules of Procedure, Richmond

October 24 - Virginia State Bar, Council of Bar Presidents, Hot Springs

November 13 and 14 - Richmond

November 28 - Richmond

December 15 and 16 - Charlottesville

1976

March 12 - Judicial Conference of Virginia (Circuit Court Judges)

Williamsburg

March 20 - Virginia Trial Lawyers 17th Annual Seminar, Williamsburg

April 16 - Judicial Conference of Virginia (General District Court Judges) Charlottesville

April 27 - Special Liaison Committee of Supreme Court, Charlottesville

May 26, 27, and 28 - Richmond

June 17, 18, 19, and 20 - Virginia Beach

July 15, 16, and 17 - Afton Mountain

September 8 and 9 - Richmond

October 22 - Virginia State Bar, Council of State Bar Presidents, Hot Springs

November 4 - Special Liaison Committee of Supreme Court, Richmond

November 17 - Richmond

December 11 - Virginia State Bar Committee on State and Federal Rules of Procedure, Lexington

Note: The Bar has also been kept informed of the Consultants' activities by various announcements in the Virginia Bar News and by the Consultants appearing before various local bar associations.

APPENDIX III

In the course of determining the proper approach to recodification of Title 8, the Code Commission gave long and careful consideration to the proposal that a single form of civil action be adopted in Virginia. It was urged upon the Commission that a unified procedure, making legal and equitable remedies available in a single proceeding, would result in greater trial convenience and judicial efficiency while not altering the traditional substantive distinctions between law and equity.

Historically, Virginia has made haste slowly in the adoption of changes in procedure. Little spur-of-the-moment modification of established rules may be found in either the Acts of Assembly or in the Rules of the Supreme Court. Despite the long existence of the present Federal Rules of Civil Procedure, this Commonwealth has been most cautious in the adoption of rules similar to those utilized in that system.

It is apparent to the keen observer that the promotion of judicial efficiency and trial convenience, both of which are lauded as

the foremost results of adoption of the single form of civil action, in fact tend to encourage judicial activism and to burden attorneys with lengthy pre-trial conferences and orders. Despite the fact that some forty-five states have adopted the single form, the Code Commission has not been shown to its satisfaction that the proposal would (1) better protect the rights of individuals in civil cases to trial by jury; (2) that the principles of stare decisis and equitable relief would be better preserved; or (3) that judicial activism would be discouraged.

The Commission is of the opinion that the condensation and simplification of procedural statutes and rules of court, if such in fact do result from the adoption of the single form of civil action (vide the volumes of cases interpreting the Federal Rules), are not sufficient to overcome the obvious advantages of Virginia procedure so firmly established and utilized through the past centuries. This is not to say that the Commission is opposed to change, but it will not propose to the General Assembly any change which has not been shown to be a decided change for the better. Throughout this revision changes in certain aspects of the present law will be noted, but in each such case the Commission has determined that the proposed change is a distinct change for the better.

CONCLUSION

Attached to and included in this Report are the following:

Table of Comparative Sections

Table of Contents to Title 8.01

Bill to repeal Title 8 and enact

Title 8.01 in lieu thereof.

The Table of Comparative Sections is given for the purpose of tracing each section of the present law into its counterpart in Title 8.01. Certain words appearing in this Table have the following meanings, respectively. "Repealed" means that the section has been repealed by a previous act of the General Assembly. "Deleted" means that the provisions of the section are not being reenacted in Title 8.01.

Following each section of proposed Title 8.01 there appears a Reviser's Note to show what section of the present law it is based upon, and a discussion of any changes which have been made.

We express our appreciation to Messrs. T. Munford Boyd, Leigh B. Middleditch, Jr. and Edward S. Graves for the cooperation and assistance which they gave the Commission in the preparation of this Revision, and for the very considerable amount of time and effort which they expended in producing the tentative and final drafts of Title 8.01. We were fortunate to have the benefit of their knowledge of the laws relating to civil remedies and procedure.

RECOMMENDATION

The Virginia Code Commission submits this Report, and recommends that the General Assembly enact the attached bill in 1977.

Respectfully submitted,

A. L. Philpott, Chairman

J. Harry Michael, Jr., Vice Chairman

John A. Banks, Jr.

Russell M. Carneal

Frederick T. Gray

John Wingo Knowles

Theodore V. Morrison, Jr.

*Anthony F. Troy

*Anthony F. Troy, Chief Deputy Attorney General, was designated by Andrew P. Miller to represent him at the meetings of the Virginia Code Commission.

TABLE OF COMPARATIVE SECTIONS

SHOWING SECTIONS OF TITLE 8 AS THEY APPEAR IN THIS REPORT

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-1	8.01-3	8-20	8.01-229
8-1.1	8.01-3	8-21	8.01-254
8-1.2	8.01-3	8-22	8.01-252
8-1.3	8.01-4	8-23	8.01-247
8-2	8.01-1	8-24	8.01-243
8-3	8.01-4.1		8.01-248
8-4	8.01-4.2	8-24.1	8.01-249
8-4.1	8.01-327.2	8-24.2	8.01-250
8-4.1:1	Deleted	8-25	8.01-229
8-4.2	8.01-289	8-26	8.01-229
8-4.3	Deleted	8-27	8.01-232
8-5	8.01-236	8-28	8.01-232
8-5.1	8.01-255.1	8-29	8.01-229
8-6	Deleted	8-30	8.01-229
8-7	8.01-237	8-31	8.01-229
8-8	8.01-229	8-32	8.01-229
	8.01-237	8-33	8.01-229
8-9	8.01-238	8-34	8.01-229
8-10	8.01-239	8-35	8.01-231
8-10.1	8.01-240	8-36	8.01-234
8-10.2	8.01-240	8-37	8.01-256
8-11	8.01-241	8-38	8.01-261
8-12	8.01-242		8.01-262
8-13	8.01-229		8.01-263
			8.01-265
	8.01-243	8-39	8.01-262
	8.01-245	8-40	Deleted
	8.01-246	8-41	8.01-638
	8.01-249	8-42	8.01-261
8-14	8.01-249	8-42.1	Repealed
8-15	8.01-229	8-43	8.01-286
	8.01-230	8-44	8.01-292
	8.01-245		8.01-295
	8.01-249	8-45	Repealed
8-16	8.01-245	8-46	Repealed
8-17	8.01-246	8-46.1	8.01-290
8-18	Deleted	8-47	Deleted
8-19	8.01-253		

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-47.1	Deleted	8-72	8.01-317
8-48	Repealed	8-73	8.01-318
8-49	8.01-294	8-73.1	Deleted
8-50	8.01-295	8-74	8.01-320
8-51	8.01-296	8-75	Deleted
8-52	8.01-293	8-76	8.01-319
	8.01-325	8-77	8.01-321
8-53	8.01-288	8-78	8.01-322
8-54	8.01-293	8-79	Deleted
8-55	8.01-297	8-80	8.01-323
8-56	8.01-287	8-81	8.01-324
8-57	8.01-291	8-81.1	8.01-328
8-58	8.01-298	8-81.2	8.01-328.1
	8.01-353	8-81.3	8.01-329
8-59	8.01-299	8-81.4	Deleted
	8.01-300	8-81.5	8.01-330
8-59.1	8.01-304	8-82	Repealed
8-60	8.01-301	8-83	Repealed
8-61	Repealed	8-84	Repealed
8-62	Repealed	8-85	Repealed
8-63	8.01-302	8-86	Repealed
8-64	8.01-303	8-86.1	8.01-3
8-65	Deleted	8-87	8.01-8
8-66	8.01-15	8-88	8.01-9
	8.01-305	8-88.1	8.01-9
8-66.1	8.01-306	8-89	Deleted
8-67	8.01-305	8-90	8.01-10
8-67.1	8.01-307	8-91	Deleted
	8.01-308	8-92	8.01-11
	8.01-312	8-93	8.01-11
8-67.2	8.01-310	8-93.1	8.01-12
	8.01-312	8-94	8.01-13
	8.01-313	8-94.1	Transferred
8-67.3	8.01-311		to Title 54
8-67.4	8.01-309	8-95	8.01-14
	8.01-310	8-96	8.01-5
8-67.5	Deleted	8-96.1	8.01-281
8-68	Deleted	8-97	8.01-6
8-69	8.01-314	8-98	Deleted
8-70	8.01-315	8-99	8.01-273
8-71	8.01-316	8-100	Repealed

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-101	Repealed	8-138	8.01-270
8-102	8.01-275	8-138.1	Deleted
8-103	Repealed	8-138.2	Deleted
8-104	Repealed	8-139	Deleted
8-105	Deleted	8-140	8.01-276
8-106	Deleted	8-140.1	8.01-227
8-107	Repealed	8-140.2	8.01-227
8-108	Repealed	8-141	Deleted
8-109	8.01-275	8-142	8.01-268
8-110	Repealed	8-143	8.01-269
8-111	Deleted	8-144	Repealed
8-111.1	Deleted	8-145	8.01-21
8-112	Repealed	8-146	8.01-22
8-113	Repealed	8-147	8.01-19
8-114	8.01-279	8-148	8.01-20
8-115	8.01-279	8-149	Deleted
8-116	8.01-279	8-150	8.01-16
8-117	Repealed	8-151	Repealed
8-118	8.01-276	8-152	8.01-17
	8.01-277	8-153	8.01-18
8-119	Deleted	8-154	8.01-335
8-120	8.01-273	8-155	8.01-23
8-121	Repealed	8-156	8.01-23
8-122	8.01-274	8-157	8.01-265
8-122.1	8.01-282	8-158	Repealed
8-123	8.01-283	8-159	Deleted
8-124	Repealed	8-160	8.01-331
8-125	Repealed	8-161	Deleted
8-126	Repealed	8-162	8.01-332
8-127	Repealed	8-163	Deleted
8-128	Repealed	8-164	8.01-334
8-129	8.01-7	8-165	8.01-331
8-130	8.01-284	8-166	Deleted
8-131	8.01-280	8-167	8.01-333
8-132	Repealed	8-168	8.01-334
8-133	Deleted	8-169	8.01-424
8-134	8.01-272	8-170	8.01-424
8-135	8.01-278	8-171	8.01-425
8-135.1	8.01-278	8-172	Deleted
8-136	Repealed	8-173	8.01-425
8-137	Repealed	8-174	Repealed

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-175	Repealed	8-208.7	8.01-342
8-176	Repealed		8.01-352
8-177	Repealed	8-208.8	8.01-343
8-178	Repealed	8-208.9	8.01-344
8-179	Repealed	8-208.10	8.01-342
8-180	Repealed		8.01-345
8-181	Repealed	8-208.11	8.01-346
8-182	Repealed	8-208.12	8.01-347
8-183	Repealed	8-208.13	8.01-348
8-184	Repealed	8-208.14	8.01-349
8-185	Repealed	8-208.14:1	8.01-350
8-186	Repealed	8-208.15	8.01-351
8-187	Repealed	8-208.16	8.01-353
8-188	Repealed	8-208.17	8.01-355
8-189	Repealed	8-208.18	8.01-356
8-190	Repealed	8-208.19	8.01-357
8-191	Repealed	8-208.20	Repealed
8-192	Repealed	8-208.21	8.01-336
8-193	Repealed		8.01-359
8-194	Repealed	8-208.22	8.01-360
8-195	Repealed	8-208.23	8.01-361
8-196	Repealed	8-208.24	8.01-354
8-196.1	Repealed	8-208.25	8.01-362
8-197	Repealed	8-208.26	8.01-363
8-198	Repealed	8-208.27	8.01-352
8-199	Repealed		8.01-353
8-200	Repealed	8-208.28	8.01-358
8-201	Repealed	8-208.29	8.01-352
8-202	Repealed	8-208.30	Repealed
8-203	Repealed	8-208.31	Repealed
8-204	Repealed	8-208.32	Transferred
8-205	Repealed		to Title
8-206	Repealed		14.1
8-207	Repealed	8-208.33	Transferred
8-208	Repealed		to Title
8-208.1	Repealed		14.1
8-208.2	8.01-337	8-208.34	Transferred
8-208.3	8.01-338		to Title
8-208.4	8.01-339		14.1
8-208.5	8.01-340	8-208.35	Transferred
8-208.6	8.01-341		to Title
			14.1

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-208.36	Transferred to Title 14.1	8-237	8.01-421
		8-238	8.01-421
		8-239	Deleted
8-208.37	Transferred to Title 14.1	8-239.1	Transferred to Title 16.1
8-208.38	Transferred to Title 14.1	8-239.2	Transferred to Title 16.1
8-209	8.01-374	8-240	Deleted
8-210	Repealed	8-240.1	Deleted
8-210.1	Repealed	8-241	8.01-422
8-210.2	Deleted	8-242	Repealed
8-211	8.01-336	8-243	Repealed
8-211.1	8.01-375	8-244	8.01-233
8-212	8.01-336		8.01-380
8-213	8.01-336	8-245	Deleted
8-214	8.01-336	8-246	8.01-423
8-215	8.01-358	8-247	Deleted
8-216	8.01-376	8-248	8.01-607
8-217	8.01-377	8-249	8.01-608
8-218	8.01-378		8.01-609
8-219	8.01-379	8-250	8.01-610
8-220	8.01-380	8-251	8.01-611
8-221	8.01-381	8-252	8.01-612
8-222	Repealed	8-253	8.01-613
8-223	8.01-382	8-254	8.01-614
8-224	8.01-383	8-255	8.01-614
8-225	8.01-384	8-256	Deleted
8-225.1	8.01-384	8-257	8.01-615
8-226	8.01-364	8-258	8.01-616
8-227	8.01-365	8-259	8.01-617
8-228	8.01-366	8-260	8.01-618
8-229	8.01-367	8-261	8.01-619
8-230	8.01-368	8-262	Transferred to Title 14.1
8-231	8.01-369		
8-232	8.01-370		
8-233	8.01-371	8-263	Deleted
8-234	8.01-372	8-263.1	8.01-419
8-235	8.01-373	8-264	8.01-386
8-236	8.01-421	8-265	8.01-390

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-266	8.01-389	8-297	8.01-407
8-267	8.01-391	8-298	8.01-408
8-267.1	8.01-418	8-299	8.01-409
8-268	8.01-391	8-300	Transferred
8-269	8.01-390		to Title
8-270	8.01-386		19.2
8-271	8.01-389	8-300.1	8.01-410
8-272	8.01-388	8-301	Deleted
8-273	8.01-386	8-302	Deleted
8-274	8.01-387	8-303	Deleted
8-275	8.01-389	8-304	Deleted
8-276	8.01-389	8-305	Deleted
8-276.1	8.01-389	8-306	Deleted
8-277	8.01-389	8-307	Deleted
8-277.1	8.01-413	8-309	Deleted
8-278	8.01-391	8-310	Repealed
8-279	8.01-391	8-311	Deleted
8-279.1	8.01-391	8-312	Deleted
8-279.2	8.01-391	8-313	Deleted
8-280	8.01-392	8-314	Deleted
8-281	8.01-393	8-315	Deleted
8-282	8.01-394	8-315.1	8.01-420
8-283	8.01-394	8-316	Deleted
8-284	8.01-395	8-316.1	8.01-411
8-285	8.01-396	8-316.2	8.01-412
8-286	8.01-397	8-316.3	8.01-412.1
8-287	8.01-398	8-317	Deleted
8-288	Transferred	8-318	Deleted
	to Title	8-319	Deleted
	19.2	8-320	Deleted
8-289	8.01-398	8-321	Deleted
8-289.1	8.01-399	8-322	Deleted
8-289.2	8.01-400	8-323	Deleted
8-290	8.01-401	8-324	Deleted
8-291	8.01-401	8-324.1	Deleted
8-292	8.01-403	8-325	Deleted
8-293	8.01-404	8-326	Deleted
8-294	8.01-405	8-327	Deleted
8-295	8.01-406	8-327.1	Deleted
8-296	8.01-407	8-327.2	Deleted
8-296.1	8.01-402	8-328	8.01-414

TITLE 8	THIS REPORT
8-329	8.01-325 8.01-415
8-329.1	Transferred to Title 20
8-330	Repealed
8-331	Repealed
8-332	Repealed
8-333	Repealed
8-334	Repealed
8-335	Repealed
8-336	Repealed
8-337	Repealed
8-338	Repealed
8-339	Repealed
8-340	Repealed
8-341	Repealed
8-342	Repealed
8-343	8.01-426
8-344	8.01-427
8-345	Repealed
8-346	Repealed
8-347	Deleted
8-348	8.01-428
8-349	8.01-429
8-350	8.01-383.1
8-351	Repealed
8-352	8.01-430
8-353	Deleted
8-353.1	Repealed
8-354	Deleted
8-355	8.01-431
8-356	8.01-432
8-357	8.01-433
8-358	8.01-434
8-359	8.01-435
8-360	8.01-436
8-361	8.01-437
8-362	8.01-438
8-363	8.01-439
8-364	8.01-440
8-365	Transferred to Title 14.1
8-366	8.01-441
8-367	8.01-442
8-368	8.01-443
8-369	8.01-444
8-370	8.01-445
8-371	8.01-445
8-372	8.01-445
8-373	8.01-446
8-374	Deleted
8-375	8.01-447
8-376	8.01-448
8-377	8.01-449
8-378	8.01-450
8-378.1	8.01-451
8-379	8.01-452
8-380	8.01-453
8-381	Deleted
8-382	8.01-454
8-383	8.01-455
8-384	8.01-456
8-385	8.01-457
8-386	8.01-458
8-387	8.01-459
8-388	8.01-460
8-389	8.01-461
8-390	Repealed
8-391	8.01-462
8-392	8.01-463
8-393	8.01-251
8-394	8.01-251
8-395	8.01-464
8-396	8.01-251
8-397	8.01-251
8-398	8.01-465
8-399	8.01-466
8-400	8.01-467
8-401	8.01-468 8.01-469

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-402	8.01-470	8-437	8.01-507.1
8-403	8.01-471	8-438	8.01-508
8-404	8.01-472	8-439	8.01-509
8-405	8.01-473	8-440	8.01-510
8-406	8.01-474	8-441	8.01-511
8-407	8.01-475	8-441.1	8.01-512
8-408	8.01-476	8-441.2	8.01-513
	8.01-255.2	8-441.3	8.01-523
8-409	Repealed	8-442	8.01-514
8-410	8.01-477	8-443	8.01-515
8-411	8.01-478	8-444	8.01-516
8-412	8.01-479	8-445	8.01-517
8-413	8.01-480	8-446	8.01-518
8-414	8.01-481	8-447	8.01-519
8-415	8.01-482	8-448	8.01-520
8-416	8.01-483	8-449	8.01-521
8-417	8.01-484	8-449.1	8.01-522
8-418	8.01-485	8-449.2	8.01-524
8-419	8.01-486	8-449.3	8.01-525
8-420	8.01-487	8-450	8.01-526
8-421	8.01-488	8-451	8.01-527
8-421.1	8.01-489	8-452	8.01-528
8-421.2	8.01-490	8-453	Transferred
8-422	8.01-491		to Title 55
8-422.1	8.01-492	8-454	8.01-530
8-422.2	8.01-493	8-455	8.01-531
8-423	8.01-494	8-456	Deleted
8-424	8.01-495	8-457	Transferred
8-425	8.01-496		to Title
8-426	8.01-497		16.1
8-427	8.01-498	8-458	8.01-529
8-428	Deleted	8-459	8.01-532
8-429	8.01-499	8-460	Transferred
8-430	8.01-500		to Title
8-431	8.01-501		16.1
8-432	8.01-502	8-461	Transferred
8-432.1	8.01-503		to Title
8-433	8.01-504		16.1
8-434	8.01-505	8-462	8.01-670
8-435	8.01-506	8-463	8.01-671
8-436	8.01-507	8-464	8.01-672

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-465	8.01-676	8-500	8.01-687
8-466	Repealed	8-501	8.01-673
8-467	Repealed	8-502	8.01-688
8-468	Repealed	8-503	8.01-577
8-468.1	Transferred to Title 14.1	8-504	8.01-578
		8-505	8.01-579
		8-506	8.01-580
8-469	Repealed	8-507	8.01-581
8-470	Repealed	8-508	Repealed
8-471	Deleted	8-509	8.01-27
8-472	Repealed	8-509.1	Repealed
8-473	8.01-673	8-510	Deleted
8-474	Repealed	8-511	8.01-28
8-475	8.01-674	8-511.1	Transferred to Title 17
8-476	8.01-675		
8-477	8.01-676	8-512	Transferred to Title 11
8-478	8.01-676		
8-479	Deleted	8-513	8.01-29
8-480	Deleted	8-514	8.01-30
8-480.1	Deleted	8-514.1	8.01-31
8-481	Repealed	8-515	Repealed
8-482	Deleted	8-516	Repealed
8-483	Deleted	8-517	8.01-32
8-484	Deleted	8-518	8.01-33
8-485	8.01-677	8-519	8.01-533
8-486	Deleted	8-520	8.01-534
8-487	8.01-678	8-521	8.01-535
8-488	Repealed	8-522	8.01-261
8-489	8.01-679	8-523	8.01-536
8-490	Deleted	8-524	8.01-537
8-490.1	Deleted	8-524.1	8.01-538
8-491	8.01-680	8-525	8.01-539
8-492	Repealed	8-526	8.01-540
8-493	8.01-681	8-527	8.01-541
8-494	Repealed	8-528	8.01-537
8-495	8.01-682	8-529	8.01-542
8-496	8.01-683	8-530	8.01-543
8-497	Deleted	8-531	8.01-544
8-497.1	8.01-684	8-532	8.01-545
8-498	8.01-685	8-533	8.01-546
8-499	8.01-686	8-534	8.01-547

TITLE 8	THIS REPORT	TITLE 8	THIS REPORT
8-535	8.01-548	8-576	Deleted
8-536	8.01-549	8-577	Deleted
8-537	8.01-550	8-577.1	8.01-217
8-538	8.01-551	8-578	8.01-184
8-539	8.01-552	8-579	8.01-185
8-540	8.01-553	8-580	Deleted
8-541	8.01-554	8-581	8.01-186
8-542	8.01-571	8-581.1	8.01-187
8-543	8.01-555	8-582	8.01-188
8-544	8.01-556	8-583	8.01-189
8-545	8.01-557	8-584	8.01-190
8-546	8.01-558	8-585	8.01-191
8-547	8.01-559	8-586	8.01-114
8-548	8.01-560	8-587	8.01-115
8-549	8.01-561	8-588	8.01-116
8-550	8.01-562	8-589	8.01-117
8-551	8.01-563	8-590	8.01-118
8-552	8.01-564	8-591	8.01-119
8-553	8.01-565	8-592	8.01-120
8-554	8.01-566	8-593	8.01-121
8-555	8.01-567	8-594	8.01-122
8-556	8.01-568	8-595	8.01-123
8-557	8.01-569	8-596	8.01-654
8-558	8.01-570	8-596.1	8.01-655
8-559	8.01-572	8-597	8.01-656
8-560	8.01-573	8-598	8.01-657
8-561	8.01-574	8-599	8.01-658
8-562	8.01-575	8-600	8.01-659
8-563	8.01-576	8-601	8.01-660
8-564	Deleted	8-602	8.01-661
8-565	Repealed	8-603	8.01-662
8-566	Deleted	8-604	Deleted
8-567	Deleted	8-605	8.01-663
8-568	Deleted	8-606	8.01-664
8-569	Deleted	8-607	8.01-665
8-570	Deleted	8-608	8.01-666
8-571	Deleted	8-608.1	8.01-667
8-572	Deleted	8-609	8.01-668
8-573	Deleted	8-610	8.01-620
8-574	Deleted	8-611	8.01-621
8-575	Deleted	8-612	8.01-622

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8-621	8.01-629	8-646.3	Deleted
8-622	8.01-630	8-646.4	Deleted
8-623	8.01-631	8-646.5	Deleted
8-624	8.01-632	8-646.6	Deleted
8-625	8.01-633	8-646.7	Deleted
8-626	8.01-634	8-646.8	8.01-65
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8-631	8.01-46	8-654.1:1	8.01-44
8-631.1	8.01-47	8-654.2	Transferred
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8-633	8.01-50	8-654.4	8.01-223
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8-636	Repealed	8-654.9	8.01-581.16
8-636.1	8.01-52	8-654.10	8.01-581.17
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8-637	Deleted	8-656	8.01-97
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8-665	8.01-106	8-696	8.01-87
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8-667	8.01-108	8-698	8.01-88
8-668	Deleted	8-699	8.01-89
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8-673	8.01-113	8-703	Transferred
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8-676	8.01-69	8-703.1	8.01-94
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8-689	8.01-77	8-716	Repealed
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	8.01-261	8-718	Repealed
8-689.2	8.01-79	8-719	Repealed
8-689.3	8.01-80	8-719.1	Repealed
8-689.4	Deleted	8-720	Repealed
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	8.01-261	8-722	Repealed
8-691	8.01-82	8-723	Repealed

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8-725	8.01-582	8-761	8.01-198
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8-732	8.01-589	8-768	8.01-205
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8-734	Deleted	8-770	8.01-207
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8-742	8.01-598	8-778	8.01-215
8-743	8.01-599	8-779	8.01-216
8-744	8.01-600	8-780	Repealed
8-744.1	8.01-601	8-781	Repealed
8-745	Deleted	8-782	Repealed
8-746	8.01-602	8-783	Repealed
8-747	8.01-603	8-784	Repealed
8-748	8.01-604	8-785	Repealed
8-749	8.01-605	8-786	Repealed
8-750	8.01-606	8-787	Repealed
8-750.1	Transferred to Title 63.1	8-788	Repealed
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8-802	8.01-135	8-841	Deleted
8-803	8.01-136	8-842	8.01-166
8-804	8.01-137	8-843	8.01-167
8-805	8.01-138	8-844	8.01-168
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8-825.1	8.01-156	8-865	8.01-643
8-826	8.01-157	8-866	Deleted
8-827	8.01-158	8-867	Deleted
8-828	8.01-159	8-868	Repealed
8-829	8.01-160	8-868.1	Deleted
8-830	8.01-161	8-868.2	Transferred
8-831	8.01-162		to Titles
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8-834	8.01-164		to Title 55
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8-880	Transferred to Title 55	8-900	Transferred to Title 55
8-881	Transferred to Title 55	8-901	Deleted
		8-902	Deleted
8-882	Transferred to Title 55	8-903	Deleted
		8-904	Deleted
8-883	Transferred to Title 55	8-905	Deleted
		8-906	Transferred to Title 55
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8-918	8.01-581.8		

SHOWING NEW SECTIONS APPEARING IN THIS RE

8.01-2	8.01-257	8.01-264	8.01-327.1
8.01-24	8.01-258	8.01-266	8.01-385
8.01-26	8.01-259	8.01-267	8.01-416
8.01-67	8.01-260	8.01-271	8.01-420.1

8.01-228	8.01-261	8.01-285	8.01-635
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8.01-235	8.01-263	8.01-327	8.01-669

SHOWING SECTIONS OF TITLES OTHER THAN TITLE 8

AS THEY APPEAR IN THIS REPORT

SOURCE	THIS REPORT
9-6.14:5	8.01-261
11-20(part)	8.01-261
11-23(part)	8.01-261
15.1-1360(part)	8.01-261
20-37.2	8.01-220
20-98(part)	8.01-261
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A BILL to revise, rearrange, amend and recodify the general laws of Virginia relating to civil remedies and procedure; to that end to repeal Title 8 of the Code of Virginia, which title includes Chapters 1 through 39 and §§ 8-1 through 8-922, as severally amended, relating to civil remedies and procedure generally; to amend the Code of Virginia by adding thereto in lieu of the foregoing title, chapters and sections of the Code repealed by this act a title numbered 8.01, chapters numbered 1 through 26 and sections numbered 8.01-1 through 8.01-688, relating to civil remedies and procedure generally; and to prescribe when such revision and recodification shall become effective.

Be it enacted by the General Assembly of Virginia:

3. That this act is in force on and after October one, nineteen hundred seventy-seven.

(Note: Enactment Number 3 appears at the end of the Bill as introduced, but is set forth here out of sequence in this Report so as to emphasize when Title 8.01 would become effective.)

1. That Title 8 of the Code of Virginia, which title includes Chapters 1 through 39 and §§ 8-1 through 8-922, as severally amended, is repealed.

2. That the Code of Virginia is amended by adding thereto, in lieu of the title, chapters and sections of the Code herein repealed, a title numbered 8.01, chapters numbered 1 through 26 and sections numbered 8.01-1 through 8.01-688 as follows:

TITLE 8.01.

CIVIL REMEDIES AND PROCEDURE.

Chapter 1.

General Provisions as to Civil Cases.

§ 8.01-1. How proceedings may be in actions pending when title takes effect.—Except as may be otherwise provided in § 8.01-256 of Chapter 4 (Limitations of Actions), all provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions; provided, however, that the applicable law in effect on the day before the effective date of the particular provisions shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice.

Reviser's Note:

This section provides some latitude to the court in applying the

provisions of Title 8.01 to causes of action arising prior to the effective date of such provisions. Compare present § 8-2. Present statutes of limitations continue to apply to such causes of action.

§ 8.01-2. General definitions for this title.—As used in this title, unless the context otherwise requires, the term:

1. "Action" and "suit" may be used interchangeably and shall include all civil proceedings whether at law, in equity, or statutory in nature and whether in circuit courts or general district courts;

2. "Decree" and "judgment" may be used interchangeably and shall include orders or awards;

3. "Fiduciary" may include any one or more or the following:

a. guardian,

b. committee,

c. trustee,

d. executor,

e. administrator, and administrator with the will annexed, or

f. curator of the will of any decedent;

4. "Rendition of a judgment" means the time at which the judgment is signed and dated.

5. "Person" may include individuals, a trust, an estate, a partnership, an association, an order, a corporation, or any other legal or commercial entity;

6. "Person under a disability" may include:

a. during the period he is confined, a person convicted of a felony;

b. an infant;

c. a "mentally retarded" or "mentally ill" person as defined in § 37.1-1(13) and (15);

d. a drug addict or an alcoholic as defined in § 37.1-1(5) and (9);

e. a person of advanced age or impaired health under § 37.1-132;

f. a person adjudged "legally incompetent" pursuant to § 37.1-128.02;

g. an incompetent ex-service person under § 37.1-134; or

h. any other person who, upon motion to the court by any party to an action or suit or by any person in interest, is determined (i) to be incapable of taking proper care of his person, or (ii) properly handling and managing his estate, or (iii) otherwise unable to defend his property or legal rights either because of age or temporary or permanent impairment, whether physical, mental, or both;

7. "Sheriff" may include deputy sheriffs and such other persons designated in §§ 15.1-48 and 15.1-77 of this Code.

Reviser's Note:

Many provisions in Title 8 are designed to protect the property and the legal rights of those persons unable to do so for themselves (e.g., § 8-674 et seq.—Actions to sell land of persons under a disability). However, a multitude of terms and phrases have been coined to refer to such people - e.g., infant, feebleminded, incompetent, incapacitated, person under a disability; the result is confusion as to exactly which malady or impairment a person must have in order to fall under the provisions of a particular statute.

So as to remove this confusion and to uniformly protect all persons unable to protect themselves regardless of the specific impairment, the Revisers recommend the adoption of the term "person under a disability" and its accompanying definition in proposed subdivision 6. Except where a statute is specifically designed to protect only persons with a particular type of disability (e.g., see present § 8-629—Joinder of action of tort to infant with action for recovery of expenses incurred thereby), this term will be utilized within Title 8.01.

In proposed subdivision 3. the generic term "fiduciary" is used to embrace all the class of parties listed in present § 8-675 [subitems (1) through (7)] who may file a bill for sale or to lease or encumber the land of a person under a disability.

Note: This recommendation is not designed to change existing law in Virginia concerning actions and suits against and for person under disability and appointments of a guardian ad litem, committee, or other fiduciaries to protect and answer for a person under disability. As an example, the term "person under a disability" is not to be construed in such a manner that an alcoholic or drug addict can come in after a default judgment and claim that the court cannot enforce a decree because no guardian ad litem or other fiduciary was appointed to protect him. This is not present Virginia case law regarding such a party and this recommendation does not propose to change present law. Moreover, this proposed revision does not change the law with respect to burden of proof, but keeps such burden upon the complaining party as to being insane or under any of the other aforementioned disabilities.

§ 8.01-3. Supreme Court may prescribe rules; effective date thereof; rules to be printed and distributed; rules to be published, indexed, and annotated; effect of subsequent enactments of General Assembly.—A. Supreme Court to prescribe rules. The Supreme Court, subject to §§ 17-116.4 and 16.1-69.32, may, from time to time, prescribe the forms of writs and make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading and the forms of process to be used in all such courts. In promulgating its rules, the Supreme Court shall have the power to include provisions imposing sanctions and costs against any party in any proceeding. This section shall be liberally construed so as to eliminate unnecessary delays and expenses.

B. Effective date; printing and distribution; maintenance by clerks of courts. New rules and amendments to rules shall not become effective until sixty days from adoption by the Supreme Court, and shall be printed and distributed as public documents pursuant to § 2.1-267.1. Such rules and amendments shall be maintained in a special book kept for such purpose by the Clerks of Court to which they are distributed.

C. Rules to be published. The Virginia Code Commission shall publish and cause to be properly indexed and annotated the rules adopted by the Supreme Court, and all amendments thereof by the Court, and all changes made therein pursuant to subsection D. hereof.

D. Effect of subsequent enactments of the General Assembly on rules of court. The General Assembly may, from time to time, by the enactment of a general law, modify, or annul any rules adopted or amended pursuant to this section.

Reviser's Note:

Proposed § 8.01-3 combines in one section the present law on rules promulgated by the Supreme Court.

A. Supreme Court to prescribe rules. For concision, this subsection combines present §§ 8-1, 8-1.1, 8-1.2, and the first paragraph of present § 8-86.1 pertaining to the rule-making authority of the Supreme Court. Sections 17-116.4 and 16.1-69.32 are referenced in recognition of the mandate that these sections impose on the Supreme Court the duty to formulate rules after it has consulted with the chairmen of the House and Senate Courts of Justice Committees and with the executive committees of the Judicial Conferences of Virginia for the circuit and district courts.

Since Title 8 deals with civil procedure, the authority in present § 8-1.1 regarding criminal practice was deleted.

B. Effective date, etc. The second paragraph of present § 8-86.1 is changed, and a new § 2.1-267.1 is being added to require printing and distribution as public documents by the Director of the Department of Purchases and Supply to those interested in and affected by the Rules. District courts are included because § 16.1-69.32 directs the Supreme Court to promulgate rules for such courts. Clerks of all courts are directed to maintain the rules in a special book.

New rules and amendments are not be effective for sixty days after they are adopted; however, to permit advance familiarization they are to be distributed upon adoption.

C. Rules to be published. Present § 8-1.2 is amplified to require that changes to the Rules of the Supreme Court enacted by the General Assembly shall appear as part of such Rules.

D. Effect of subsequent enactments by the General Assembly. This provision restates the power granted the General Assembly by Article VI, § 5 of the Constitution of Virginia.

§ 8.01-4. District courts and circuit courts to prescribe rules.—The district courts and circuit courts may, from time to time, prescribe for their respective districts and circuits such rules as may be reasonably appropriate to promote proper order and decorum, and the convenient and efficient use of court houses and clerks' offices. No rule of any such court shall be prescribed or enforced which is inconsistent with any statutory provision, or the Rules of the Supreme Court, or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such Court.

Reviser's Note:

Proposed § 8.01-4 comports present § 8-1.3 with the 1973 district and circuit court reorganization acts. The phrase in present § 8-1.3 "the orderly management of court dockets" was omitted because its meaning is precise and it might lead to promulgation of local rules which would permit an unnecessary and inappropriate lack of uniformity in procedure.

§ 8.01-4.1. How jurisdiction determined when proceeding is on a penal bond.—When a proceeding before a court is on a penal bond, with condition for the payment of money, the jurisdiction shall be determined as if the undertaking to pay such money had been without a penalty. And when jurisdiction depends on the amount of a judgment, if it be on such a bond, the jurisdiction shall be determined by the sum, payment whereof will discharge the judgment.

Reviser's Note:

This is present § 8-3 without substantive change.

§ 8.01-4.2. Who may execute bond for obtaining a writ or order.—A bond for obtaining any writ or order may be executed by any person with sufficient surety, though neither be a party to the case.

Reviser's Note:

This is present § 8-4 without substantive change.

Present § 8-4.3. Order for medical examination.. . To be deleted.

Reviser's Note:

The substance of this section has been incorporated in Rule 4:10 of the Rules of Court.

CHAPTER 2.

PARTIES.

COMMENTS.

Present Article 1 entitled "Rules," has been eliminated and the sole statute thereunder, § 8-86.1, (Supreme Court may make rules) has been incorporated into proposed § 8.01-3 (General provisions as to civil cases). For further reference see the Reviser's Note to proposed § 8.01-3.

Article 1.

General Provisions.

§ 8.01-5. Effect of nonjoinder or misjoinder; limitation to joinder of insurance company.—A. No action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant, but whenever such nonjoinder or misjoinder shall be made to appear by affidavit or otherwise, new parties may be added and parties misjoined may be dropped by order of the court at any time as the ends of justice may require.

B. Nothing in this section shall be construed to permit the joinder of any insurance company on account of the issuance to any party to a cause of any policy or contract of liability insurance, or on account of the issuance by any such company of any policy or contract of liability insurance for the benefit of or that will inure to the benefit of any party to any cause.

Reviser's Note:

Proposed § 8.01-5 carries forward the policy of present § 8-96 by providing that parties may be added to or dropped from an action without prejudice until all parties necessary for the just disposition of the case are before the court. This section should be read in conjunction with rules of court 2:15, 3:9A and 3:14 which provide for the addition of parties to an action.

Omitted from proposed § 8.01-5 are those parts of existing § 8-96 which exempt a party from being added if it shall be made to appear that the action could not be maintained against him for specified reasons—i.e. a new party who is neither a resident of the Commonwealth nor subject to service of process therein, or where the action is barred by the statute of limitation or under the provisions of Chapter 1 of Title 11 (Contracts—General Provisions). The substance and functional effect of these provisions are better implemented under Rule of Court 3:9A (Joinder of Additional Parties).

To facilitate reference, the last sentence of present § 8-96 has been set forth in separate subsection B. without material change.

§ 8.01-6. Amending pleading to correct misnomer.—A misnomer in any pleading may, on the motion of any party, and on affidavit of the right name, be amended by inserting the right name.

Reviser's Note:

Proposed § 8.01-6 does not change the substance of present § 8-97. Proposed § 8.01-276 obviates the need for reference to the former use of pleas in abatement for misnomer.

§ 8.01-7. When court may add new parties to suit.—In any case in which full justice cannot be done, or the whole controversy ended, without the presence of new parties to the suit, the court, by order, may direct the clerk to issue the proper process against such new parties, and, upon the maturing of the case as to them, proceed to make such orders or decrees as would have been proper if the new parties had been made parties at the commencement of the suit.

Reviser's Note:

This is present § 8-129 without material change. However, the proposal is intended to apply to actions at law as well as suits in equity. The importance of the provision lies in its recognition of the court's power to add new parties sua sponte, while a motion is required to initiate the other joinder of party provisions.

Article 2.

Special Provisions.

§ 8.01-8. How infants may sue.—Any minor entitled to sue may do so by his next friend.

Reviser's Note:

This is present § 8-87 without change. It is important to remember that the qualifications of the next friend are subject to court review and approval, and upon objection the court will oder an inquiry to ascertain whether or not the suit is in the minor's benefit. However, in the absence of such an objection and unless expressly disallowed, the approval by the court of the person acting as next friend is implied. See *Jackson* v. *Counts*, 106 Va. 7, 54 S.E. 870 (1906), and *Kirby* v. *Gilliam*, 182 Va. 111, 28 S.E. 2d 40 (1943).

§ 8.01-9. Guardian ad litem for persons under a disability; when guardian ad litem need not be appointed for person under a disability.—A. A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint some discreet and competent attorney-at-law as guardian ad litem to such defendant, whether such defendant shall have been served with process or not; or, if no such attorney be found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs. Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such

defendant is so represented and protected. And the court, whenever of opinion that the interest of such person requires it, shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow such guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of such person.

B. Notwithstanding the provisions of subsection A. or the provisions of any other law to the contrary, in any suit wherein a person under a disability is a party defendant and is represented by an attorney-at-law duly licensed to practice in this Commonwealth, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires an answer to be filed by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of guardian ad litem.

Any judgment or decree rendered by any court against a person under a disability without a guardian ad litem, but in compliance with the provisions of this subsection (b), shall be as valid as if the guardian ad litem had been appointed.

Reviser's Note:

Proposed § 8.01-9 combines present §§ 8-88 and 8-88.1.

A. Guardian ad litem for person under a disability. Present § 8-88 has been expanded by proposed § 8.01-9 to include all persons under a disability (as defined in proposed § 8.01-2) whenever such persons are party defendants to a suit. Otherwise this subsection is substantially the same as present § 8-88 except that unnecessary references to the judge in vacation have been eliminated, and it has been made clear that an attorney appointed as guardian ad litem is not liable for costs.

B. When guardian ad litem need not be appointed for a person under a disability; exceptions. After further consideration of the sections of the Code on the lease, sale, exchange and encumbrance of the land of persons under disability, two principal changes have been made to present § 8-88.1. First, the provision of the existing statute permitting the court to dispense with the appointment of a guardian ad litem has been amended; if a statute requires in a particular suit that the guardian ad litem file an answer, then one must be appointed under this proposed section—See e.g. proposed § 8.01-73 (Guardian ad litem to be appointed when person under a disability is a defendant to a suit to lease or sell land of such a person).

The second material change is that which permits the court to appoint the attorney of record for the person under a disability, if he has one, as the guardian ad litem and imposing on the attorney who is so appointed all the duties and the functions of a guardian ad litem under the existing statutes; this provision simply enacts and authorizes the practice used in many parts of the Commonwealth.

It should also be noted that the proposal requires that the attorney of record who has made an appearance be duly licensed to practice in this Commonwealth. The existing statute does not mention the Commonwealth but simply provides that the attorney must be "duly licensed", perhaps enabling the existing statute to be invoked if the person under a disability is represented by an attorney in a foreign state who is duly licensed there but who undertakes to make an appearance for such person in the Commonwealth. Since the attorney may also be the guardian ad litem, the requirement has been added that the attorney be duly licensed to practice in Virginia.

Minor changes made to conform with other posposed revisions in this Title are not intended to alter substantive law.

§ 8.01-10. Joinder of Tenants in Common.—Tenants in common may join or be joined as plaintiffs or defendants.

Reviser's Note:

Proposed § 8.01-10 does not change present § 8-90.

Present § 8-89. When fact of defendant's nonresidence to be returned, and suit abated. To be deleted.

Reviser's Note:

Present § 8-89 has been deleted as both obsolete and unnecessary. The territorial restrictions on the service of process have been abolished by proposed §§ 8.01-292 and 8.01-295 which respectively allow unrestricted Statewide service and broadens the territory within which a particular officer may serve process. Additionally, if the defendant is a nonresident of the Commonwealth, service may well be possible under Virginia's Long Arm statute (See Chapter 9 of Title 8.01). Finally, return days are not generally applicable to the issuance of process commencing an action; Rules of Court 2:4 and 3:3 allow the clerk, on request of the plaintiff, to issue additional process irrespective of return days.

§ 8.01-11. Proceedings on a writing binding a deceased person.—A. A bond, note, or other written obligation to a person or persons who, or some of whom, are dead at the time of its execution may be proceeded on in the name of the personal representative of such person, or the survivors or survivor, or of the representative of the last survivor of such persons.

B. If one person bound either jointly or as a partner with another by a judgment, bond, note, or otherwise for the payment of a debt, or the performance or forebearance of an act, or for any other thing, die in the lifetime of such other, the representative of the decedent may be charged in the same manner as the decedent might have been charged, if those bound jointly or as partners, had been bound severally as well as jointly, otherwise than as partners.

Reviser's Note:

Proposed § 8.01-11 combines present §§ 8-92 and 8-93 which deal with actions by and against the successors in interest of deceased persons. The changes in wording were made for the sake of clarity and were not intended to have substantive effect.

The notes to be set forth in the Code of Virginia under proposed § 8.01-11 should include cross-references to § 11-9 (Writing payable to deceased person) and to Rules 2:16 and 3:15 on substitution of parties.

Present § 8-91. Suing in the name of persons who are dead. To be deleted.

Reviser's Note:

Present § 8-91, a holdover from the days when Virginia's third party beneficiary statute did not apply to sealed instruments, has been deleted. See § 55-22 (When person not a party etc., may take or sue under instruments).

§ 8.01-12. Suit by beneficial owner when legal title in another.—When the legal title to any claim or chose in action, for the enforcement of the collection of which a court of equity has jurisdiction, is in one person and the benficial equitable title thereto is in another, the latter may either maintain a suit in the name of the holder of the legal title for his use and benefit or in his own name to enforce collection of the same. In either case the beneficial equitable owner shall be deemed the real plaintiff and shall be liable for costs.

Reviser's Note:

Proposed § 8.01-12 is present § 8-93.1 without change.

§ 8.01-13. Assignee or beneficial owner may sue in own name; certain discounts allowed.—The assignee or beneficial owner of any bond, note, writing or other chose in action, not negotiable may maintain thereon in his own name any action which the original obligee, payee, or contracting party might have brought, but, except as provided in § 8.9-206, shall allow all just discounts, not only against himself, but against such obligee, payee, or contracting party, before the defendant had notice of the assignment or transfer by such obligee, payee, or contracting party, and shall also allow all such discounts against any intermediate assignor or transferor, the right to which was acquired on the faith of the assignment or transfer to him and before the defendant had notice of the assignment or transfer by such assignor or transferor to another.

Reviser's Note:

Proposed § 8.01-13 does not change present § 8-94. § 8.9-206 referred to in the statute covers UCC agreements not to assert defenses against an asignee.

§ 8-94.1. Collection agencies purchasing debts, etc., for purpose of collection. To be transferred to Chapter 17.2 of Title 54.

§ 8.01-14. Suit against assignor.—Any assignee or beneficial owner may recover from any assignor of a writing; but only joint assignors shall be joined as defendants in one action. A remote assignor shall have the benefit of the same defense as if the suit had been instituted by his immediate assignee.

Reviser's Note:

Proposed § 8. 01-14is present § 8-95 without substantial change.

§ 8.01-15. Suits by and against unincorporated associations or orders.—All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated.

Reviser's Note:

Proposed § 8. 01-15is the first sentence of present § 8-66 [the second sentence of which regarding process is deleted as unnecessary in light of proposed . § 8. 01-3 05 (Process against unincorporated associations or orders or unincorporated common carriers)]..

Article 3.

Death or Change of Parties.

§ 8.01-16. New parties may have continuance.— Except in the Supreme Court any new party to a case, whether he be joined or substituted, may in the discretion of the court have a continuance; and the court may allow him to plead anew or amend the pleadings so far as it deems reasonable, but in other respects the case shall proceed to final judgment or decree for or against him, in like manner as if he had been an original party to the case.

Reviser's Note:

Proposed § 8. 01-16is present § 8-150. The proposal makes a continuance discretionary with the trial court in any case where a new party is joined or substituted. With the abolition of the writ of scire facias, proposed § 8. 01-24, the procedure will be by motion. While there are changes in language, the substantive effect of the proposal remains the same as present § 8-150.

§ 8.01-17. When party, whose powers cease, is defendant.—When the party whose powers cease is defendant, the plaintiff may continue his suit against him to final judgment or decree; provided that a successor in interest may be substituted in accordance with the

Rules of Court; and provided further that upon motion the court may order that the suit proceed against the former party as well as the successor.

Reviser's Note:

Proposed § 8.01-17 is present § 8-152. It continues the right of a plaintiff to continue his action against a defendant whose powers have ceased, e.g., an executor who has died. The first proviso permits the appointment of a successor for such a defendant. The second proviso permits the plaintiff, upon court order, to proceed against such defendant as well as his successor. This alters present practice in that present § 8-152 does not permit this in an action at law.

§ 8.01-18. When discontinued unless revived.—If the committee, personal representative, heir, or devisee of the plaintiff or appellant who was a party, or of the decedent whose personal representative was plaintiff or appellant, shall not make a motion for substitution of parties under the applicable Rules of Court within a reasonable time after there may have been a suggestion on the record of the fact making such motion proper, the suit of such plaintiff or appellant shall be discontinued, unless good cause be shown to the contrary.

Reviser's Note:

Proposed § 8.01-18 is present § 8-153. A reasonable time has been inserted for the substitution of parties under the Rules of Court. Otherwise minor language changes are made in the proposal without material change to present § 8-153.

§ 8.01-19. Effect of marriage or change of name of party.—The marriage of a party shall not cause a suit or action to abate. If a party changes his name, upon affidavit or other proof of the fact, the suit or action shall proceed in the new name, but if the change of name be not suggested before judgment, the judgment shall be as valid, and may be enforced in like manner, as if no such change of name had taken place.

Reviser's Note:

Proposed § 8.01-19 is present § 8-147. Minor language changes are made in the proposal without material change to present § 8-147.

§ 8.01-20. Effect of marriage, change of name or death on appeal.—If at any time after verdict or judgment in the trial court during the pendency of an appeal or before the appeal is granted, the marriage, change of name or death of a party, or any other fact which might otherwise be relied on in abatement occurs, and such fact be suggested or relied on in abatement in the Supreme Court, the court may, in its discretion, take or retain jurisdiction and enter judgment or decree in the case as if such event had not occurred.

Reviser's Note:

Proposed § 8.01-20 is present § 8-148. Minor language changes are made in the proposal without material change to present § 8-148.

§ 8.01-21. Judgment when death, etc., occurs after verdict but before judgment.—When a party dies, or becomes convicted of a felony or insane, or the powers of a party who is a personal representative or committee cease, if such fact occurs after verdict, judgment may be entered as if it had not occurred.

Revsier's Note:

Proposed § 8.01-21 is present § 8-145. Minor language changes are made in the proposal without material change to present § 8-145.

§ 8.01-22. When death, etc. occurs as to any of several plaintiffs or defendants.—If a party plaintiff or defendant becomes incapable of prosecuting or defending because of death, insanity, conviction of felony, removal from office, or other reason and there are one or more co-plaintiffs or co-defendants, the court on motion may in its discretion either (i) suspend the case until a successor in interest is appointed in accordance with the Rules of Court, or (ii) sever the action or suit so that the case shall proceed against the remaining parties without delay, with the case as to the former party being continued and tried separately against the successor in interest when he is substituted as provided by the Rules of Court.

Reviser's Note:

Proposed § 8.01-22 is present § 8-146. The question of abatement because of death, etc., of a party is linked to the survivability of actions. Abatement, in the sense of the action or suit being temporarily halted until a successor in interest is appointed, generally would not appear to create problems. Present § 8-146 mainly applies to multiple party actions or suits and taken literally would permit the action or suit to proceed against the living parties (and if at law, the action against the decedent would be severed and brought against his personal representative separately). Since Rules of Court 2:16 and 3:15 provide an adequate procedure for substitution of a party if he dies, etc., the present statute is altered to give the court discretion to halt the entire proceedings pending the appointment of a successor or to permit the action or suit to proceed against the living parties severing the decedent and preserving a separate action or suit as to him.

The question of survival of actions is addressed in proposed § 8.01-25; its provisions and Reviser's Notes are also applicable here.

§ 8.01-23. Decree in a suit when number of parties exceeds thirty and one of them dies.—When, in any suit in equity, the number of parties exceeds thirty, and any one of the parties jointly interested with others in any question arising therein, shall die, the court

may, notwithstanding, if in its opinion all classes of interests are represented and no one will be prejudiced thereby, proceed to render a decree in such suit as if such party were alive; decreeing to the heirs, devisees, legatees, distributees, or personal representatives, as the case may be, such interest as the deceased person, if alive, would be entitled to. The provisions of § 8.01-322 shall apply to decrees entered hereunder.

Reviser's Note:

Proposed § 8.01-23 combines present §§ 8-155 and 8-156 and makes minor language changes thereto.

Article 4.

Writ of Scire Facias Abolished.

§ 8.01-24. Writ of scire facias abolished; substitutes therefor.—The writ facias is hereby abolished. Relief heretofore available by scire facias may be obtained by appropriate action or motion pursuant to applicable statutes and Rules of Court.

Reviser's Note:

This is a new section. It is believed that scire facias is a cumbersome, obsolete writ which is little understood and whose objectives can be better served by a more direct form of pleading. It is thus recommended that the writ be abolished and replaced by the motion; the proposed section adopts the language of W.Va. RCP81(b), and of FRCP81(b) as it relates to scire facias.

The principal uses in Virginia practice for the writ of scire facias are the revival of actions under present § 8-149 and the revival of judgments under present § 8-396. Under § 8-149, the action may be revived by motion, without notice or scire facias, but only if the motion is made when the court is sitting in term. However, Rules of Court 2:16 and 3:15 permit the substitution of parties by motion irrespective of when the motion is made; this is the procedure generally utilized for revival of actions with the provisions of present §8-149 falling into disuse.

Proceeding by a writ of scire facias to revive a judgment, and thereby extend it before the lien is barred by lapse of time, is not a new action but a continuation of the former action in which the judgment was rendered. This objective can be accomplished more simply and just as effectively by motion. Furthermore, since execution of the judgment may be delayed or quashed by motion of the judgment debtor under present Va. Code § 8-410, it only seems fair to permit the judgment creditor to obtain revival by motion.

Present § 8-149. For and against whom scire facias may be sued out; when sui revived on motion. To be repealed.

Reviser's Note:

See Reviser's Note under § 8.01-24.

CHAPTER 3.

ACTIONS.

Article 1.

Survival and Assignment of Causes of Actions.

Related Rewritten Section:

§ 64.1-145. Actions for goods carried away, waste, or damage to estate of decendent.—Any action at law for damages for the taking or carrying away of any goods, or for the waste, destruction of, or damage to any estate of the decedent, whether such damage be direct or indirect, may be maintained by or against the decedent's personal representative.

Reviser's Note:

The phrase "whether such damage be direct or indirect" has been added to eliminate the distinction between direct and indirect injury to property as it relates to the question of survival. Proposed § 8.01-25 extensively revises Virginia's survival of action provisions. All causes of action will survive thereby. See reviser's note to that section which is also applicable to this section.

§ 8.01-25. Survival of causes of action.—Every cause of action whether legal or equitable, which is cognizable in the Commonwealth of Virginia, shall survive either the death of the person against whom the cause of action is or may be asserted, or the death of the person in whose favor the cause of action existed, or the death of both such persons. Provided that in such an action punitive damages shall not be awarded after the death of the party liable for the injury. Provided, further, that if the cause of action asserted by the decedent in his lifetime was for a personal injury and such decedent dies as a result of the injury complained of with a timely action for damages arising from such injury pending, the action shall be amended in accordance with the provisions of § 8.01-56.

As used in this section, the term "death" shall include the death of an individual or the termination or dissolution of any other entity.

Reviser's Note:

It is intended by the proposal of this section to state positively what existing § 8-628.1 states negatively with the regard to the survival of causes of action. In other words, instead of saying "no cause of action shall be lost. . ." the proposed section says that all ned would increase; such an causes of action shall survive.

Moreover, while existing § 8-628.1 refers to causes of action for injury to person or property, the proposed section relates to all causes of action. Also, the term "death" has been expanded to include "dissolution" and "termination".

The law has longed recognized survivability of causes of action arising out of contracts made by the decedent during his lifetime, and has permitted actions to be brought by or against the decedent's personal representative. (For example, see § 64.1-144.) In Virginia the first relaxation of the common law inhibition of the survival of any cause of action in tort was made in the prototype of what is now codified as § 64.1-145. That section permits the survival of actions for damage to property, or as the statute expresses it "the estate" of a decedent with such actions being brought by or against his personal representative. That statute, however, was soon construed by the courts to relate only to "direct" injuries to the property. As a result, recovery was denied to and against a personal representative when the court found that the damages were indirect or consequential. The cases making this distinction in many instances defy reconciliation. (For example, compare *Cover* v. *Critcher*, Va. 357, (1925), with *Trust Company of Norfolk* v. *Fletcher*, 152 Va. 768, (1962), and *Worrie* v. *Boze*, 198 Va. 533, (1957).)

[For a good discussion of the history of the legislation consisting of various statutes as amended from time to time to provide circumstances in which a cause of action for personal injuries would survive, down to the date of its decision, see *Herndon* v. *Wickham*, 198 Va. 824, (1957).]

One of the most troublesome areas in the law of survivability of causes of action is presented by the legislative device of making the applicability of the statute of limitations depend upon whether or not the cause of action survives. Another complexity — in this instance judge made — has arised from enunciation of the rule that in the absence of statute, only causes of action which survive may be assigned. *Winston* v. *Gordon*, 115 Va. 899, (1914); *City of Richmond* v. *Hanes*, 203 Va. 102, (1961). It is believed that the proposed statutes in this area of the law of survivability will relieve some of the uncertainty and confusion which has troubled the bench and bar.

The second proviso of this section was added by the Revisers in the belief that it would be wise in view of the interpretation of the wrongful death statutes made by our Supreme Court and by the federal courts which have dealt with present §§ 8-633 and 8-634, to the affect that the Virginia wrongful death statute is not a "survival" statute but creates a new right in the personal representative of the decedent who dies as a result of a previous tortious injury. *Wilson* v. *Whittacker*, 207 Va. 1032, (1967); *Grady* v. *Irvine*, 254 F. 2ds 224, (4th Cir. (1958).

The first proviso pertaining to the award of punitive damages codifies case law. See *Dalton* v. *Johnson*, 204 Va. 102 (1963). [For rule as to punitive damages in wrongful death actions, see § 8.01-52.]

The limitation provisions of present § 8-628.1 are contained in Chapter 4, Limitations of Actions.

§ 8.01-26. Assignment of causes of action.—Only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action ex contractu are assignable.

Reviser's Note:

In the Commonwealth, the test of assignability is survival, and only those causes of action which would survive to the personal representative are assignable. Presently, the actions which survive and therefore are assignable are those which grow out of breach of contract or are for direct injury to real or personal property. See *Winston* v. *Gordon*, 115 Va. 899 (1914); *Richmond Redevelopment & Housing Authority* v. *Laburnum Construction Corp* ., 195 Va. 827 (1954).

Proposed § 8.01-25 allows all causes of actions to survive. (See proposed § 8.01-25 and Reviser's Note.) If the assignability test continued to be survival, the number of actions which might be assigned would increase; such an expansion in the right of assignment of actions might facilitate the trafficking in claims and litigation, a situation the revisers neither condone nor recommend. To avoid this possible consequence, proposed § 8.01-26 separates the issue of assignability from that of survival— i.e. no longer will an action be assignable simply because it survives. Instead, unless the action falls within proposed § 8.01-26, it is not assignable even though it may be an action which survives under proposed § 8.01-25. However, with the exception of the elimination of the illogical distinction between direct and indirect damage to property, the proposal codifies existing case law on the assignment of actions. See *Birmingham v. Chesapeake and Ohio R.R. Co.* , 98 Va. 548 (1900) also cited in *Maynard v. General Electric Co.* , 486 F2d 538 at 540 (1973); *Freedman v. People's Service Drug Store*, 208 Va. 700 (1966).

Article 2.

Actions on Contracts Generally.

§ 8.01-27. Civil action on note or writing promising to pay money.—A civil action may be maintained upon any note or writing by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent. The action may also be maintained on any such note or writing for any past due instalment on a debt payable in instalments, although other instalments thereof be not due.

Reviser's Note:

This is present § 8-509 without change.

Present § 8-510. When account to be filed with motion for judgment. To be deleted.

§ 8.01-28. When judgment to be given in action upon contract unless defendant

appear and deny claim under oath.—In any action at law on a contract, express or implied, for the payment of money, if the plaintiff file with his motion for judgment or civil warrant an affidavit made by himself or his agent, stating therein to the best of the affiant's belief the amount of the plaintiff's claim, that such amount is justly due, and the time from which plaintiff claims interest, and if a copy of such affidavit together with a copy of any account filed with the motion for judgment or warrant shall have been served on the defendant at the time a copy of the motion for judgment or warrant is so served, he shall be entitled to a judgment on such affidavit and statement of account without further evidence unless the defendant appears and pleads under oath denying that the plaintiff is entitled to recover from the defendant on such claim, in which event plaintiff shall, on motion, be granted a continuance. If the defendant's pleading admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

Reviser's Note:

This is present § 8-511. "Plea" has been changed to "pleading" since the former word might be interpreted to require the defendant to file a "plea" rather than to use an answer or grounds of defense.

Note: Present § 8-511.1 is to be transferred, with amendments as shown below, to Title 17.

§ 8-511.1. When plaintiff entitled to less than ~~twenty~~ *one hundred* dollars, judgment for defendant.—In any personal action ~~on contract~~ in a ~~court of record~~ *circuit court*, wherein it is ascertained that ~~less is due~~ to ~~the plaintiff than twenty.~~ *one hundred* dollars, exclusive of interest, judgment shall be given for the defendant, unless the court enter of record that the matter in controversy was of greater value than ~~twenty.~~ *one hundred* dollars, exclusive of interest, in which case it may give judgment for the plaintiff for what is ascertained to be due him, with or without costs, as to it may seem right.

Reviser's Note:

This section is to be transferred to Title 17, § 17-123, *Jurisdiction of Circuit Courts*, and the amount in that section, "twenty dollars" changed to conform with the recommended change of this section, i.e., "twenty dollars" deleted and substituted in its place "one hundred dollars". This section has been changed so as to apply to all actions and not merely to contracts. Accordingly, "on contract" has been deleted. "Court of record" has been deleted and "circuit court" substituted in its place in order to conform with modern practice.

Present § 8-512. Promise after bankruptcy must be in writing.

Reviser's Note:

This section is to be transferred without change to Title 11

which embraces other sections of the statute of frauds and requires certain contracts to be in writing.

§ 8.01-29. Procedure in actions on annuity and instalment bonds, and other actions for penalties for nonperformance.—In an action on an annuity bond, or a bond for money payable by instalments, when there are further payments of the annuity, or further instalments to become due after the commencement of the action, or in any other action for a penalty for the nonperformance of any condition, covenant, or agreement, the plaintiff may assign as many breaches as he may think fit, and shall, in his motion for judgment assign the specific breaches for which the action is brought. The jury impaneled in any such action shall ascertain the damages sustained, or the sum due, by reason of the breaches assigned, and judgment shall be entered for the penalty, to be discharged by the payment of what is so ascertained, and such further sums as may be afterwards assessed. Motion may be made by any person injured against the defendant and, for what may be assessed or found due upon the new breach or breaches assigned, execution may be awarded.

Reviser's Note:

The only significant change to present § 8-513 is the elimination of the reference to the writ of scire facias; proposed § 8.01-24 has recommended its abolition and replaces it with a simple motion. The language following "assessed" has been deleted an unnecessary. "Personal representative" following "defendant" in the last sentence was deleted as being unnecessary considering the survival of contract actions generally. (See Proposed § 8.01-25 and present § 64.1-144.)

§ 8.01-30. Procedure in actions on contracts made by several persons.—Upon all contracts hereafter made by more than one person, whether joint only or joint and several, an action may be maintained and judgment rendered against all liable thereon, or any one or any intermediate number, and if, in an action on any contract heretofore or hereafter made, more than one person be sued and process be served on only a part of them, the plaintiff may dismiss or proceed to judgment as to any so served, and either discontinue as to the others, or from time to time as the process is served, proceed to judgment against them until judgment be obtained against all. Such dismissal or discontinuance of the action as to any defendant shall not operate as a bar to any subsequent action which may be brought against him for the same cause.

Reviser's Note:

This is present § 8-514, which changed the common law whereby a judgment against one of several joint contractors was a bar to any action against the others. The consultants recommend no changes.

§ 8.01-31. Accounting in equity.—An accounting in equity may be had against any fudiciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion, or against the personal representative of any such party.

Reviser's Note:

Present § 8-514.1 has been modified by deleting "bailiff" and other such terms which contemplate a fiduciary and the word "fiducary" substituted in the place of those terms. This section will be cross-referenced to Title 26, § 26-5, Liability for losses by negligence or failure to make defense.

§ 8.01-32. Action on lost evidences of debt; indemnifying bond.—A civil action may be maintained on any past due lost bond, note, or other written evidence of debt, and if judgment be rendered for the plaintiff, there shall be entered as a part of the judgment that the plaintiff is not to have the benefit thereof, nor be allowed to enforce it by execution or otherwise, unless and until he shall have first entered into bond before the court or the clerk therein in such penalty as is prescribed in the judgment, and with condition to indemnify and save harmless the defendant from all loss or damage he may sustain or incur by reason of having to pay in whole or in part such past due lost bond, note, or other written evidence of debt to some other person than the plaintiff. The indemnifying bond hereinbefore required shall be payable to the defendant, and shall be filed in the clerk's office of the court in which the judgment is rendered.

In the event of any inconsistency between this section and any applicable provisions of § 8.3-804, the provisions of that section shall control.

Reviser's Note:

The headline of present § 8-517 has been changed to emphasize the real purpose of this statute which is to permit an action on lost instruments that were evidences of debt. The words "or defendants" and "order awarding" were deleted as unnecessary. (With respect to the deletion of "or defendants" see § 1-13.15.) Finally a correction of the cross reference to the UCC is made.

§ 8.01-33. When equity has jurisdiction.—A court of equity shall not have jurisdiction of a suit upon a bond, note, or writing, by an assignee or holder thereof, unless it appear that the plaintiff had not an adequate remedy thereon at law.

Reviser's Note:

No substantive changes have been made to present § 8-518.

Article 3.

Injury to Person or Property.

§ 8.01-34. When contribution among wrongdoers enforced.—Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude.

Reviser's Note:

Present § 8-627 is founded on principles of equity being a statutory interpretation of an ancient equitable rule that contribution among joint tort feasors exists as a matter of right except where the party who otherwise would be entitled to contribution has forfeited his right when the joint liability arose out of an act involving moral turpitude or a voluntary tort. See, e.g., *Hudgins* v. *Jones* , 205 Va. 495 (1964). The exception stems from public policy that, for purpose of deterence, denies judicial remedy to one guilty of seriously wrongful conduct. *Sperry Rand Corporation* v. *ATO, Inc.*, 325 F. Supp. 1209, aff'd 4th Cir., 417 F 2nd 1387 (1971). The minor change proposed is merely for clarification and is not intended to materially alter the statute as it has been interpreted by case law.

§ 8.01-35. Damages for loss of income not diminished by reimbursement.—In any suit brought for personal injury or death, provable damages for loss of income due to such injury or death shall not be diminished because of reimbursement of income to the plaintiff or decedent from any other source, nor shall the fact of any such reimbursement be admitted into evidence.

Reviser's Note:

This is present § 8-628.3 without change.

§ 8.01-36. Joinder of action of tort to infant with action for recovery of expenses incurred thereby.—Where there is pending any action by an infant plaintiff against a tortfeasor for a personal injury, any parent, or guardian of such infant, who is entitled to recover from the same tortfeasor the expenses of curing or attempting to cure such infant from the result of such personal injury, may bring an action against such tortfeasor for such expenses, in the same court where such infant's case is pending, either in the action filed in behalf of the infant or in a separate action. If the claim for expenses be by separate action, upon motion of any party to either case, made to the court at least one week before the trial, both cases shall be tried together at the same time as parts of the same transaction. But separate verdicts when there is a jury trial shall be rendered, and the judgment shall distinctly separate the decision and judgment in the separate causes of action.

In the event of the cases being carried to the Supreme Court, which may be done if there be the jurisdictional amount in either case, they shall both be carried together as one case and record, but the Supreme Court shall clearly specify the decision in each case, separating them in the decision to the extent necessary to do justice among the parties.

Reviser's Note:

The 1973 General Assembly improved the language of this section, § 8-629; except for the deletion of the term "of Virginia" following "Supreme Court" (see § 1-13.27:2), no change has been made.

§ 8.01-37. Recovery of lost wages in action for injuries to emancipated infant.—In

any suit for personal injuries brought on behalf of an emancipated infant , when such infant has sustained lost wages as a result of such injuries, he shall be entitled to recover such lost wages as a part of his damages. Where recovery is made hereunder or where recovery is attempted to be made and a decision on the merits adverse to said infant results, no other person may recover such lost wages.

Reviser's Note:

The word "infant" has been substituted for the word "child" throughout present § 8-629.1.

§ 8.01-38. Tort liability of hospitals.—Hospital as referred to in this section shall include any institution within the definition of hospital in § 32-298 of the Code of Virginia and maternity hospital as defined in § 32-147 of the Code of Virginia.

No hospital, as defined in this section, shall be immune from liability for negligence or any other tort on the ground that it is a charitable institution unless such hospital renders exclusively charitable medical services for which service no charge is ever made to or on account of the patient or unless the party alleging such negligence or other tort was accepted as a patient by such institution under an express written agreement executed by the hospital and delivered at the time of admission to the patient or the person admitting such patient providing that all medical services furnished such patient are to be supplied on a charitable basis without financial liability to the patient or reimbursement to the hospital for the specific services rendered such patient from any other source; provided, however, that a hospital which is a charitable institution and which is insured against liability for negligence or other tort in an amount not less than $100,000 for each occurrence shall not be liable for damage in excess of the limits of such insurance.

Reviser's Note:

This is present § 8-629.2, which represents a radical departure from the previous law in Virginia which extended an exemption to charitable institutions even though such institutions collected from patients who were able to pay for services and medical attention. This policy change was enacted by the 1974 General Assembly and, therefore, no change is made to this section.

§ 8.01-39. Completion or acceptance of work not bar to action against independent contractor for personal injury, wrongful death or damage to property.—In any civil action in which it is alleged that personal injury, death by wrongful act or damage to property has resulted from the negligence of or breach of warranty by an independent contractor, it shall not be a defense by such contractor to such action that such contractor has completed such work or that such work has been accepted as satisfactory by the owner of the property upon which the work was done or by the person hiring such contractor.

Nothing contained herein shall be construed to limit, modify or otherwise affect the provisions of § 8-250.

Reviser's Note:

This is present § 8-629.3 without change.

§ 8.01-40. Unauthorized use of the name or picture of any person.—A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

B. No action shall be commenced under this section more than twenty years after the death of such person.

Reviser's Note:

The first sentence of this section, present § 8-650, will be transferred to Title 18.2 since its import is purely penal. The phrase "within this State" has been deleted since it is felt that this suit should be confined only to those claims arising within the Commonwealth. Other language modifications have been made to conform to language in the deleted first sentence and to make it clear that this suit is purely civil. While these changes extensively rewrite this section, the substance of the civil rememdies has been retained.

Paragraph (b) establishes a twenty-year limitation period for such an action; the period begins upon the death of the person whose name is misused. The revisers recognize that the placing of the limitation here is contrary to the general approach of locating all limitation provisions in proposed Chapter 4 of this title (Limitation of Actions). However, the specialized nature of this problem seems to justify this exception. A cross-reference to this section will be placed in Chapter 4.

§ 8.01-41. Wrongful distress, etc.—If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful distraint, seizure, or sale.

Reviser's Note:

This is present § 8-651. The phrase "seizure, and also, if the property be sold, for the sale thereof" has been deleted and the words "distraint, seizure, or sale" substituted in its place. This change is to conform with modern practice. In view of this change, a cross-reference will be made to § 55-232 of the Landlord-Tenant Act.

§ 8.01-42. Loss or injury to clothing in dyeing or laundering.—No person engaged in the business of dyeing, or laundering wearing apparel, cloth or other articles, shall be liable, or in any action or suit against him be held liable, for the loss of, or injury to, any wearing apparel, cloth or other articles delivered to him to be dyed or laundered, in an amount exceeding twenty times the charges made or to be made by him for the work done or contemplated to be done on any such wearing apparel, cloth or other articles, unless at the time of the delivery to him of any such wearing apparel, cloth or other articles, the value of the same, and when there is more than one piece or article the value of each piece or article, be agreed upon and evidenced by a writing stating such value, or separate values when there is more than one piece or article, signed by him; provided, however, that:

1. Nothing in this section contained shall be construed as requiring of any such person more than the exercise of such degree of care as is now imposed by existing law;

2. In no event shall any such person be held liable in any suit or action involving any such loss or injury for any sum greater than the damages suffered, and proved, by the plaintiff therein when such damages would not under the rules of law existing prior to June eighteenth, nineteen hundred and twenty exceed twenty times the amount of such charges;

3. Nothing in this section shall be construed as interfering with or inhibiting, or impairing the obligation of, any written contract between any hotel, railroad company, steamboat company or other patron and any person engaged in the business of dyeing or laundering of wearing apparel, cloth or other article, in relation to such work;

4. No liability shall rest upon or be borne by any hotel for any loss of or damage to wearing apparel, cloth or other article, the property of any guest of such hotel who shall have delivered, or caused the same to have been delivered, for dyeing or laundering to any person engaged in the business of dyeing or laundering; and

5. The prices to be charged for service, based upon the valuation of the articles to be laundered, or dyed, together with a reference to this section, shall be printed upon the face of all laundry slips used by any person engaged in the laundering business, and upon the face of all other slips, of a similar character, used by any other person engaged in the business of dyeing wearing apparel cloth or other articles.

Reviser's Note:

This is present § 8-654 without change.

§ 8.01-43. Action against parent for damage to public property by minor.—The Commonwealth, acting through the officers having charge of the public property involved, or the governing body of a county, city, town, or other political subdivision, or a school board may institute an action and recover from the parents or either of them of any minor living with such parents or either of them for damages suffered by reason of the willful or malicious destruction of, or damage to, public property by such minor, provided that not exceeding two hundred dollars may be recovered from such parents or either of them as a result of any incident or occurrence on which such action is based.

Reviser's Note:

With the exception of changing "State" to "Commonwealth", no change to present § 8-654.1 has been made.

§ 8.01-44. Action against parent for damage to private property by minor.—The owner of any property may institute an action and recover from the parents, or either of them, of any minor living with such parents, or either of them, for damages suffered by reason of the willful or malicious destruction of, or damage to, such property by such minor, provided that not exceeding two hundred dollars may be recovered from such parents, or either of them, as a result of any incident or occurrence on which such action is based. Any such recovery from the parent or parents of such minor shall not preclude full recovery from such minor except to the amount of the recovery from such parent or parents. The provisions of this statute shall be in addition to, and not in lieu of, any other law imposing upon a parent liability for the acts of his minor child.

Reviser's Note:

This is present § 8-654.1:1 without change.

Article 4.

Defamation.

§ 8.01-45. Action for insulting words.—All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

Reviser's Note:

Only minor changes have been made to present § 8-630. The word "acceptation" has been changed to "acceptance" and the phrase "shall be actionable" has been moved from the end of the sentence and positioned after "All words".

§ 8.01-46. Justification and mitigation of damages.—In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true, and, after notice in writing of his intention to do so, given to the plaintiff at the time of, or for, pleading to such action, may give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Reviser's Note:

This is present § 8-631 without change.

§ 8.01-47. Immunity of school personnel investigating or reporting alcohol or drug use.—In addition to any other immunity he may have, any teacher, instructor, principal,

school administrator, school coordinator, guidance counsellor or any other professional or administrative staff member of any elementary or secondary school, or institution of higher learning who, in good faith with probable cause and without malice, acts to report, investigate or cause any investigation to be made into the activities of any student or students or any other person or persons as they relate to alcohol or drug use or abuse in or related to the school or institution or in connection with any school or institution activity, shall be immune from all civil liability that might otherwise be incurred or imposed as the result of the making of such a report, investigation or disclosure.

Reviser's Note:

This is present § 8-631.1 without change.

§ 8.01-48. Mitigation in actions against newspapers, etc.—In any civil action against the publisher, owner, editor, reporter or employee of any newspaper, magazine or periodical under § 8.01-45, or for libel or defamation, because of any article, statement or other matter contained in any such newspaper, magazine or periodical, the defendant, whether punitive damages be sought or not, may introduce in evidence in mitigation of general and punitive damages, or either, but not of actual pecuniary damages, all the circumstances of the publication, including the source of the information, its character as affording reasonable ground of reliance, any prior publication elsewhere of similar purport, the lack of negligence or malice on the part of the defendant, the good faith of the defendant in such publication, or that apology or retraction, if any, was made with reasonable promptness and fairness; provided that the defendant may introduce in evidence only such circumstances and to the extent set forth in his or its grounds of defense.

Reviser's Note:

This is present § 8-632 without change.

§ 8.01-49. Defamatory statements in radio and television broadcasts.—The owner, licensee or operator of a radio and television broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of any such broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, such agent or employee, failed to exercise due care to prevent the publication or utterance of such statement in such broadcast; provided, however, that in no event shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations be held liable for damages for any defamatory statement broadcast over the facilities of such station or network by or on behalf of any candidate for public office.

Reviser's Note:

This is present § 8-632.1. The phrase "visual or sound radio" modifying "broadcasts" has been changed to "radio and television" so as to clearly indicate its application to all such broadcasts.

Article 5.

Death by Wrongful Act.

§ 8.01-50. Action for death by wrongful act; how and when to be brought.—A. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

B. Every such action under this section shall be brought by and in the name of the personal representative of such deceased person within the time limits specified in § 8.01-244.

Reviser's Note:

This proposal combines present §§ 8-633 and 8-634 with the former being subsection (a), and the latter subsection (b). The following changes have been made:

(1) The provisions in present § 8-633 on the survival of this action have been embraced by proposed Article 1, § 8.01-25 of this chapter and therefore have been deleted from the present section.

(2) The provisions in present §§ 8-633 and 8-634 relating to a statute of limitations have been removed and placed in proposed § 8.01-244 of Chapter 4, Limitations of Actions. (The draft of the proposed statute of limitations on wrongful death parallels the language of present §§ 8-633 and 8-634.) This recommendation comports with the effort to locate most statute of limitations provisions in proposed Chapter 4 of Title 8.01.

(3) The last paragraph of present § 8-633 has been deleted as no longer having any significance.

(4) The first sentence of present § 8-634 has been altered by adding the phrase "within the time limits specified in § 8.01-244."

(5) The last paragraph of the present § 8-634 has been deleted as no longer having any significance.

§ 8.01-51. No action when deceased has compromised claim.—No action shall be maintained by the personal representative of one who, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death.

Reviser's Note:

The present statute stems from the rule applied in *Brammer* v. *Norfolk & W. R. Co.*, 107 Va. 206 (1907). This is present § 8-635 without change.

§ 8.01-52. Amount of damages.—The jury or the court, as the case may be, in any such action under § 8.01-50 may award such damages as to it may seem fair and just, provided that punitive damages shall not be awarded in such actions. The verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following:

1. sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;

2. compensation for reasonably expected loss of (i) income of the decedent and (ii) services, protection, care and assistance provided by the decedent;

3. expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and

4. reasonable funeral expenses.

Damages recoverable under 3. and 4. above shall be specifically stated by the jury or the court, as the case may be, and shall be apportioned among the creditors who rendered such services, as their respective interests may appear.

The court shall apportion the costs of the action as it shall deem proper.

Reviser's Note:

Present §§ 8-636.1 (Amount and distribution of damages) and 8-638 (When verdict fails to do so judgment to distribute recovery) contain, inter alia., duplicate provisions as to beneficiaries, fail to denote when these beneficiaries are to be determined, and are unclear as to the specification of the damages. Proposed §§ 8.01-52 (Amount of damages), 8.01-53 (Class of beneficiaries; when determined), and 8.01-54 (Judgment to distribute recovery when verdict fails to do so) amend and reorder the provisions of the present sections to present them more logically and to clarify the procedures. See Reviser's Note at end of each proposed section.

Proposed § 8.01-52 adopts present § 8-636.1 with several changes. The section expressly recognizes that the amount of damages may be awarded by the jury or by the court if the case is tried without a jury. Provisions in the first paragraph of present § 8-636.1 defining the class and beneficiaries have been deleted and incorporated into proposed § 8.01-53. Inserted is a proviso prohibiting the award of punitive damages in wrongful death actions. This provision codifies case law. See *Wilson* v. *Whittaker*, 207 Va. 1032 (1967). It should also be noted that this rule as to punitive damages in such actions differs from the general rule - i.e. punitive damages may be awarded unless the person liable has died. See *Dalton* v. *Johnson*, 204 Va. 102 (1963). The second paragraph of the present section has been incorporated into the first paragraph of the proposal.

The third paragraph of the present section addresses the apportioning of damages awarded for medical treatment and funeral expenses. To this paragraph has been added language which requires the court or the jury, as the case may be, to specifically set out such damages.

§ 8.01-53. Class and beneficiaries; when determined.—A. The damages awarded pursuant to § 8.01-52 shall be distributed as specified under § 8.01-54 to (i) the surviving spouse, children, and grandchildren of the deceased, or (ii) if there be none such, then to the parents, brothers, and sisters of the deceased, or (iii) if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents.

B. The class and beneficiaries thereof eligible to receive such distribution shall be fixed (i) at the time the verdict is entered if the jury makes the specification, and (ii) at the time the judgment is rendered if the court specifies the distribution.

Reviser's Note:

Proposed § 8.01-53 defines the class and beneficiaries to receive the damages awarded and states when they are to be determined. Subsections (i) and (ii) of subsection A. set forth the first two classes eligible to receive damages and delineates the beneficiaries within each. Similar provisions are in present §§ 8-636.1 and 8-638.

A. (iii) is the final proviso of present § 8-638 with one important exception. The present language speaks of "surviving spouse and parent". Referring to present § 1-13.15 (Number), the word "parent" could also be read "parents". However, the history of this section indicates that "parent" replaced the earlier language "widow or widower". Thus it appears that the present section includes as beneficiaries within this third class only the mother or father of the decedent and not both. The revisers have altered the present language so that the third class will now include as beneficiaries both living parents or either surviving one.

Subsection B. of proposed § 8.01-53 sets the time when the class and beneficiaries who may receive the awarded damages will be fixed. This proposal codifies present Virginia case law. See e.g., *Baltimore & Ohio R. R. Co.* v. *Wightman's Admr.*, 70 Va. (29 Gratt.) 431 (1877) and *Johns* v. *Blue Ridge Transfer Co.*, 199 Va. 63 (1957).

§ 8.01-54. Judgment to distribute recovery when verdict fails to do so.—A. The verdict may and the judgment of the court shall in all cases specify the amount or the proportion to be received by each of the beneficiaries, if there be any. No verdict shall be set aside for failure to make such specification.

B. If either party shall so request the case shall be submitted to the jury with instructions to specify the distribution of the award, if any. If the jury be unable to agree upon or fail to make such distribution, the court shall specify the distribution and enter judgment accordingly. For the purpose of distribution the court may hear additional evidence.

C. The amount recovered in any such action shall be paid to the personal

representative who shall first pay the costs and reasonable attorney's fees and then distribute the amount specifically allocated to the payment of hospital, medical, and funeral expenses. The remainder of the amount recovered shall thereafter be distributed by the personal representative, as specified in subsections A. and B. above, to the beneficiaries set forth in § 8.01-54; provided that any distribution made to any such beneficiaries shall be free from all debts and liabilities of the decedent. If there be no such beneficiaries, the amount so recovered shall be assets in the hands of the personal representative to be disposed of according to law.

Reviser's Note:

Proposed § 8.01-54 is based on present § 8-638 and clarifies the procedure for the specification of the damages awarded under proposed § 8.01-52 and their distribution to those beneficiaries determined under proposed § 8.01-53.

Subsection A. of the proposal is, with minor language changes, the first two sentences of present § 8-638.

Subsection B. requires the court, upon request of either party, to instruct the jury to specify the distribution of the award among the beneficiaries. This paragraph also clarifies the court's authority to apportion the award.

Subsection C. of proposed § 8.01-54 provides for the actual distribution of the award. The subsection has rewritten and reordered the particular provisions of present § 8-638 (beginning the "The amount..." and ending with "...to law"), but has made no change in their substance.

The damages awarded are to be paid to the decedent's personal representative. After payment of costs and reasonable attorney's fees, the representative is to distribute the medical and funeral expenses as specifically allocated under proposed § 8.01-52.

The remainder of the awarded damages are to be distributed as specified in subsections A. and B. of proposed § 8.01-54 to the beneficiaries as determined under proposed § 8.01-53. As in the present section, any such distribution is free from the debts and liabilities of the decedent.

Finally, if there are no beneficiaries under proposed § 8.01-53, the personal representative is to dispose of the remaining awarded damages according to law; then, and only then, can the remainder of the awarded damages be subjected to claims by creditors of the decedent.

Present § 8-637. New trials. To be deleted.

Reviser's Note:

A reading of the preceding sections which present § 8-637 refers

to or any other provision of this article indicates that no one could be misled to think that the court was deprived of its power to grant new trials.

§ 8.01-55. Compromise of claim for death by wrongful act.—The personal representative of the deceased may compromise any claim to damages arising under or by virtue of § 8.01-50, including claims under the provision of a liability insurance policy, before or after action brought, with the approval of the court wherein any such action has been brought, or if none has been brought, with the consent of any circuit court. Such approval may be applied for by the personal representative, on petition to such a court, stating the compromise, the terms thereof, and reasons therefor, and giving reasonable notice thereof to all persons who may be interested. If the court approve the compromise, and the parties in interest do not agree upon the distribution to be made of what has been or may be received by the personal representative under such compromise, or if any of them are incapable of making a valid agreement, the court shall direct such distribution as a jury might direct under § 8.01-52 as to damages awarded by them. In other respects what is received by the personal representative under the compromise shall be treated as if recovered by him in an action under the section last mentioned.

Reviser's Note:

The changes recommended in present § 8-639 are in line with modern practice. The reference "of the judge" and the word "judge" have been deleted throughout this section and word "court" substitute in its place so to embrace any judge who may sit in "vacation or term". The language "in term or vacation" is believed unnecessary since the word "court" encompasses any court which convenes at any time. This change eliminates the perplexity of what may be done "in term" versus what may be done "in vacation".

Having deleted the reference to "in term or vacation", it was necessary to delete the last sentence of the present section which refers to the judge who confirms a compromise in "vacation" and the procedure for disposition of papers by the judge in such a case.

Regarding the provision in the present statute that grandchildren need not be made parties to the proceedings for confirmation of the compromise if their parents are made parties, this exception is deleted as unnecessary. The petition is to show that "notice" has been given "to all persons who may be interested." Such language has been substituted for "convening the parties" and now appears as follows: "(and) giving reasonable notice thereof of such petition to all persons who may be interested". This language is believed to be more definitive and is broad enough to cover all interested parties.

The reference to present § 8-636 has been replaced with proposed § 8.01-52. The reference to "an automobile" policy has been deleted and the words "a liability" substituted in its place. This change is simply to accomodate the many types of vehicle or liability policies which insurance companies issue in the normal course of business.

§ 8.01-56. When right of action not to determine nor action to abate.—The right of

action under § 8.01-50 shall not determine, nor the action, when brought, abate by the death, dissolution, or other termination of a defendant; and when a person who has brought an action for personal injury dies pending the action, such action may be revived in the name of his personal representative. If death resulted from the injury for which the action was originally brought, a motion for judgment and other pleadings shall be amended so as to conform to an action under § 8.01-50, and the case proceeded with as if the action had been brought under such section. In such cases, however, there shall be but one recovery for the same injury.

Reviser's Notes:

The proposed statute makes no substantial change and is for the most part the identical language of existing § 8-640. The second clause of existing § 8-640 has been changed only to eliminate certain procedural stipulations which were felt to be adequately covered by proposed § 8.01-50 and by the Rules of Court. It may be suggested that no part of the second clause is necessary in view of the provisions of proposed § 8.01-50. However, the language is retained to emphasize that a wrongful death action is a new right conferred upon the personal representative and not the survival of the old cause of action.

To the first clause of the first sentence of the proposed statute has been added "dissolution or other termination of a defendant". The present statute provides only for the dissolution of a corporation. The proposal expands this provision to encompass other organizations such as associations and trusts.

Article 6.

Injuries to Railroad Employees.

§ 8.01-57. Liability of railroads for injury to certain employees.—Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while employed by such carrier or, in the case of the death of any such employee, to his personal representative, for such injury or death, resulting in whole or in part from the wrongful act or neglect of any of its officers, agents, servants, or employees, or by reason of any defect, or insufficiency due to its neglect in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment, except when such employee is injured while engaged in interstate commerce, and except when such employee is injured in the course of his regular employment and such regular employment does not expose such employee to the hazards incident to the maintenance, use and operation of such railroad. If the action be for the death of an employee, §§ 8.01-50 through 8.01-56 shall apply thereto.

Reviser's Note:

This is present § 8-641. The Revisers have changed the reference "§§ 8-634 to 8-640" to "§§ 8.01-50 through 8.01-56" so as to include the entire wrongful death article. Also deleted is the

language "so far as applicable and when not in conflict herewith" to avoid any possibility of a conflict with §§ 8.01-50 through 8.01-56.

The statute of limitation provision has been deleted since it is to be absorbed into proposed § 8.01-246.

§ 8.01-58. Contributory negligence no bar to recovery; violation of safety appliance acts.—In all actions brought against any such common carrier to recover damages for personal injuries to any employee or when such injuries have resulted in his death, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; and no such employee, who may be injured or killed, shall be held to have been guilty of contributory negligence in any case when the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Reviser's Note:

No change has been made to present § 8-642. (In passing, it is noted that comparative negligence is recognized herein.)

§ 8.01-59. Assumption of risk; violation of safety appliance acts.—In any action brought against any common carrier, under or by virtue of § 8.01-57, to recover damages for injuries to, or death of, any of its employees, the knowledge of any employee injured or killed of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such carrier shall not of itself be a bar to recovery for an injury or death caused thereby, nor shall such employee be held to have assumed the risk of his employment in any case in which the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee.

Reviser's Note:

No change has been made to present § 8-643.

§ 8.01-60. Contracts exempting from liability void; set-off of insurance.—Any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by § 8.01-57, shall to that extent be void; but in any action brought against any such common carrier under or by virtue of such section, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity company that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which such action was brought.

Reviser's Note:

No change has been made to present § 8-644.

§ 8.01-61. Definition of "common carrier" as used in article.—The term "common carrier" as used in the four preceding sections shall include the receivers or other persons or corporations charged with the duty of the management or operation of the business of a

common carrier by railroad; but shall not include persons, firms or corporations owning or operating railroads when such railroads are primarily and chiefly used as incidental to the operation of coal, gypsum or iron mines or saw mills, nor shall it apply to any railroad owned or operated by any county.

Reviser's Note:

No change has been made to present § 8-645.

§ 8.01-62. Action may embrace liability under both State and federal acts.—The motion for judgment or other pleading in any such action may embrace a cause of action growing out of any statute of the United States or this Commonwealth for such injury or death, without being demurrable on this account, and without the plaintiff being required to elect under which statute he claims. Sections 8.01-57 through 8.01-61 shall not apply to electric railways operated wholly within this Commonwealth.

Reviser's Note:

This is present § 8-646 without substantive change. In place of "act of Congress of the United States of America" the Revisers have substituted "statute of the United States or this Commonwealth". This minor change does not broaden the scope of present § 8-646 but is made only to reflect case law that it is not necessary for the plaintiff to specify whether the action is brought under the United States or the Virginia statute; i.e.,it is sufficient if the facts alleged bring the action within either statute since the Virginia court has jurisdiction under both the federal and State laws. *Shumaker's Admix.* v. *Atlantic Coast Line R.R. Co.* 125 Va. 393 (1919).

Article 7.

Motor Vehicle Accidents.

§ 8.01-63. Liability for death or injury to guest in motor vehicle.—Any person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and any personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the negligent operation of such motor vehicle. However, this statute does not limit any defense otherwise available to the owner or operator.

Reviser's Note:

No change has been made to present § 8-646.1.

§ 8.01-64. Liability for negligence of minor.—Every owner of a motor vehicle causing or knowingly permitting a minor under the age of sixteen years who is not permitted under the provisions of § 46.1-357 of this Code to drive such a vehicle upon a highway, and any

person who gives or furnishes a motor vehicle to such minor, shall be jointly or severally liable with such minor for any damages caused by the negligence of such minor in driving such vehicle.

Reviser's Note:

Except for correcting the cite to present Title 46.1, no change has been made to present § 8-646.2.

Present §§ 8-646.3 through 8-646.7 are to be deleted.

Reviser's Note:

The deletion of these related sections is recommended since some appear to be potentially violative of Constitutional due process requirements. Regarding § 8-643.3, it is believed that the comprehensive nature of § 8.01-221, which applies the same rule of damages to the violation of "any statute," covers the application of present § 8-643.3 and therefore the latter should be deleted.

§ 8.01-65. Defense of lack of consent of owner.—It shall be a valid defense to any action brought for the negligent operation of a motor vehicle for the owner of such vehicle to prove that the same was being driven or used without his knowledge or consent, express or implied, but the burden of proof thereof shall be on such owner.

Reviser's Note:

The word "such" which preceded the word "action" in the second line of the present section has been deleted. The language "brought for the negligent operation of a motor vehicle" has been inserted after "action" in the second line. Otherwise no change has been made to present § 8-646.8.

§ 8.01-66. Recovery of damages for loss of use of vehicle.—Any person who shall be entitled to recover for damage to or destruction of a motor vehicle shall be entitled to recover, in addition to any other damages to which he may be legally entitled, the reasonable reimbursement per diem cost of hiring a comparable substitute vehicle for the period of time during which such person is deprived of the use of his motor vehicle; provided, that such rental period shall not exceed a reasonable period of time for such repairs to be made or if the original vehicle is a total loss, a reasonable time to purchase a new vehicle; provided further, however, that nothing herein contained shall relieve the claimant of the duty to mitigate damages.

Reviser's Note:

No change has been made to present § 8-646.9.

Article 8.

Actions for the Sale, Lease, Exchange, Redemption and Other Disposition of Lands of persons under a Disability.

§ 8.01-67. Definitions; persons under a disability; fiduciary.—The terms "fiduciary" and "person under a disability" as used in this article shall have the meanings ascribed to them in § 8.01-2.

Reviser's Note:

See § 8.01-2 and the Reviser's Note thereto.

§ 8.01-68. Jurisdiction.—Circuit courts in the exercise of their equity jurisdiction, upon being satisfied by competent evidence independent of the admissions in the pleadings or elsewhere in the proceedings, that one or more of the types of relief hereinafter specified will promote the interest of an owner of land, or any interest therein, who is a person under a disability as defined in this chapter, and taking into consideration the rights of any other party interested in such land, may order the sale, exchange, lease, encumbrance, redemption, or other disposition of such real estate as to the court may seem just and equitable.

In the case of the sales of such lands or interest therein, the court shall be governed by the established practices for judicial sales generally except as they may be specifically modified by provisions of this article.

Reviser's Note:

Present § 8-675 is unnecessarily complicated due to numerous amendments made over a century or more in past legislatures. The thrust of the present section, which is attempted to be preserved, is to authorize the promotion of the interest of the person under a disability without injuriously affecting the rights of the persons who may have an interest in the land also and therefore the court must take into consideration "the rights of any other person interest in such land." It is believed the proposed criteria embraces all the details that are set out with needless verbosity in present 8-675 as well as in some of the other existing statutes, for most of which the Revisers recommend deletion. (Present §§ 8-675, 8-677, 8-681, 8-682, and 8-683, are represented by proposed § 8.01-68.

Moreover, the court is authorized in this proposed section to promote the interest of a person under a disability and therefore it is believed unnecessary to specify in detail his best interest such as education, maintenance and other needs that can be found in several existing statutes. The court's power "to prpomote the interest" covers any and all such needs as the court deems appropriate.

§ 8.01-69. Commencement of suit; parties.—Any of the relief specified in this article may be sought by bill in equity filed by a fiduciary, as defined in this article, or by any

other person having an interest in the subject matter of the proceedings. A person under a disability, fiduciary, all those who would be the heirs of distributees of the defendant person under disability if he were dead, and all other persons interested in the subject matter of the proceeding, shall be made parties defendant when not parties plaintiff.

Reviser's Note:

This is present § 8-676 which has been simplified. For the second paragraph of § 8-676, see § 8.01-70.

§ 8.01-70. Bar of dower and curtesy.—Any sale or encumbrance of land under the provisions of this article shall operate to bar the contingent right of dower of the wife in the share of her husband in the land so sold or encumbered, and to bar the contingent right of curtesy of the husband in the share of his wife in the land so sold or encumbered, whether such wife in the first instance, or the husband in the second instance, be made party to the suit or not.

Reviser's Note:

The language of this proposed section is verbatim from the amendment adopted in 1973 and tacked to present § 8-676. Apparently the General Assembly intended to equate the provisions barring contingent marital rights in land sold under this article with the similar provision regarding sales for the purpose of partition of land. (See present § 8-695 which heavily influenced the enactment of this statute.)

Present §§ 8-686 and 8-687. To be deleted.

Reviser's Note:

Present §§ 8-686 and 8-687 appear to be in conflict with the 1973 Legislative amendment of present § 8-676. See Reviser's Note to § 8.01-70.

§ 8.01-71. How dower or curtesy passed when spouse is a person under disability; rights in purchase money.—If the husband or wife of a person under a disability wishes to sell or encumber real estate and to have her right of dower, or his right of curtesy, therein released, he or she, as the case may be, may bring an action in the circuit court as prescribed in subdivision 4. of § 8.01-261. To such petition the person under a disability and his or her fiduciary if one has been appointed, shall be made parties defendant, and the court, pursuant to the provisions of § 8.01-9, shall appoint a guardian ad litem for the person under a disability. The guardian ad litem, as well as any such fiduciary, shall file answers to the action. If it appears to the court to be proper, an order may be made for the execution of such release by a commissioner to be appointed by the court for that purpose, which release shall be effectual to pass such right of dower or of curtesy, as the case may be. But, in the case of a sale the court shall make such order as in its opinion may be proper to secure to the person under a disability the same interest in the purchase money and the income thereof that she or he would have had in the real estate and income thereof if it had not been sold, or, at the discretion of the court, to secure to her or to him

out of the purchase money such sum in gross as in the court's opinion may be sufficient to compensate her for right of dower or him for right of curtesy.

Reviser's Note:

Minor language changes have been made to present § 8-688 and a proper reference to the proposed applicable venue section has been inserted. Also a proper reference to the appointment provisions of a guardian ad litem, § 8.01-85, has been inserted. The definitional terms of "fiduciary" and "person under a disability" have been inserted.

It is important to note that the import of this statute pertains to the dower or curtesy interest of the insane person and how such contingent interest of the insane person may be passed by the same spouse. Section 8.01-70 bars any contingent right of a sane spouse where the other spouse is insane and the property is to be sold. (See § 8-695 and Reviser' Note of proposed § 8.01-70.)

§ 8.01-72. When death to abate such suit.—A suit instituted under this article shall abate by reason of the death of the person under a disability unless a sale, exchange, lease, encumbrance, redemption, or other disposition of real estate has been confirmed by a decree in such suit.

Reviser's Note:

This section alters present § 8-678. The term "the person under a disability" has been substituted for the enumerated persons presently listed in § 8-678. The phrase "unless a sale, exchange, lease, encumbrance, redemption, or other disposition of real estate has been confirmed" has been inserted in place of present language. This proposed language relates back to similar language located in proposed § 8.01-68.

This section has been rewritten but there has been no change to the substance of the existing law that confirmation by the court of its action will allow the court to proceed to a conclusion of the transaction even though the defendant party under a disability may have died subsequent to such confirmation.

§ 8.01-73. Guardian ad litem to be appointed.—In every suit brought under this article, a guardian ad litem shall be appointed for persons under a disability and for all persons proceeded against by an order or publication under the designation of "parties unknown" as provided for in § 8.01-316. The guardian ad litem shall file an answer as such.

Reviser's Note:

This section is present § 8-679 but principally eliminating the provisions regarding an answer by infants over the age of fourteen

years. The provision is useless since the infant must be made a party, he may presumably answer regardless of age, if he wishes to do so.

Under the provisions of this section, the guardian ad litem appointed shall also represent the interest of "unknown parties," if any, who are proceeded against by order of publication.

With the adoption of this proposal, the deletion of present § 8-680 is in order.

Present § 8-680. Failure to answer in person and as guardian ad litem. To be deleted.

Reviser's Note:

See last paragraph of Reviser's Note under § 8.01-73.

§ 8.01-74. Leases on behalf of persons under a disability; new leases.—A. Leases on behalf of persons under a disability. When a person under a disability is entitled to or bound to renew any lease, any fiduciary on behalf of such person under a disability or any other interested may apply by motion after reasonable notice to parties having a present interest in the property to be leased, to the circuit court as prescribed in subdivision 4. of § 8.01-261, and by the order of the court any person appointed by it may, from time to time, surrender or accept a surrender of such lease, or take or make a new lease of the same premises for such term and with such provisions as the court directs. Such reasonable sums as are incurred to renew any such lease shall, with interest thereon, be paid out of the profits of the leasehold premises, and be a charge there on until payment.

B. New leases. When it shall appear to a circuit court that the interests of a person under a disability will be promoted by the execution of anew lease, where no prior lease exists, any fiduciary or any other person interested in the subject matter may apply in like summary fashion as stated in paragraph A. above and upon showing to the satisfaction of the court that the provisions therein were compled with, including reasonable notice to parties having a present interest to the property to be leased, the circuit court upon the consideration of the probable length of the disability and the duration of the proposes lease, may order such lease to be executed. Such lease may be renewed or surrendered at any time pursuant to paragraph A above and under such conditions as the court may direct.

Reviser's Note:

This is present § 8-674 with minor language changes to conform with the recommended definitions set out in § 8.01-67. Although § 8-674 is seldom used, the summary procedure therein as permitted may have the benefit of speed and economy when the only purpose sought is to renew a lease.

In proposed subsection B, there is a provision pertaining to new leases where no prior lease exists. This alternate procedure recommended with regards to a new lease is designed to afford economy and speed in a summary fashion rather than requiring, under proposed § 8.01-68, the complicated procedure for a sale,

lease, exchange, redemption, or other disposition of the land of a person under a disability. Obviously a lease is less dispositive than a sale and, except in the extraordinary cases, the formal requirements of sale and exchange need not be required. It is for this reason the Revisers recommend extension of the summary proceedings now provided in existing § 8-674 to renewal of leases as well as to new leases.

In this proposed subsection, therefore, similar to a sale or other disposition, the lease can only be executed upon proper notice to parties having a present interest in the property to be leased and only if the court deems such lease will promote the interest of the disabled person. Judge Lamb advocated an uncomplicated procedure long ago and cited the legal construction and legislative limitations of present § 8-674. As Judge Lamb pointed out, the prime consideration and safeguard needed for any simplified procedure is that the court be empowered to consider both the length of the disability and the duration of the lease before a judge orders an excution of the lease. (Lamb, "Virginia Probate and Practice" at 280 (1957). See also Note: "Sale, Lease, Encumbrance, of Infant's Land", 47 Va. L. Rev. 534, 550 (1961).) Thus the Revisers have placed such a power with the court. Subsection B. is designed, moreover, to keep the standard of "judicial vigilance" that Judge Lamb felt was necessary in order to protect the interest of a person under a disability.

§ 8.01-75. Who not to be purchaser.—At any sale under this article neither a fiduciary for a person under a disability, as defined under this article, nor the guardian ad litem shall be a purchaser directly or indirectly.

Reviser's Note:

The proposed section is in substance the same as present section § 8-684 except to remove the disqualification of a lessee as a purchaser of the land. It is believed a lessee may often be a ready and willing purchaser and the person under a disability should not be deprived of the opportunity to make an advantageous sale under the supervision of the court to the lessee. The term "fiduciary" has been used to encompass the enumerated persons included in the definition of proposed § 8.01-67.

§ 8.01-76. How proceeds from disposition to be secured and applied; when same may be paid over.—The proceeds of sale, or rents, income, or royalties, arising from the sale or lease, or other disposition, of lands of persons under a disability, whether in a suit for sale or lease thereof, or in a suit for partition, or in condemnation proceedings, shall be invested under the direction of the court for the use and benefit of the persons entitled to the estate; and in case of a trust estate subject to the uses, limitations, and conditions contained in the writing creating the trust. The court shall take ample security for all investments so made, and from time to time require additional security, if necessary, and make any proper order for the faithful application and safe investment of the fund, and for the management and preservation of any properties or securities in which the same have been invested, and for the protection of the rights of all persons interested therein, whether such rights be vested or contingent, but nothing hereinbefore contained shall prevent the court having charge thereof from directing such funds to be paid over to the legal

appointed and qualified fiduciary (as defined in § 8.01-67) of the person under a disability, whenever the court is satisfied that such fiduciary has executed sufficient bond; or from applying at any time all or any portion thereof to the proper needs and requirements of the person under a disability. Provided, however, that if such funds do not exceed two thousand five hundred dollars, the court, in its discretion and without the intervention of a fiduciary, may pay such funds to any person deemed appropriate by the court for the use and benefit of a person under a disability, whether such person resides within or without the Commonwealth. Such funds not in excess of two thousand five hundred dollars shall, when paid over to such person deemed appropriate, be treated as personal property.

Reviser's Note:

Minor language changes have been made to present § 8-685 to implement the proposed definitions of "a person under a disability" and "fiduciary". In addition, a provision has been added which permits the court in its discretion to order payment of the proceeds of sale to a person whom the court deems appropriate when the funds of the sale do not exceed two thousand five hundred dollars. However, the new language does not change the court's consideration that such lesser amount is to be used only for the use and benefit of a person under a disability, whether such person resides within or without this Commonwealth.

§ 8.01-77. What proceeds of sale to pass as real estate.—The proceeds received under the preceding provisions of this article or under Article 9 (§ 8.01-81 et seq.) of this chapter, from the sale or division of real estate of a person under a disability or so much thereof as may remain at such persons's death, if such person continue until death incapable from any cause of making a will, shall pass to those who would have been entitled to the land if it had not been sold or divided.

Reviser's Note:

Minor language changes have been made to present § 8-689 for clarity.

§ 8.01-78. Alternate procedure for sale of real estate of a person under a disability.—If the personal estate of any person under a disability for whom a fiduciary has been appointed under any of the provisions of Title 37.1, be insufficient for the discharge of his debts or if the personal estate or residue thereof after payment of debts and the rents and profits of his real estate be insufficient for his maintenance and that of his family, if any, the fiduciary of his estate may petition a circuit court for authority to mortgage, lease or sell so much of the real estate of such person as may be necessary for the purposes aforesaid, or any of them, setting forth in the petition the particulars and amount of the estate, real and personal, and a statement of the application of any personal estate, and debts and demands existing against the estate.

Reviser's Note:

Only minor language changes have been made to present § 8-689.1. The terms "fiduciary" and "a person under a disability", as

defined in § 8.01-67, have been incorporated into the section.

This section, moreover, is restricted to the provisions of Title 37.1.

§ 8.01-79. Same; reference of petition to commissioner.—On the presenting of such petition it may be referred to a commissioner in chancery or to a special commissioner appointed by the court, to inquire into and report upon the matters therein contained, whose duty it shall be to make such inquiry, to give notice to and hear all parties interested in such real estate and to report thereon with all convenient speed.

Reviser's Note:

This is present § 8-689.2. The reference to a commissioner in chancery or a special commissioner has been made permissive rather than mandatory. Also the commissioner is required to give notice to all interested parties.

§ 8.01-80. Same: action of court on report; application of proceeds of transaction.—If upon the coming in of the report and examination of the matter it shall appear to the court to be proper, an order shall be entered for the mortgaging, leasing, or sale, on such terms and conditions as the court may deem proper, of so much of such real estate as may be necessary; but no conveyance shall be executed until such shall have been confirmed by the court. The proceeds of such transactions shall be secured and applied under the order of the court.

Reviser's Note:

This is present § 8-689.3. The last sentence of this present section, which is limited to sales, has been expanded to include mortgaging and leasing by the insertion of the word "such" for "the sale" near the end of the first sentence and the words "such transactions" for the word "sale" in the last sentence.

Present § 8-689.4. Validation of sales, etc., of land of incapacitated persons. To be deleted.

Reviser's Note:

This section is being deleted as it is merely a validating statute which no longer has any utility.

Article 9.

Partition.

§ 8.01-81. Jurisdiction of partition of land.—Tenants in common, joint tenants, and coparceners of real property, including mineral rights east and south of the Clinch River,

shall be compellable to make partition; and a lien creditor or any owner of undivided estate in real estate may also compel partition for the purpose of subjecting the estate of his debtor or the rents and profits thereof to the satisfaction of his lien. Any court having general equity jurisdiction shall have jurisdiction in cases of partition; and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings, between such tenants in common, joint tenants, coparceners and lien creditors.

All partitions of mineral rights heretofore had, are hereby validated.

Reviser's Note:

The reference in present § 8-690 to venue has been deleted pursuant to the consolidation of venue provisions under proposed Chapter 5. This change is in line with effort to eliminate the confusion of jurisdiction and venue. The venue provision regarding partition is found in proposed Chapter 5, Subdivision 4. of § 8.01-261.

§ 8.01-82. When shares of two or more laid off together.—Any two or more of the parties, if they so elect, may have their shares laid off together when partition can be conveniently made in that way.

Reviser's Note:

This is present § 8-691 without change.

§ 8.01-83. Allotment to one or more parties, or sale, in lieu of partition.—When partition cannot be conveniently made, the entire subject may be allotted to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or in any case in which partition cannot be conveniently made, if the interest of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court, notwithstanding any of those entitled may be a person under a disability, may order such sale, or an allotment of a part thereof to any one or more of the parties who will accept it and pay therefor to the other parties such sums of money as their interest therein may entitle them to, and a sale of the residue, and make distribution of the proceeds of sale, according to the respective rights of those entitled, taking care, when there are creditors of any deceased person who was a tenant in common, joint tenant, or coparcener, to have the proceeds of such deceased person's part applied according to the rights of such creditors.

Reviser's Note:

This is present § 8-692 without substantive change. The phrase "a person under a disability" which is defined in proposed § 8.01-67, has been substituted for "an infant or insane person".

§ 8.01-84. Application of proceeds to payment of lien.—When there are liens on the interest of any party in the subject so sold, the court may, on the petition of any person

holding a lien, ascertain the liens, and apply the dividend of such party in the proceeds of sale to the discharge thereof, so far as the same may be necessary.

Reviser's Note:

The phrase "in judgment or otherwise" has been deleted from present § 8-693 as unnecessary language. No changes in substance have been made.

§ 8.01-85. Disposition of share in proceeds of a person under a disability.—The court making an order for sale shall, when the dividend of a party exceeds two thousand five hundred dollars, if such party be a person under a disability, order the same to be disposed as the proceeds of a sale under the provisions of § 8.01-76 are required to be invested.

Reviser's Note:

This is present § 8-694. The word "disposed" has been substituted for the word "invested" regarding the disposition of proceeds in a sale of an infant's land. Following the language "disposed as the proceeds of a sale under" the language "the provisions of § 8.01-76" has been inserted. Thereafter, the Revisers have deleted all the following language of § 8-694 in order to make § § 8.01-85 and 8.01-86 consistent with one another. The language of the two present sections, §§ 8-694 and 8-695, is sufficiently different and causes some consternation in attempting to reconcile them. By deleting the language in this statute and referring back to the provisions of § 8.01-76, the Reviser's proposed change gives clarity to the proper disposition of proceeds from a sale of an infant's or insane person's land. The Revisers have deleted "an infant or insane person" and have substituted in its place the term "a person under a disability" which is defined in proposed § 8.01-67.

§ 8.01-86. Such sale bar dower and curtesy.—A sale of land made under the provisions of this article shall operate to bar any contingent right of dower or curtesy in any share so sold whether or not the owner of such share be made a party to the suit.

Reviser's Note:

No change in substance has been made to present § 8-695.

§ 8.01-87. Validation of certain partitions prior to Act of 1922.—All partitions heretofore had, when the proceedings conformed to the law as it existed prior to the amendment of § 5281 of the Code of 1919 by an act approved March twenty-seventh, nineteen hundred and twenty-two, although they did not conform to such section as it read under the amendment of nineteen hundred and twenty-two, as aforesaid, are hereby validated; but nothing in this validating section shall be construed as intended to affect vested rights.

Reviser's Note:

Undoubtedly some title disputes exist that will require examinations of title as far back as the transactions covered by this section, present § 8-696. This section was enacted to correct a drafting error in the 1922 amendment to § 5281 of the 1919 Code. No change has been made to this section.

Present § 8-697. Validation of sales when stock has been taken instead of cash. To be deleted.

Reviser's Note:

This section is to be deleted as it has no apparent utility in modern practice. It was possibly passed to give validity to some transactions which took place prior to 1918. However, any rights that might be asserted involving such transactions would likely be barred by the passage of time.

§ 8.01-88. Decree of partition to vest legal title.—A decree heretofore or hereafter made, confirming any partition or allotment in a suit for partition, shall vest in the respective co-owners, between or to whom the partition or allotment is made, the title to their shares under the partition or allotment, in like manner and to the same extent, as if such decree order such title be conveyed to them and the conveyance was made accordingly.

Reviser's Note:

No change has been made to present § 8-698.

§ 8.01-89. When proceeds of sale deemed personal estate.—The proceeds of any sale made under § 8.01-83 shall, except as provided in § 8.01-77, be deemed personal estate from the time of the confirmation of such sale by the court.

Reviser's Note:

This is present § 8-699 without change.

§ 8.01-90. When name or share of parties unknown.—If the name or share of any person interested in the subject of the partition be unknown, so much as is known in relation thereto shall be stated in the bill.

Reviser's Note:

This is present § 8-700 without change.

§ 8.01-91. Effect of partition or sale on lessee's rights.—Any person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land is allotted or sold on the same term on which by his lease he held it before the partition.

Reviser's Note:

This is present § 8-701. Some doubt had been expressed concerning this section, in view of the annotations in the present Code regarding a federal case (*Mitchell* v. *Weaver* , 116 F. Supp. 707) that is purported to distinguish two prior Virginia cases (*Lucy* v. *Kelly* , 117 Va. 318; and *Phillips* v. *Delaney*, 114 Va. 681).

After reading these cases, the Revisers are of the opinion there is no distinction or inconsistency between the cases and the case of *Phillips* v. *Delaney* clearly interprets the section to mean precisely what the language imports. Therefore, the Revisers have no recommendation for change of this section.

§ 8.01-92. Allowance of attorneys' fees out of unrepresented shares.—In any partition suit when there are unrepresented shares, the court shall allow reasonable fees to the attorney or attorneys bringing the action on account of the services rendered to the parceners unrepresented by counsel.

Reviser's Note:

This is present § 8-701.1 without change.

§ 8.01-93. Partition of goods, etc., by sale, if necessary.—When an equal division of goods or chattels cannot be made in kind among those entitled, a court of equity may direct the sale of the same, and the distribution of the proceeds according to the rights of the parties.

Reviser's Note:

Present § 8-702 is seldom used but nonetheless is grand in its design to fulfill a useful purpose (e.g., in the case of heirs or distributees seeking settlement of a decedent's estate). Therefore, no recommendation for change has been made to this section.

Present § 8-703. Jurisdiction of partition of personal property and proceedings therefor.—Every general district court shall have jurisdiction of proceedings for partition of personal property, within the limits as to value and in accordance with the provisions hereinafter contained.

When joint owners of personal property of the value of more than twenty dollars but not more than five thousand dollars cannot agree upon a partition thereof, any party in interest may compel partition, the proceeding for which shall be commenced by a petition presented to a general district court as prescribed in Subdivision 12. of § 8.01-261 . A copy of the petition, together with a notice of the time and place the partitioner will ask for a hearing thereon, shall be served on each of the defendants at least ten days prior to the day of hearing. All subsequent proceedings shall be in accordance with the applicable provisions of this chapter for partition of real estate; provided that, if the partition be made in kind, the commissioners need not necessarily be freeholders.

If the value of the property exceeds five hundred dollars, the case shall, upon the

application of any defendant, be removed by the general district court to any circuit court of the county or city having jurisdiction of removals from such general district court, in like manner as other civil cases are so removed, upon the applicant complying with all the provisions of law concerning removals from general district court in other civil cases.

Any party aggrieved by a final judgment rendered by the general district court in any such proceeding shall have an appeal of right to any circuit court of the county or city having jurisdiction of appeals from such general district court, to be perfected within the time, and in all other respects in accordance with the provisions of law concerning appeals from general district court in other civil cases.

Reviser's Note:

This section will be transferred to Title 16.1 because it relates entirely to courts not of record. Wherever the term "trial justice" appeared in this section, present § 8-703, the words "general district Court" has been substituted therefor. The reference to "civil justice, and civil and police justice" was deleted. The wordage "within the limits of the territory for which he is appointed" was deleted in conformity with proposed Chapter 5 on Venue. The sum of three thousand dollars was changed to five thousand dollars in conformity with recent legislative changes regarding such amounts. With regard to removal, "two hundred dollars" was changed to "five hundred dollars." The language "court of record" was replaced with "circuit court".

Article 10.

Sale, Lease, or Exchange of Certain

Estates in Property.

§ 8.01-94. When sold, leased or exchanged.—Whenever an interest in property, real or personal, is held by a person, natural or artificial, with remainder or limitation over contingent upon any event, or for his life or for the life of another, and there is limited thereon any other estate, vested or contingent, to any other such person, whether in being or to be thereafter born or created in any manner whatsoever, such person holding an interest in the property so subject to remainder or limitation over or for his own life, or his committee, or, if the estate so held be for the life of another, then his heir or personal representative, as the case may be, may for the purpose of obtaining a sale or leasing or exchange of the fee simple interest or absolute estate in such property, if the sale or leasing or exchange thereof is not prohibited by the instrument creating the estate, and the remaindermen, or any of them, whether in being or hereafter to be born or created, are from any cause incapable at the time of filing the bill as herein provided or of giving their assent, or the remainder or limitation over is contingent or defeasible, file a bill in equity in the circuit court stating plainly the property to be sold or leased or exchanged and all facts calculated to show the propriety of such sale or lease or exchange. A like bill may be filed for the sale or leasing or exchange of the remainder in such estate by a remainderman, his guardian or committee. All persons interested in the property presently or contingently, other than the plaintiff, shall be made defendants, and if such remaindermen be not born or created at such time of filing such bill, such suit shall not for such cause abate, but such unborn person or uncreated artificial person shall be made defendant and subject to

the decree of the court by the name of "person unknown or person yet to be born or created," and the court shall upon the filing of such bill appoint a guardian ad litem to defend the interest of such unborn person or uncreated artificial person. If it be clearly shown independently of any admissions in the pleadings that the interest of the plaintiff will be promoted and the rights of no other person will be violated thereby, the court may decree a sale or lease or exchange of the property or any part thereof, or of the remainder therein. In case of a sale on credit, the court shall take ample security. If such sale on credit be of real estate, a lien thereon shall be reserved. The title to any land acquired in any exchange herein provided for shall be held and owned by the same persons in the same way, to the same extent and subject to the same conditions that they owned the land given in such exchange.

Reviser's Note:

This is present § 8-703.1. Reference to venue or jurisdiction has been deleted in order to conform with the policy of presenting all venue provisions in a consolidated proposed chapter, Venue, Chapter 5. The requirement of verification of the bill has been eliminated. The last sentence has been deleted as misleading. Other minor language changes have been made without substantive change.

§ 8.01-95. Procedure in such case.—The procedure in such suit and the investment of the proceeds of sale shall be in accordance with §§ 8.01-73, 8.01-75 and 8.01-76, so far as the same can be made applicable, and the court may, in its discretion, commute the life estate according to § 55-269.1. In the case of a lease, however, the rents may be made payable direct to the person or persons entitled thereto, for the time being.

Reviser's Note:

This is present § 8-703.2 without substantive change.

Article 11.

General Provisions for Judicial Sales.

§ 8.01-96. Decree for sale; how made; bond of commissioner.—In decreeing a sale under any provisions of law, the court may provide for the sale of property in any part of the Commonwealth, and may direct the sale to be for cash, or on such credit and terms as it may deem best, and it may appoint one or more special commissioners to make such sale. No special commissioner, appointed by a court, shall receive money under a decree, until he gives bond, with approved security, before such court or its clerk, in a penalty to be prescribed by the court, conditioned upon the faithful discharge of his duties as such commissioner and to account for and pay over as the court may direct all money that may come into his hands as such commissioner.

Reviser's Note:

Only minor language changes have been made to present § 8-655.

§ 8.01-97. Delinquent taxes to be ascertained.—In every suit brought in this Commonwealth for the sale of lands for the payment of debts or to subject lands to the payment of liens binding thereon, it shall be the duty of the court, or any commissioner to whom the cause is referred, to ascertain all delinquent taxes on such land together with penalties if any.

Reviser's Note:

The Revisers have made minor language changes and have rewritten part of present § 8-656 in order to simplify it. The last sentence and language pertaining to the sale of land for delinquent taxes has been deleted since such a sale is provided for in § 58-1117.1 et seq.

§ 8.01-98. Sales of land when purchase price insufficient to pay taxes, etc.—In any proceedings for the sale of real estate or to subject real estate to the payment of debts, it appears to the court that the real estate cannot be sold for enough to pay off the liens of taxes, levies, and assessments returned delinquent against it, and it further appears that the purchase price offered is adequate and reasonable, such sale shall be confirmed, and the court shall decree the payment and distribution of the proceeds of such sale pro rata to the taxes, levies, and assessments due the Commonwealth or any political subdivision thereof, after having first deducted the cost of such proceedings in court. Such decree shall be certified to the clerk of the appropriate court who has charge of the delinquent tax books, and such clerk shall cause the lien of such taxes, levies, and assessments to be marked satisfied upon the list of delinquent lands regardless of whether the same shall have been paid in full.

Reviser's Note:

This is present § 8-657 without substantive change. The last sentence has been deleted as unnecessary.

§ 8.01-99. Bond required of special commissioner for sale.—Except as hereinafter provided, no special commissioner shall advertise the property for sale or renting, or sell or rent the same, until he shall have given bond in a penalty to be prescribed by the court sufficient to cover at least the probable amount of the whole purchase money or such portion of the rent the court deems appropriate, and shall have obtained from such clerk a certificate that such bond has been given. The certificate or a copy thereof shall be appended to the advertisement; provided, however, that in any case of such sale or rental, the court may direct all the cash proceeds thereof to be deposited by the purchaser or lessee to the credit of such court in some bank to be designated by it, and may direct that all evidences of indebtedness arising from such transaction or rent be deposited for safekeeping with such bank or the clerk of such court and the court may in its discretion thereafter dispense with the bond.

The clerk shall make the certificate whenever the bond has been given and note the same in the proceedings in the cause. The certificate or a copy thereof shall be returned with the report of the sale or renting.

Reviser's Note:

Minor language changes have been made to present § 8-658 to make it comport with modern practice and to simplify the statute.

Regarding the posting of bond for rental of real estate, the Revisers have proposed discretion with the court to determine "such portion of the rent [as] the court deems appropriate" in assessing the penalty bond prescribed by the statute. This proposal would allow the court to prevent an estate, such as an estate of a person under a disability, from having to expend a considerable amount of money to pay out a heavy bond premium that would be required for a long lease over a period of years. This dilemma would be particularly true if the property produced substantial annual rent. Therefore, this recommendation proposes an equitable solution that is less harsh than the present section.

The provision for a clerk's fee in the last sentence of present § 8-658 has been deleted as obsolete.

§ 8.01-100. Penalties for false certificate or failure to give bond.—If any clerk make a certificate as to the bond, which is untrue, he and the sureties on his official bond shall be liable to any person injured thereby; and, if he issue such certificate, knowing it to be false, he shall, in addition to such liability, be guilty of a Class 3 misdemeanor, and, upon conviction, be removed from his office. Any special commissioner who shall advertise property for sale or rent, and sell or rent the same before he shall have given bond as is required by § 8.01-658 shall be guilty of a Class 3 misdemeanor.

Reviser's Note:

This is present § 8-661. It is positioned here for logical sequence. The punishments prescribed in that section have been changed to a Class 3 misdemeanor. Other minor language changes have been made.

§ 8.01-101. Purchasers relieved of liability for purchase money paid to such commissioner.—When the certificate pursuant to the provisions in § 8.01-99 shall have been published with an advertisement of the sale or renting of property, or when such bond shall have been given prior to a sale or renting not publicly advertised, any person purchasing or renting such property in pursuance of such advertisement or in pursuance of the decree or order of sale or renting, shall be relieved of all liability for the purchase money or rent, or any part thereof, which he may pay to any special commissioner, as to whom the proper certificate shall have been appended to such advertisement, or who shall have given the bond aforesaid.

Reviser's Note:

This is present § 8-659. The words "such certificate" have been replaced with the following language; "the certificate pursuant to the provisions in § 8.01-658". This simple change is only to make the statute read with more explicitness.

§ 8.01-102. Purchasers not required to see to application of purchase money.—No purchaser or renter at a duly authorized sale or renting made by a receiver, personal representative, trustee, or other fiduciary shall be required to see to the application of the purchase money.

Reviser's Note:

This is present § 8-660 the last sentence of which has been deleted as unnecessary. No substantive changes have been made.

§ 8.01-103. Special commissioner or other person appointed to do so to receive purchase money, etc.—The special commissioner, who makes the sale or renting, shall receive and collect all the purchase money or rent, unless some other person be appointed to collect the same and in such case the court shall require of such person bond with surety in such penalty as to it may seem fit. When such appointment is made, it shall be the duty of the clerk to give notice thereof, in writing, to the purchaser or lessee, to be served as other notices are required by law to be served; but no payment shall be made to the person so appointed, until he shall have given the bond required by the decree or order; provided, however, that if, before the purchaser or lessee has received notice of such appointment, he shall have made any payment on account of the purchase money or rent to the special commissioner, or any person appointed for the purpose, who made the sale or renting, such special commissioner, or other person, who made the sale or renting, and the sureties on his bond, shall be responsible for the money so paid, and the purchaser or lessee, who made the payment, shall not be responsible therefor.

If any clerk fail to give the notice hereinbefore required to be given by him, he and the sureties on his official bond shall be liable to any person injured by such failure; and he shall, moreover, be guilty of a Class 4 misdemeanor.

Reviser's Note:

This is present § 8-662. The punishment prescribed has been changed to a Class 4 misdemeanor. Other minor language changes have been made.

§ 8.01-104. When collection of money by commissioner, etc., larceny.—If any special commissioner or receiver, appointed by any court to collect money, and required by law, or decree of the court, to give bond before collecting the same, shall collect such money, or any part thereof, without giving such bond, and fail properly to account for the same, he shall be deemed guilty of larceny of the money so collected and not so accounted for.

Reviser's Note:

This is present § 8-663 with minor language changes . This statute does have penal provisions which might imply its transfer to Title 18.2. The Revisers recommend its retention in this article as it is believed the statute would be given more notice and attention by those to whom it specifically applies.

§ 8.01-105. Rule against special commissioners, etc., for judgment for amounts due.—

Any court of this Commonwealth, may, at the instance of any party in interest, award a rule against any special commissioner or receiver appointed by or acting under the authority of such court, and against the surety of such commissioner or receiver, or against a purchaser at a judicial sale under a decree of such court, and against the surety or sureties of such purchaser, returnable to such date as the court may fix, to show cause why judgment shall not be entered against them for any amount which the court may ascertain to be due from such commissioner, receiver, or purchaser. A rule issued under this section shall be executed at least fifteen days before the return day thereof.

Reviser's Note:

This is present § 8-664 with minor language changes.

§ 8.01-106. How cause heard upon rule and judgment rendered.—Upon the return of a rule executed under § 8.01-105 upon any of the parties thereto, the court may if neither party demand a jury, proceed to hear and determine all questions raised by such rule, and shall enter a judgment against such special commissioner, receiver, or purchaser, as the case may be, and his surety or sureties, for the amount appearing to be due by such commissioner, receiver or purchaser, or may enter judgment against such of them as have been summoned to answer such rule. If it appears in such proceeding that such commissioner, receiver, purchaser, or any of them, or their sureties is dead, or under a disability, then such rule shall be awarded against the personal representative of those dead, and the fiduciary of those who are under a disability, and judgment may be rendered jointly and severally against such personal representative, fiduciary and those laboring under no disability in the same proceeding.

Reviser's Note:

This is present § 8-665. The second sentence of this section has been deleted as unnecessary. The term "person under a disability" as defined in proposed § 8.01-67 has been substituted for "insane or convict" and for other such references in this statute. Other minor language changes have been made.

§ 8.01-107. Trial by jury of issues made upon rule.—If, upon the return of such rule, any party thereto demand a trial by jury, the court shall order a trial by jury to ascertain what liability, if any, exists against any such special commissioner, receiver, or purchaser, and their sureties; and the court shall enter judgment on the verdict awarded by the jury. New trials may be granted as in other cases; and notwithstanding such rules be awarded and judgment be rendered against part only of the persons liable thereto, the court may award new rules and proceed to judgment against all the parties who are liable thereto. The provisions of this section, and §§ 8.01-105 and 8.01-106, shall apply to any officers and their sureties, acting under the decree of the court.

Reviser's Note:

This is present § 8-666 with minor languge changes.

§ 8.01-108. When sureties of purchaser, etc., proceeded against by rule.—Whenever a special commissioner, a receiver, purchaser at a judicial sale, or his personal

representative, or any of them, can be proceeded against by rule for the recovery of money under §§ 8.01-105, 8.01-106 and 8.01-107, the surety of such commissioner, receiver, or purchaser, and the personal representatives of such sureties, may also be proceeded against under such sections.

Reviser's Note:

This is present § 8-667 with minor language changes . It is a useful section in that it saves time and expense by permitting the procedure for the issuance of a rule to show cause against the surety on the bond of any of the officers mentioned in the three preceding sections instead of requiring the person on whose behalf the proceedings are instituted to bring a separate action against the sureties.

Present § 8-668. When sheriff or sergeant to execute decree or order of sale. To be deleted.

Reviser's Note:

The Revisers recommend the deletion of this statute as being unnecessary.

§ 8.01-109. Commission for selling, collecting, etc.; each piece of property to constitute separate sale.—For the services of commissioners or officers under any decree for a sale, including the collection and paying over of the proceeds, there shall be allowed a commission of five per centum on amounts up to and including fifty thousand dollars, and two per centum on all above that and if the sale be made by one commissioner or officer and the proceeds collected by another, the court under whose decree they acted shall apportion the commission between them as may be just.

For the purposes of this section, each piece of property so sold shall constitute a separate sale, even though more than one piece of property is sold under the same decree.

Reviser's Note:

This is present § 8-669 with minor language changes.

§ 8.01-110. Appointment of special commissioner to execute deed, etc., effect of deed.—A court in a suit wherein it is proper to decree the execution of any deed or writing may appoint a special commissioner to execute the same on behalf of any party in interest and such instrument shall be as valid as if executed by the party on whose behalf it is so executed.

Reviser's Note:

This is present § 8-670 with minor language changes.

§ 8.01-111. What such deed to show.—Every deed executed by any such commissioner pursuant to the provisions of § 8.01-110 shall specifically set out as nearly as practicable the name of the person on whose behalf the same is executed; provided, that when such deed conveys the right, title or interest of the heirs of a person who is dead it shall be sufficient for such deed to set out that the same is executed on behalf of the heirs of such decedent. But a failure to comply with the provisions of this section shall not affect or invalidate any such deed; and all deeds heretofore executed by any such commissioner in which such persons or heirs are not specifically set out are hereby validated.

Reviser's Note:

This is present § 8-671. The phrase "pursuant to the provisions of § 8.01-110" has been inserted after the language "such commissioner".

§ 8.01-112. Reinstatement of cause to appoint special commissioner to make deed.—Any ended cause may be reinstated for the purpose of entering a decree directing a deed to be made to any party clearly shown by the record to be entitled thereto, or for the purpose of substituting a new commissioner to make a deed in the place of one previously appointed for that purpose, but who has died or become incapacitated to act before making such deed.

Reviser's Note:

Other than minor language changes no changes have been made to present § 8-672.

§ 8.01-113. When title of purchaser at judicial sale not to be affected.—If a sale of property be made under a decree of a court, and such sale be confirmed, the title of the purchaser at such sale shall not be disturbed unless within twelve months from such confirmation the sale be set aside by the trial court or an appeal be allowed by the Supreme Court, and a decree be therein afterwards entered requiring such sale to be set aside; provided that this limitation shall not affect any right of restitution of the proceeds of sale.

Reviser's Note:

This section, present § 8-673, is valuable for the protection of bona fide purchasers at judicial sales. It has been construed not to protect a purchaser who relies on a void decree. (See *Brenham* v. *Smith*, 120 Va. 30 and *Robertson* v. *Stone*, 199 Va. 41.) The last sentence regarding restitution has been rewritten without changing the substance thereof. Other minor language changes have been made.

Article 12.

Detinue.

§ 8.01-114. When property to be taken by officer; summary of evidence, affidavits and report to be filed.—A. In an action of or warrant in detinue, a judge of the court before whom such action or warrant is pending, or a magistrate appointed pursuant to Article 3 of Chapter 3 of Title 19.2 (§ 19.2-33 et seq.), may issue an order or other process directed to the sheriff or other proper officer, as the case may be, commanding him to seize the property for the recovery of which such action or warrant is brought, or a specified portion thereof, and deliver same to the plaintiff pendente lite under the circumstances hereinafter set forth.

B. The judge or the magistrate aforesaid may issue such an order or other process ex parte upon the application of plaintiff, if there shall appear from his evidence, or that of his witnesses: (i) the kind, quantity and value of the property as to which plaintiff seeks possession; (ii) (a) that such property will be sold, removed, secreted, or otherwise disposed of by the defendant, in violation of an obligation to plaintiff, so as not to be forthcoming to answer the final judgment of the court respecting the same, or (b) that such property will be destroyed or materially damaged or injured if permitted to remain longer in possession of such defendant or other person claiming under him; and (iii) that plaintiff's claim of entitlement to recover said property has a substantial basis.

C. The judge or the magistrate, as the case may be, may receive evidence in the form of affidavits or ore tenus and, if the latter, shall record the name of each witness and a brief summary of his testimony. Such summary, and all affidavits submitted, shall be filed with the papers in the cause, together with a written report of the action taken on the plaintiff's request with the reasons therefor.

Reviser's Note:

This section, present § 8-586, and others in this article were amended in 1974 to make the procedure comply with the requirements set out in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *Sniadach* v. *Family Finance Corporation* , 395 U.S. 337 (1969). These two cases were further discussed in a later case of *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974) in which the Supreme Court restricted the scope of the two former cases. Present § 8-586 meets the criteria of constitutionality set out in *Mitchell* v. *W. T. Grant*. Therefore no substantive changes have been made.

§ 8.01-115. Bond required as prerequisite.—No such order or process, however, shall be issued until the plaintiff, or some one for him, shall execute a bond, with sufficient surety, to be approved by and filed with the court, in a penalty at least double the estimated value of the property claimed, payable to the defendant, with condition to redeliver the property so seized to the defendant, or to the person from whose possession it was taken, if the right to the possession shall be adjudged against the plaintiff, and to pay all costs which may be awarded against the plaintiff in such action or warrant, and all damages which may accrue to the defendant or any other person by reason of the seizure of such property under such order or process.

Reviser's Note:

This is present § 8-587. The words "clerk or trial justice" have been deleted and the word "court" has been substituted therefor.

§ 8.01-116. Return of property to defendant or other claimant.—A. Subject to the provisions of paragraph B. below, the defendant in any such action or warrant, or any other person claiming title to the property so seized and taken possession of by the officer, may have such property returned to him at any time after such seizure upon executing a bond, with sufficient surety, to be approved by the officer, payable to the plaintiff, in a penalty at least double the estimated value of such property, with condition to pay all costs and damages which may be awarded against the defendant in such action or warrant and all damages which may accrue to any person by reason of the return of such property to the defendant or such claimant, and also to have the property forthcoming to answer any judgment or order of the court or judge respecting the same. Such bond shall be delivered to such officer and by him returned to the office of the clerk or to the judge who issued such order or process. The officer, on receiving such bond, shall forthwith return the property taken by him to the defendant or any other person claiming title thereto or from whose possession it was taken.

B. In any such action or warrant, upon application of the defendant after reasonable notice to the plaintiff or his attorney, the judge of the court in which such action or warrant is pending may order such property returned to the defendant upon such lesser security and upon such terms as in the nature of the case may be just and reasonable.

C. If no such bond or other security be delivered to such officer after his seizing and taking posession of such property, then same, if in the hands of the officer, shall be kept by him, unless it be perishable or expensive to keep, in which case it may be sold by order of the court; such sale to be made in the same manner as if it were a sale under execution.

Reviser's Note:

Other than the deletion of the phrase "or of the judge in vacation", there have been no changes made to present § 8-588.

§ 8.01-117. Exceptions to sufficiency of bonds.—Either party may file exceptions to the sufficiency of the bond of the other or of the claimant of the property, if he has given bond, or such claimant may file exceptions to the sufficiency of the bond of either party and the court before whom the action or warrant is pending, may, on the motion of either party or of the claimant, after reasonable notice to the others, pass upon such exceptions and make such order thereupon as may be just and reasonable.

Reviser's Note:

This is present § 8-589. The words "or trial justice" and "or the judge of such court in vacation" have been deleted in order to conform the section to modern practice.

§ 8.01-118. Where bond filed with a general district court to be transmitted.—A bond filed with or returned to a general district court shall be forthwith transmitted to the clerk's office of the circuit court of the county or city to which appeals from such general district court lie.

Reviser's Note:

This is present § 8-590. The term "a general district court" has been substituted for the term "trial justice". The word "transmitted" is substituted for the word "returned" since it is more expressive of the intent of the statute. The Revisers recommend the deletion of the language "corporation court of the ", retaining "the circuit court of the county or city" and substituting in place of "in which he resides" the following language: "to which appeals from such general district court lie". The circuit court to which the statute directs a bond formerly by trial justice to be returned, should not depend upon the residence of the judge as it did in the old statute upon the residence of the trial justice, but rather, should be returned to the circuit court to which appeals may be taken from the general district court.

§ 8.01-119. Hearing to review issuance of order or process under § 8.01-114 or to consider request for such order or process.—A. Within twenty-one days after the issuance of any ex parte order or process pursuant to § 8.01-114, or promptly upon application of either party, in either event after reasonable notice, the court in which such action or warrant is pending shall conduct a hearing to review the decision to issue the order or other process described in § 8.01-114, or to consider the request of the plaintiff for issuance of such order or other process, whether or not the plaintiff has attempted to previously obtain an order pursuant to § 8.01-114. If the plaintiff gives reasonable notice of his intention to apply for such an order of process before the court, such hearing may be on the return day of the warrant. Evidence may be presented in the same manner as in paragraph B. of § 8.01-114.

B. At the conclusion of the hearing, if the evidence shall establish the facts set forth in clause (i), subsection B. of § 8.01-114, and the court shall be satisfied from the evidence as to either the existence of one or more of the conditions set forth in clause (ii), subsection B. of § 8.01-114, or that there is good reason to believe that the defendant is insolvent, so that any recovery against him for the alternate value of the property and for damages and costs will probably prove unavailing, or that plaintiff may suffer other irreparable harm if his request is denied, and if it further appears to the court that there is a substantial likelihood that plaintiff's allegations will be sustained at the trial on the cause then the court shall issue the order or other process requested by plaintiff, or let stand an order issued in the cause pursuant to § 8.01-114. If the decision of the court shall be in favor of the defendant, the former order or process issued in the cause shall be abated and the property returned to the possession of the person from whom it was taken to abide the final trial of the action or warrant. Proof of insolvency as grounds for possession of goods by the plaintiff shall not be introduced for purposes of affirming a prior ex parte order, but only upon an initial application for possession after reasonable notice.

C. Issuance of any order or process pursuant to this section shall be subject to the provisions of §§ 8.01-115 and 8.01-116.

Reviser's Note:

This is present § 8-591. The word "court" has been substituted for the word "judge." The 1973 Session of the Legislature altered this section in order to conform with the Supreme Court decisions proviously mentioned in the Reviser's Note to § 8.01-114. The Revisers have concluded that the 1973 substantive changes conform with the present constitutional requirements of *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974).

§ 8.01-120. No verdict as to some items; omission of price or value.—If in such detinue action, on an issue concerning several things, in one or more counts, no verdict be found for part of them, it shall not be error, but the plaintiff shall be barred of his title to the things omitted; and if the verdict omit the price or value, the court may at any time have a jury impaneled to ascertain the same.

Reviser's Note:

Other than inserting the word "detinue" before "action", there has been no change made to this section, present § 8-592.

This section was enacted many years ago to change the common law which was that if a verdict failed to enumerate and deal with all the articles for which detinue was sought, the verdict was defective and must be set aside and a new trial ordered. It has not been amended or modified for many years and it seems to be still viable.

§ 8.01-121. Final judgment.—When final judgment is rendered on the trial of such detinue action or warrant, the court shall dispose of the property or proceeds according to the rights of those entitled; and when in any such action or warrant the plaintiff shall prevail under a contract which, regardless of its form or express terms, was in fact made to secure the payment of money to the plaintiff or his assignor, judgment shall be for the recovery of the amount due the plaintiff thereunder, or else the specific property, and costs and the defendant shall have the election of paying the amount of such judgment or surrendering the specific property. The court may grant the defendant a reasonable time not exceeding thirty days, within which to make such election upon such security being given as the court may deem sufficient.

In the event that the defendant shall elect to surrender the property as aforesaid, the plaintiff upon delivery of such property to him or repossession thereof by him may proceed to sell the same in accordance with the applicable provisions of the Uniform Commercial Code (Virginia Code §§ 8.9-501 through 8.9-507) with all the rights and responsibilities therein provided.

Reviser's Note:

This is present § 8-593.

Though detinue originally was not a vehicle for collection of debts, this idea was conceived many years ago and so construed in *Lloyd* v. *Federal Motor Truck Co.*, 168 Va. 72. The original purpose of detinue, of course, was to recover the specific property, but somebody got the notion it was a good way to collect the debt Presumably this is well imbedded in our thinking and ought to be continued. It has been suggested however, that the decision in *Lloyd* v. *Federal Motor Truck Co.*, supra, should be modified so as to allow the plaintiff to recover a deficiency judgment. This change would seem to be in accord with the Uniform Commercial Code to which the present statute (§ 8-593) defers. The revision attempts to incorporate these suggestions made by the Code Commission. Other minor language changes have been made. The phrase "or judge

has been deleted as unnecessary since "court" would encompass such language.

Note: It may be noted that the applicable provisions of the Uniform Commercial Code require the plaintiff to exercise his rights in accordance with what is therein described as "reasonable commercial practice." There is a developing body of case law construing this phrase.

It is significant that provisions of the Code for the enforcement of additional sales contracts which specifically allowed the court to award deficiency judgments (§§ 55-89 through 55-94) were repealed in 1964 when the Uniform Commercial Code was adopted.

§ 8.01-122. Charges for keeping property.—The legal charges, if any, for keeping any such property, while in the possession of the officer, shall be paid by the plaintiff and certified by the officer to the court who, in case such order or process be not abated and final judgment be rendered for the plaintiff, shall tax the same along with the other costs of the suit.

Reviser's Note:

This is present § 8-594. The word "court" has been substituted for "clerk or trial justice".

§ 8.01-123. Recovery of damages sustained for property withheld during appeal.—When a judgment for specific personal property is affirmed by an appellate court, or an injunction to such judgment is dissolved, the person who is entitled to execution of such judgment, or who would be entitled if execution had not been had, may, on motion to the court from which such execution has issued, or might issue, after fifteen days' notice to the defendant or his personal representative, have a jury impaneled to ascertain the damages sustained by reason of the detention of such property, subsequent to such judgment, or if it was on a verdict, subsequent to such verdict; and judgment shall be rendered for the damages, if any, so ascertained.

Reviser's Note:

This is present § 8-595 without change.

Article 13.

Unlawful Entry and Detainer.

§ 8.01-124. Motion for judgment for unlawful entry or detainer.—If any forcible or unlawful entry be made upon lands, or if, when the entry is lawful and peaceable, the tenant shall detain the possession of land after the right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right of title he had thereto, or the party against whom such possession is unlawfully detained may file a motion for judgment in the circuit court alleging that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question.

Reviser's Note:

This is present § 8-789 rewritten to clarify the language and to make it consistent with the following sections of this article. The statute is also drawn to be consistent with the proposed statute of limitations and venue provisions of proposed Chapters 4 and 5 respectively. Accordingly, the three year statute of limitations has been removed from this section and will be located in Chapter 4; the venue provisions are now in proposed § 8.01-39(A)(4) of proposed Chapter 5. Reference to the "general district court" and "summons" has been deleted since it is believed that the proper interpretation of these statutes governing the remedy places the jurisdiction to bring this action by summons in a general district court pursuant to the provisions of proposed § 8.01-125.

§ 8.01-125. When summons returnable to circuit court; jury.—When the action is commenced in the circuit court, the summons is returnable thereto and, upon application of either party trial by jury shall be had.

Reviser's Note:

The Revisers found the reference in the present § 8-792, regarding the return of the summons to a court of record, puzzling. No existing statutes of this present article have a provision by which the summons issued by a magistrate or district judge may be returned to the circuit court. This section has therefore been altered so that it applies only to actions commenced in the circuit court. Also, the final sentence granting actions of unlawful entry and detainer precedence on the civil docket has been deleted. This comports with the general deletion of such provision where there is no compelling reason for their precedence.

§ 8.01-126. Summons issued by magistrate or judge of a general district court.—In any case when possession of any house, land or tenement is unlawfully detained by the person in possession thereof, the landlord, his agent, attorney, or other person, entitled to the possession may present to a magistrate or judge of a general district court a statement under oath of the facts which authorize the removal of the tenant or other person in possession, describing such premises; and thereupon such magistrate or judge of a general district court shall issue his summons against the person or persons named in such affidavit. Such summons issued by a magistrate or judge may be directed to the sheriff and served in the same manner as the process issued from the court. When issued by a magistrate it may be returned to and the case heard and determined by the judge of a general district court. Such summons shall be served at least five days before the return day thereof.

Reviser's Note:

This is present § 8-791. The references to venue provisions have been removed since all-encompassing provisions for venue are to be located in proposed Chapter 5. The word "general" has been inserted before "district court", and the reference to "sergeant" has

been deleted.

§ 8.01-127. Removal of action.—Notwithstanding the provisions of § 16.1-92, in any case where the amount in controversy exceeds the sum of five hundred dollars in which an action has been commenced or a summons has been issued pursuant to § 8.01-126, in or returnable to a general district court, removal of the action to the circuit court shall be conditional upon the tenant giving security for all rent which has accrued and may accrue upon the premises, whether it accrues before or accrues after the removal, and also for all damages that have accrued or may accrue from an unlawful use and occupation of the premises.

Reviser's Note:

This is present § 8-791.1. The word "general" has been inserted before "district court". Also the phrase "with sufficient corporate or cash surety" has been deleted. It is up to the court to determine the type and adequacy of the security to be required.

§ 8.01-128. Verdict and judgment; damages.—If it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, the verdict or judgment shall be for the plaintiff for the premises, or such part thereof as may be found to have been so held or detained. The verdict or judgment shall also be for such damages as the plaintiff may prove to have been sustained by him by reason of such forcible or unlawful entry, or unlawful detention, of such premises, and such rent as he may prove to have been owing to him, provided such damages and rent claimed shall not exceed the jurisdictional amount of the court in which the action is tried. No such verdict or judgment shall bar any separate concurrent or future action for any such damages or rent as may not be so claimed.

Reviser's Note:

The limitation provision in present § 8-793 has been deleted; this comports with the general effort to locate all such provisions in proposed Chapter 4 of this Title. (Limitation of Actions). The phrase "at the time of the institution of the action" has also been deleted. Amendment of pleading provisions allows the plaintiff to claim damages which arise after the filing of the action. Other unnecessary language in the present section has been deleted; but no change in substance is intended.

§ 8.01-129. Appeal from judgment of the general district court.—An appeal shall lie from the judgment of a general district court, in any proceeding under this article, to the circuit court in the same manner and with like effect and upon like security as appeals taken under the provisions of § 16.1-106 et seq. The appeal shall be taken within ten days and the security approved by the court from which the appeal is taken; and when the appeal is taken by the defendant, he shall be required to give security also for all rent which has accrued and may accrue upon the premises, but for not more than one year's rent, and also for all damages that have accrued or may accrue from the unlawful use and occupation of the premises for a period not exceeding three months. Trial by jury shall be had upon application of any party.

Reviser's Note:

This is present § 8-794. The term "trial justice" has been replaced by "the general district court" or "court". The phrase beginning with "of the court," and ending "are situated", addresses the venue of such actions and has been deleted. Venue for these actions is prescribed subdivision 4. of § 8.01-261. The sentence in present § 8-794 stating what type of security may be taken has been deleted. The type and adequacy of the security is left up to the court. Other minor language changes are made without change in substance. The present reference to "Chapter 1 of Title 16" has been substituted with the more specific cite, "the provisions of § 16.1-106 et seq."

§ 8.01-130. Judgment not to bar action of trespass or ejectment.—No judgment in an action brought under the provisions of this Article shall bar any action of trespass or ejectment between the same parties, nor shall any such judgment or verdict be conclusive, in any such future action, of the facts therein found.

Reviser's Note:

This is present § 8-795, which has been on the books since 1849 and its present language since the 1919 revision. The Revisers believe it to be well understood by the bar and the courts and therefore recommend no change in this section.

Article 14.

Ejectment.

§ 8.01-131. Action of ejectment retained; when and by whom brought.—(a) The action of ejectment is retained, subject to the provisions hereinafter contained, and to the applicable Rules of Court.

(b) Such action may be brought in the same cases in which a writ of right might ve been brought prior to the first day of July, eighteen hundred and fifty, and by any claiming real estate in fee or for life or for years, either as heir, devisee or purchaser, or otherwise.

Reviser's Note:

This section is a consolidation of present §§ 8-796 and 8-797. No stantive change has been made.

Present § 8-798. Where brought. To be deleted.

Reviser's Note:

The deletion of this section is recommended in view of proposed subdivision 4. of § 8.01-261 in order to conform with the policy to consolidate all provisions relating to venue in proposed Chapter 5.

§ 8.01-132. What interest and right plaintiff must have.—No person shall bring such ejectment action unless he has, at the time of commencing it, a subsisting interest in the premises claimed and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof.

Reviser's Note:

This is present § 8-799 with the word "ejectment" inserted before "action".

§ 8.01-133. Who shall be defendants; when and how landlord may defend.—The person actually occupying the premises and any person claiming title thereto or claiming any interest therein adversely to the plaintiff may also, at the discretion of the plaintiff, be named defendants in the action. If there be no person actually occupying the premises adversely to the plaintiff, then the action must be against some person exercising ownership thereon or claiming title thereto or some interest therein at the commencement of suit. If a lessee be made defendant at the suit of a party claiming against the title of his landlord such landlord may appear and be made a defendant with or in place of his lessee.

Reviser's Note:

This is present § 8-800 without change.

§ 8.01-134. How action commenced and prosecuted.—The action shall be commenced and prosecuted as other actions at law. The name of the real claimant shall be inserted as plaintiff, and all the provisions of law concerning a lessor of a plaintiff shall apply to such plaintiff.

Reviser's Note:

This is present § 8-801 without change.

§ 8.01-135. What is to be stated in the motion for judgment.—It shall be sufficient for the plaintiff to aver in his motion for judgment that on some day specified therein, which shall be after his title accrued, he was possessed of the premises claimed, and, being so possessed thereof, the defendant afterwards, on some day likewise specified, entered into such premises or exercised acts of ownership thereon or claimed title thereto or some interest therein, to the damage of the plaintiff in such sum as he shall state in his motion for judgment.

Reviser's Note:

The Revisers have no recommendation for change to present § 8-802.

§ 8.01-136. How premises described.—The premises claimed shall be described in the motion for judgment with convenient certainty, so that, from such description, with the aid of information derived from the plaintiff, possession thereof may be delivered.

Reviser's Note:

This is present § 8-803 without change.

§ 8.01-137. Plaintiff to state how he claims.—The plaintiff shall also state whether he claims in fee or for his life, or the life of another, or for years, specifying such lives or the duration of such term, and when he claims an undivided share or interest he shall state the same.

Reviser's Note:

This is present § 8-804 without change.

§ 8.01-138. There may be several counts and several plaintiffs.—The motion for judgment may contain several counts, and several parties may be named as plaintiffs jointly in one count and separately in others.

Reviser's Note:

This is present § 8-805 without change.

§ 8.01-139. What proof by plaintiff is sufficient.—The consent rule, formerly used, remains abolished. The plaintiff need not prove an actual entry on, or possession of, the premises demanded, or receipt of any profits thereof, or any lease, entry, or ouster, except as hereinafter provided. But it shall be sufficient for him to show a right to the possession of the premises at the time of the commencement of the suit.

Reviser's Note:

The Revisers have no recommendation for change to present § 8-809.

§ 8.01-140. Effect of reservation in deed; burden of proof.—In any action, suit or other judicial proceeding involving the title to land embraced in the exterior boundaries of any patent, deed or other writing, which reserves one or more parcels of land from the operation of such patent, deed or other writing, if there be no claim made by a party to the proceedings that the land in controversy, or any part thereof, lies within such reservation, such patent, deed or other writing shall be construed, and shall have the same effect, as if it contained no such reservation; and if any party to such proceeding claims that the land in controversy, or any part thereof, lies within such reservation, the burden shall be upon him to prove the fact, and all land not shown by a preponderance of the evidence to lie within such reservation shall be deemed to lie without the same.

This section shall apply in cases involving the right to the proceeds of any such land

when condemned or sold, as well as in cases where the title to land is directly involved, and shall apply in any case in which the title to any part of the land, or its proceeds, but for this section, would or might be in this Commonwealth.

Reviser's Note:

Except for substituting "this Commonwealth" for "the State", there has been no change made to present § 8-810.

§ 8.01-141. When action by cotenants, etc., against cotenants, what plaintiff to prove.—If the action be by one or more tenants in common, joint tenants or coparceners against their cotenants, the plaintiff shall be bound to prove actual ouster or some other act amounting to total denial of the plaintiff's right as cotenant.

§ 8.01-142. Verdict, when action against several defendants.—If the action be against several defendants, and a joint possession of all be proved, and the plaintiff be entitled to a verdict, it shall be against all, whether they pleaded separately or jointly.

§ 8.01-143. When there may be several judgments against defendants.—If the action be against several defendants, and it appear on the trial that any of them occupy distinct parcels in severalty or jointly, and that other defendants possess other parcels in severalty or jointly, the plaintiff may recover several judgments against them, for the parcels so held by one or more of the defendants, separately from others.

Reviser's Note:

No changes have been made to present §§ 8-811, 8-812 and 8-813.

§ 8.01-144. Recovery of part of premises claimed.—The plaintiff may recover any specific or any undivided part or share of the premises, though it be less than he claimed in the motion for judgment.

Reviser's Note:

No change has been made to present § 8-814.

§ 8.01-145. When possession of part not possession of whole.—In a controversy affecting real estate, possession of part shall not be construed as possession of the whole when an actual adverse possession can be proved.

Reviser's Note:

No change has been made to present § 8-815.

§ 8.01-146. When vendee, etc., entitled to conveyance of legal title, vendor cannot recover.—A vendor, or any claiming under him, shall not, at law any more than in equity, recover against a vendee, or those claiming under him, lands sold by such vendor to such

vendee, when there is a writing, stating the purchase and the terms thereof, signed by the vendor or his agent and there has been such payment or performance of what was contracted to be paid or performed on the part of the vendee, as would in equity entitle him, or those claiming under him, to a conveyance of the legal title of such land from the vendor, or those claiming under him, without condition.

Reviser's Note:

No change has been made to present § 8-816.

§ 8.01-147. When mortgagee or trustee not to recover.—The payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or deed of trust may have been made to secure or effect, shall prevent the grantee, or his heirs, from recovering at law, by virtue of such mortgage or deed of trust, property thereby conveyed, whenever the defendant would in equity be entitled to a decree, revesting the legal title in him without condition.

Reviser's Note:

No change is made to present § 8-817.

§ 8.01-148. Right of defendant to resort to equity not affected.—Whether the defendant shall or shall not make or attempt a defense under §§ 8.01-816 and 8.01-817, he shall not be precluded from resorting to equity for any relief to which he would have been entitled if such sections had not been enacted.

Reviser's Note:

No substantive change has been made to present § 8-818.

§ 8.01-149. Verdict when jury finds for plaintiffs or any of them.—If the jury be of opinion for the plaintiffs, or any of them, the verdict shall be for the plaintiffs, or such of them as appear to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof or claimed title thereto at the commencement of the action.

§ 8.01-150. Verdict when any plaintiff has no right.—When any plaintiff appears to have no such right, the verdict as to such plaintiff shall be for the defendants.

Reviser's Note:

No changes have been made to §§ 8-819 and 8-820.

§ 8.01-151. How verdict to specify premises recovered.—When the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally as specified in the motion for judgment, but if it be proved to only a part or share of the premises, the verdict shall specify such part particularly as the same is proved, and with the same certainty of description as is required in the motion for

judgment.

Reviser's Note:

No change is recommended for present § 8-821.

§ 8.01-152. How verdict to specify undivided interest or share.—If the verdict be for an undivided share or interest in the premises claimed, it shall specify the same, and if for an undivided share or interest of a part of the premises, it shall specify such share or interest, and describe such part as before required.

Reviser's Note:

No change has been made to present § 8-822.

§ 8.01-153. Verdict to specify estate of plaintiff.—The verdict shall also specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term.

Reviser 's Note:

No change is recommended for present § 8-823.

§ 8.01-154. When right of plaintiff expires before trial, what judgment entered.—If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be according to the fact, and judgment shall be entered for his damages sustained from the withholding of the premises by the defendant, and as to the premises claimed, the judgment shall be that the defendant go thereof without day.

Reviser's Note:

No change has been made to present § 8-824.

§ 8.01-155. How judgment for plaintiff entered.—The judgment for the plaintiff shall be, that he recover the possession of the premises, according to the verdict of the jury, if there be a verdict, or if the judgment be by default, or on demurrer, according to the description thereof in the motion for judgment.

Reviser's Note:

No change has been made to present § 8-825.

§ 8.01-156. Authority of sheriffs, etc., to store and sell personal property removed from premises; recovery of possession by owner; disposition or sale.—In any county or city, when personal property is removed from premises pursuant to an action of unlawful detainer or ejectment, or pursuant to any other action in which personal property is

removed from premises in order to restore such premises to the person entitled thereto, the sheriff shall cause such personal property to be placed in a storage area, if such a storage area has been designated by the governing body of such county or city, unless the owner of such personal property then and there removes the same from the public way.

The owner, before obtaining possession of such personal property so placed in a storage area by the sheriff shall pay to the parties entitled thereto the reasonable and necessary costs incidental to such removal and storage. Should such owner fail or refuse to pay such costs within thirty days from the date of placing the property in storage, the sheriff shall, after due notice to the owner and holders of liens of record, dispose of the property by publicly advertised public sale. The proceeds from such sale shall be used to pay all costs of removal, storage, and sale, all fees and liens, and the balance of such funds shall be paid to the person entitled thereto. Should the cost of removal and storage exceed the proceeds realized from such sale the county or city shall reimburse the sheriff for such excess.

Reviser's Note:

Other than the deletion of references to city sergeants and constables, there have been no changes made to present § 8-825.1.

Note: Sergeants and constables are encompassed by the definition of "sheriff". See § 8.01-2 (Definitions).

§ 8.01-157. Assignment of dower in ejectment suit to recover it.—If the action be brought to recover dower, which has not been assigned before the commencement of such action, the court in which the judgment is rendered may have dower assigned by a commissioner appointed for that purpose.

Reviser's Note:

Only minor language changes, have been made to present § 8-826.

§ 8.01-158. How claim of plaintiff for profits and damages assessed.—If the plaintiff file with his motion for judgment a statement of the profits and other damages which he means to demand, and the jury find in his favor, they shall, at the same time, unless the court otherwise order, assess the damages for mesne profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages for any destruction or waste of the buildings or other property during the same time for which the defendant is chargeable.

Reviser Note:

No change has been made to present § 8-827.

§ 8.01-159. When court to assess the damages.—If there be no issue of fact tried in the cause, and judgment is to be rendered for the plaintiff on demurrer, or otherwise, such damages shall be assessed by the court, unless either party shall move to have the assessed by a jury, or the court shall think proper to have them so assessed, in which ca

a jury shall be impaneled to assess them. If the defendant is in default the court shall proceed to render judgment and assess damages as provided in Rule of Court 3:17.

Reviser's Note:

This is present § 8-828. The improper reference to Rule 3:19 has been changed to the correct reference, Rule 3:17 of the Rules of Court.

§ 8.01-160. Defendant to give notice of claim for improvements.—If the defendant intends to claim allowance for improvements made upon the premises by himself or those under whom he claims, he shall file with his pleading a statement of his claim therefor, in case judgment be rendered for the plaintiff.

Reviser's Note:

No change is recommended for § 8-829.

§ 8.01-161. How allowed.—In such case, the damages of the plaintiff, and the allowance to the defendant for improvements, shall be estimated, and the balance ascertained, and judgment therefor rendered, as prescribed in Article 15 of this chapter.

Reviser's Note:

This is present § 8-830 without substantive change.

§ 8.01-162. Postponement of assessment and allowance.—On the motion of either party, the court may order the assessment of such damages and allowance to be postponed until after the verdict on the title is recorded.

§ 8.01-163. Judgment to be conclusive.—Any such judgment in an action of ejectment shall be conclusive as to the title or right of possession established in such action, upon the party against whom it is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, except as hereinafter mentioned.

Reviser's Note:

No changes have been made to present §§ 8-831 and 8-832.

Present § 8-833. Saving in favor of persons under disability. To be deleted.

Reviser's Note:

The Revisers recommend the deletion of this section. An appropriate limitation period has been determined and inserted in

proposed Chapter 4, Limitations of Actions. (See proposed §§ 8.01-229 A. and 8.01-251.)

§ 8.01-164. Recovery of mesne profits, etc., not affected.—Nothing in this chapter shall prevent the plaintiff from recovering mesne profits, or damages done to the premises, from any person other than the defendant, who may be liable to such action.

§ 8.01-165. Writ of right, etc., abolished.—No writ of right, writ of entry, or writ of formedon, shall be hereafter brought.

Reviser's Note:

No change has been made to present §§ 8-834 and 8-835.

Article 15.

Improvements.

§ 8.01-166. How defendant may apply therefor, and have judgment suspended.—Any defendant against whom a decree or judgment shall be rendered for land, when no assessment of damages has been made under Article 14 (§ 8.01-131 et seq.) of this chapter, may, at any time before the execution of the decree or judgment, present a pleading to the court rendering such decree or judgment, stating that he, or those under whom he claims while holding the premises under a title believed by him or them to have been good, have made permanent improvements thereon, and moving that he should have an allowance for the same which are over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment or decree, and impanel a jury to assess the damages of the plaintiff, and the allowances to the defendant for such improvements.

Reviser's Note:

This is present § 8-842. Minor changes to conform with this proposed chapter's numerical order have been made. No recommendations for any substantive changes are proposed.

§ 8.01-167. How damages of plaintiff assessed.—The jury, in assessing such damages, either under this article or under Article 14 (§ 8.01-131 et seq.) of this chapter, shall determine the annual value of the premises during the time the defendant was in possession thereof, exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant.

Reviser's Note:

This is present § 8-843. The numerical references have been changed to conform with this proposed chapter. Minor language changes have been made. No substantive changes are

recommended.

§ 8.01-168. For what time.—The defendant shall not be liable for such annual value for any longer time than five years before the suit, or for damages for any such waste or other injury done before such five years, except when he claims for improvements as aforesaid.

Reviser's Note:

This is present § 8-844. It is noted that the limitation of "five years" is a limitation on the allowance of damages rather than a limitation on the action. The former is similar to "set-off" and therefore, it is recommended that this statute be kept in its present position so not to confuse it with provisions in proposed Chapter 4 (Limitation of Actions).

§ 8.01-169. How value of improvements determined in favor of defendant.—If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the same, permanent and valuable improvements, they shall determine the value of such improvements as were so made before receipt by the person making the same of notice in writing of the title under which the plaintiff claims, not exceeding the amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby at the time of such determination.

§ 8.01-170. If allowance for improvements exceed damages, what to be done.—If the sum determined for the improvements exceed the damages determined by the jury against the defendant as aforesaid, they shall then determine against him, for any time before such five years, the rents and profits accrued against, or damage for waste or other injury done by him, or those under whom he claims, so far as may be necessary to balance his claim for improvements, but in such case he shall not be liable for the excess, if any, of such rents and profits, or damages, beyond the value of the improvements.

§ 8.01-171. Verdict for balance, after offsetting damages against improvements.—After offsetting the damages assessed for the plaintiff and the allowances to the defendant for improvements, if any, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment or decree shall be entered therefor according to the verdict.

§ 8.01-172. Balance for defendant, a lien on the land.—Any such balance due to the defendant shall constitute a lien upon the land recovered by the plaintiff, until the same shall be paid.

§ 8.01-173. How tenant for life, paying for improvements, reimbursed.—If the plaintiff claim only an estate for life in the land recovered, and pay any sum allowed to the defendant for improvements, he, or his personal representative at the determination of his estate, may recover from the remainderman or reversioner, the value of such improvements as they then exist, not exceeding the amount so paid by him, and shall have a lien therefor on the premises, in like manner as if they had been mortgaged for the payment thereof, and may keep possession of such premises until the same be paid.

Reviser's Note:

No changes, other than minor language changes, have been made to present §§ 8-845 through 8-849.

§ 8.01-174. Exception as to mortgagees and trustees.—Nothing in this article, nor anything concerning rents, profits, and improvements, in Article 14 (§ 8.01-131 et seq.) of this chapter, shall extend or apply to any suit brought by a mortgagee, or trustee in a deed of trust to secure creditors, his heirs, or assigns, against a mortgagor or grantor in such deed of trust, his heirs, or assigns, for the recovery of the mortgaged premises or of the land conveyed by such deed of trust.

Reviser's Note:

Numerical changes have been made to conform to this proposed chapter. No changes in substance are recommended for present § 8-850.

§ 8.01-175. When plaintiff may require his estate only to be valued; how determined; how he may elect to relinquish his title to defendant.—A. When the defendant shall claim allowance for improvements, as before provided, the plaintiff may, by an entry on the record, require that the value of his estate in the premises, without the improvements, shall also be ascertained.

B. The value of the premises in such case shall be determined as it would have been at the time of the inquiry, if no such improvements had been made, and shall be ascertained in the manner hereinbefore provided for determining the value of improvements.

C. The plaintiff in such case, if judgment is rendered for him, may at any time, enter on the record his election to relinquish his estate in the premises to the defendant at the value so ascertained under this section, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, provided he pay therefor such value, with interest, in the manner in which the court may direct.

Reviser's Note:

Present §§ 8-851, 8-852, 8-853 have been consolidated into one section that retains the present catchlines with minor language changes. This proposal is primarily for greater ease of reference. Some clarifying language has been added.

§ 8.01-176. How payment of such value to be made by defendant; when land is sold therefor.—The payments shall be made to the plaintiff, or into court for his use, and the land shall be bound therefor, and if the defendant fail to make such payments within or at the times limited therefor respectively, the court may order the land to be sold and the proceeds applied to the payment of such value and interest, and the surplus, if any, to be paid to the defendant; but if the net proceeds be insufficient to satisfy such value and interest, the defendant shall not be bound for the deficiency.

§ 8.01-177. When such value to be deemed real estate.—If the party by or for whom the land is claimed in the suit be a person under a disability, such value shall be deemed to be real estate, and be disposed of as the court may consider proper for the benefit of the persons interested therein.

§ 8.01-178. When and how defendant, if evicted, may recover from plaintiff amount paid.—If the defendant or his heirs or assigns shall, after the premises are so relinquished to him, be evicted thereof by force of any better title than that of the original plaintiff, the person so evicted may recover from such plaintiff or his representative the amount so paid for the premises, as so much money had and received by such plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of such payment.

Reviser's Note:

No substantive changes have been made to present §§ 8-854, 8-855 and 8-856. The language "minor or insane person" has been deleted in § 8-855 and in its place is substituted "a person under a disability" as defined in proposed § 8.01-67.

Article 16.

Establishing Boundaries to Land.

§ 8.01-179. Motion for judgment to establish boundary lines.—Any person having a subsisting interest in real estate and a right to its possession, or to the possession of some share, interest or portion thereof, may file a motion for judgment to ascertain and designate the true boundary line or lines to such real estate as to one or more of the coterminous landowners. Plaintiff in stating his interest shall conform to the requirements of § 8.01-137, and shall describe with reasonable certainty such real estate and the boundary line or lines thereof which he seeks to establish.

Reviser's Note:

This is present § 8-836. The reference to "jurisdiction" has been deleted since it apparently means "venue" which is covered by proposed § 8.01-261(4.f.). Thus the phrase "by such court" has been deleted. Other minor language changes have been made. The last sentence has been deleted as unnecessary.

§ 8.01-180. Parties defendant; pleadings.—The plaintiff shall make defendants to such motion for judgment all persons having a present interest in the boundary line or lines sought to be ascertained and designated.

Reviser's Note:

Only minor language changes have been made to present § 8-837. The last sentence has been deleted as unnecessary.

§ 8.01-181. Surveys.—The court may appoint a surveyor and direct such surveys to be made as it deems necessary, and the costs thereof shall be assessed as the court may direct.

Reviser's Note:

Deleted from this section, present § 8-838, are the language and provisions for trial. The Revisers recommend keeping the survey provisions within the discretion of the court and imposing costs upon the parties as the court may direct when a survey is ordered.

§ 8.01-182. Claims to rents, etc., not considered.—In a proceeding under this article, no claim of the plaintiff for rents, profits or damages shall be considered.

Reviser's Note:

No change has been made to present § 8-839.

§ 8.01-183. Recordation and effect of judgment.—The judgment of the court shall be recorded in the current deed book of the court. The judgment shall forever settle, determine, and designate the true boundary line or lines in question, between the parties, their heirs, devisees, and assigns. The judgment may be enforced in the same manner as a judgment in an action of ejectment.

Reviser's Note:

Only minor language changes have been made to present § 8-840 so as to conform the section to modern practice.

Present § 8-841. Writ of error to judgment. To be deleted.

Reviser's Note:

This section is to be deleted since its principal purpose expresses common knowledge among attorneys of the bar.

Article 17.

Declaratory Judgments.

§ 8.01-184. Declaratory judgments.—In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Reviser's Note:

This is present § 8-578. The catchline of the section has been changed from "Jursidictions" to "Declaratory judgments" so as not to confuse this section with any applicable sections in proposed Chapter 5. Also "circuit courts" has been substituted for "courts of record"; "or decree" has been inserted after "order".

§ 8.01-185. Venue.—The venue of actions seeking declarations of right with or without consequential relief shall be determined in accordance with provisions of Chapter 5 of this title.

Reviser's Note:

The present section, § 8-579, is somewhat more than a paraphrase of proposed § 8.01-257. It is noted that the present statute was passed in 1922 when the concept of declaratory judgment was novel and regarded with some suspicion as to its constitutionality. This suspicion having long since subsided, there exists no good reason for special treatment with regard to venue. Thus the statute has been rewritten and provisions in proposed Chapter 5 regarding venue control as to declaratory judgments.

Present § 8-580. Procedure. To be deleted.

Reviser's Note:

Present § 8-580 is being deleted, since the nature of declaratory judgments is understood and no longer viewed with suspicion. The statute is unnecessary.

§ 8.01-186. Further relief.—Further relief based on a declaratory judgment order or decree may be granted whenever necessary or proper. The application shall be by motion to a court having jurisdiction to grant the relief. If the application is deemed sufficient the court shall, on reasonable notice, require an adverse party whose rights have been adjudicated by the declaration of right to show cause why further relief should not be granted forthwith.

Reviser's Note:

Other than the minor language change of substituting "motion" for "petition", there have been no changes made to present § 8-581.

§ 8.01-187. Commissioners to determine compensation for property taken or damaged.—Whenever it is determined in a declaratory judgment proceeding that a person's property has been taken or damaged within the meaning of Article I, § 11 of the Virginia Constitution and compensation has not been paid or any action taken to determine the compensation within sixty days following the entry of such judgment order or decree, the court which entered the order or decree may, upon motion of such person after

reasonable notice to the adverse party, enter a further order appointing commissioners to determine the compensation. The appointment of commissioners and all proceedings thereafter shall be governed by the procedure prescribed for the condemning authority.

Reviser's Note:

Other than inserting "judgment" before "order or decree," and minor language changes, no changes have been made to present § 8-581.1.

§ 8.01-188. Jury trial.—When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

Reviser's Note:

No changes have been made to present § 8-582.

§ 8.01-189. Injunction.—The pendency of any action at law or suit in equity brought merely to obtain a declaration of rights or a determination of a question of construction shall not be sufficient grounds for the granting of any injunction.

Reviser's Note:

The word "mere" as it first appears has been deleted. The word "of" has been changed to "or". The phrase "at law" has been added after "action" and "in equity" after "suit". No change in substance is recommended for present § 8-583.

§ 8.01-190. Costs.—The costs, or such part thereof as the court may deem proper and just in view of the particular circumstances of the case, may be awarded to any party.

§ 8.01-191. Construction of article.—This article is declared to be remedial. Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor. It is to be liberally interpreted and administered with a view to making the courts more serviceable to the people.

Reviser's Note:

No substantive changes have been made to present §§ 8-584 and 8-585.

Article 18.

§ 8.01-192. How claims to be prosecuted.—When the Comptroller or other authorized person shall disallow, either in whole or in part, any such claim against the Commonwealth as is provided for by § 2.1-223.1, 2.1-223.3 or 8.01-605 at which time a right of action under this section shall be deemed to accrue, the person presenting such claim may petition an appropriate circuit court for redress.

Reviser's Note:

The statute of limitation provision has been moved from this section, present § 8-752, and located in proposed Chapter 4, Limitation of Actions. (A similar proposal is recommended for present § 8-757, which section's statute of limitation is irreconciable with present § 8-752. A statute of limitations for claims against the State has been placed in Chapter 4 which changes the overall period from 10 to 8 years. Present § 2.1-223.5 is to be repealed since it is inconsistent with the proposed statute of limitations of § 8.01-255). The present section's requirement that a claim against the State be brought only in the Circuit Court of the City of Richmond has been expanded. As rewritten the section permits a claim against the State to be brought in "an appropriate circuit court". This language is located in the last sentence and refers to the venue section, § 8.01-261 (1. and 2.) of proposed Chapter 5 (Venue). The sentence beginning with "and when a person has any other claim..." in present § 8-752 has been deleted. The intent of the statute is confined to only "pecuniary claims" and thus would not include "any other claims" against the Commonwealth.

§ 8.01-193. Defense and hearing.—In every such case, the Comptroller shall be a defendant. He shall file an answer stating the objections to the claim. The cause shall be heard upon the petition, answer, and the evidence.

Reviser's Note:

Only minor language changes have been made to present § 8-753.

§ 8.01-194. Jury may be impaneled; judgment.—The court may, and on the motion of any party shall, cause a jury to be impaneled to ascertain any facts which are disputed, or the amount of any claim which is unliquidated.

Reviser's Note:

Added to present § 8-754 is the language "on motion of either party the Court shall" at the beginning of the statute. The last sentence has been deleted as unnecessary.

Present § 8-755. Facts to be certified. To be deleted.

§ 8.01-195. No judgment to be paid without special appropriation.—No judgment against the Commonwealth, unless otherwise expressly provided, shall be paid without a special appropriation therefor by law.

Reviser's Note:

Present § 8-756 appears to be so logical that it may not be necessary as a statutory procedure. It is believed however that this statute is peculiar to claims against the State and the present rules of court are not broad enough to cover its particular application in such claims. Thus the statute is retained with no substantive changes. The words "or decree" have been deleted as unnecessary.

Present § 8-757. When suits may not be brought.

Reviser's Note:

The limitation provisions of this section have been redrafted and placed in proposed Chapter 4, Limitation of Actions. The remaining portion of the statute has been deleted.

Article 19.

Actions by the Commonwealth.

§ 8.01-196. Comptroller to institute proceedings.—The Comptroller shall institute and prosecute all proceedings proper to enforce payment of money to the Commonwealth.

Reviser's Note:

No change is recommended for present § 8-758.

Present § 8-759. In what court brought. To be deleted.

Reviser's Note:

Present § 8-759 is to be deleted in view of the policy to cover all venue provisions in proposed Chapter 5, Venue.

§ 8.01-197. In what name; when not to abate.—Any such action shall be in the name of the Commonwealth of Virginia except when it is on a bond payable to, or a contract made with, the Governor or some other person. And then it may be in the name of such Governor or other person for the use of the Commonwealth, notwithstanding such Governor or other person may have died, resigned, or been removed from office before the commencement of the action. And there shall be no abatement thereof, by reason of the death, resignation, or removal from office of any such plaintiff pending the action.

Reviser's Note:

No change is recommended for present § 8-760.

§ 8.01-198. Action, against whom instituted.—Any such action may be instituted against any person indebted or liable to the Commonwealth in any way whatever, and against his sureties, and against his and their personal representatives. And it may be made when the debt or liability is created or secured by a bond or other instrument, whether the same be payable to the Commonwealth or to any person acting in a public character on behalf of the Commonwealth, or be for the payment of money or the performance of other duties. Every judgment on any such motion shall be in the name of the Commonwealth.

§ 8.01-199. Judgment, nature of.—On any such motion, the judgment shall be for so much principal and interest as would be recoverable by action. It may be also for fifteen per centum damages in addition thereto when the proceeding is against a treasurer, sheriff, or other collector, or his sureties, or his or their personal representatives, for taxes or other public money which ought to have been paid into the State Treasury. In such proceeding, the court, in pronouncing judgment, may consider all the circumstances, and give judgment for the damages or not, or for such part of the damages, as it may deem proper.

§ 8.01-200. Mistakes against State corrected.—After a debt to the Commonwealth shall have been paid, if it appear that an error or mistake has been committed to its prejudice, whether before or after the issuing of execution, a motion may be made on ten days' notice against any person liable for the debt, for the amount of such error or mistake, and judgment may be given therefor, without interest or damages thereon.

§ 8.01-201. Execution; real estate to be sold.—In a writ of fieri facias upon a judgment or decree against any person indebted or liable to the Commonwealth, or against any surety of his, after the words "we command you that of the," the clerk shall insert the works "goods, chattels, and real estate," and conform the subsequent part of such writ thereto. And under any writ so issued, real estate may be taken and sold.

Reviser's Note:

No changes have been made to present §§ 8-761, 8-762, 8-763 and 8-764.

§ 8.01-202. Execution, to whom issued.—An execution on behalf of the Commonwealth from the circuit court of the city of Richmond may, if the Comptroller see fit, be directed to any sheriff, of any political subdivision, and shall be served by any of such officers in whose hands the Comptroller may cause it to be placed.

§ 8.01-203. Goods and chattels liable before real estate.—Every writ of fieri facias, issued according to § 8.01-201, shall be levied first on the goods and chattels of the person against whose estate such writ issued. If, in the political subdivision, the residence of such person, there are no goods and chattels liable thereto, or not a sufficiency thereof, then the officer having such writ shall levy it on the real estate of such person.

§ 8.01-204. Notice of sale of real estate; when sale to be made.—When a levy is so made upon real estate, the officer making it shall post notice thereof, and of the time and place of sale, at such public places as may seem to him expedient, and at the front door of

the courthouse of the political subdivision in which the real estate is, on a court day. The time of selling real estate shall be not less than sixty nor more than ninety days from the time of posting the notice at the courthouse door. And the sale shall take place at the premises or at the door of the courthouse, as the officer may deem most advisable.

§ 8.01-205. How sale made.—If the amount of the execution be not sooner paid, such officer shall proceed, on the day mentioned in the notice, to sell at public auction the interest of the party against whom the execution issued in the real estate or so much thereof as the officer may deem sufficient; and if a part only be sold it shall be laid off in one parcel in such place and manner as the debtor or his agent may direct or, if he give no direction, as the officer may deem best.

§ 8.01-206. Terms of sale.—The sale shall be upon six months' credit; and if the land be not purchased for the Commonwealth, the officer shall take bond of the purchaser, with sureties, for the payment of the purchase money to the Commonwealth. Every such bond shall mention on what occasion the same was taken, and be returned to the office of the court from which the execution issued, and the clerk shall endorse thereon the date of its return.

§ 8.01-207. Who to collect purchase money and make deed; disposition of proceeds of sale.—On or before the maturity of such bond the sheriff or other officer who made the sale shall withdraw the bond from the clerk's office, leaving his receipt therefor and an attested copy thereof, and collect the same. So soon as the purchase money has been paid, the sheriff or other principal officer, or the deputy who acted in making the sale, shall, as commissioner, and in the name of the Commonwealth, convey the land to the purchaser by deed executed at his costs, reciting the execution, the sale and the price of the land. Such deed shall pass to the purchaser all the interest which the party against whom the execution issued had in the land at the date of the judgment or decree. Out of the money so collected the sheriff or officer who made the sale shall pay all costs attending such execution and sale, the costs of a survey, if there was one, all delinquent and unpaid taxes and levies on such land and the debt due the Commonwealth, and the residue, if any, he shall pay to the judgment debtor.

Reviser's Note:

Only minor language changes have been made to present §§ 8-765 through 8-770.

§ 8.01-208. When successor of officer to make deed.—When the officer and his deputy who acted in making the sale have both died or removed from the Commonwealth before making such deed, the same may be executed by any successor of such officer.

Reviser's Note:

No substantive change has been made in present § 8-771.

§ 8.01-209. Bond for purchase money to have force of judgment.—When any bond taken under § 8.01-206 becomes payable and is returned to the office of the court from which the execution issued, it shall have the force of a judgment against such of the obligors therein as may be then alive. Execution may be issued thereon against them. And the same shall be proceeded under in like manner as an execution issued on such a judgment or decree as is mentioned in § 8.01-201, save only that the clerk shall endorse

"no security is to be taken", and the officer shall govern himself accordingly and sell for ready money any real estate which he may levy on under the same.

Reviser's Note:

No change is recommended for present § 8-772.

§ 8.01-210. Judgment against deceased obligors.—A judgment may be obtained against the survivors of a deceased obligor of a bond taken under the provisions of § 8.01-206 by an action at law against the personal representative of such obligor.

Reviser's Note:

This section, present § 8-773, has been rewritten without substantive change.

§ 8.01-211. When venditioni exponas issued to sheriff of adjacent county; what to contain.—When return is made on any execution on behalf of the Commonwealth that goods, chattels or real estate remain unsold for want of bidders, or to that effect, the clerk of the court from which such execution issued shall, when required by the Comptroller, issue a writ of venditioni exponas, directed to the sheriff of any county adjacent to that in which the levy was made that the Comptroller may designate. Such writ shall recite the execution under which the levy was made, the nature of such levy and return that the property remains unsold for the want of bidders and shall command the sheriff of such adjacent county, if the property remaining unsold be goods or chattels, to go into the county in which the levy was made and receive the same from the officer that made the levy and, whether the property be goods, chattels, or real estate, to sell the same.

§ 8.01-212. Officer to deliver to sheriff goods and chattels levied on.—The officer who made the levy shall deliver the goods and chattels to the sheriff to whom such writ of venditioni exponas may be directed, upon such sheriff's producing to him such writ and executing a receipt for such goods and chattels. If the officer shall fail to deliver the same and return be made on such writ to that effect, the court from which it issued, upon motion, may give judgment against him and his sureties for the whole sum that the execution amounted to at the time of such failure, with interest thereon from that time.

§ 8.01-213. Where same to be sold.—The sheriff to whom such writ of venditioni exponas is directed, shall sell the goods and chattels in the county where received, if they can be sold therein, and if not he shall cause them to be removed to the courthouse of his own county and there sold. The removal shall be at the costs of the party against whom the execution issued, and the sale under the execution shall be to raise the cost of removal, in addition to the amount which it would otherwise have been necessary to raise.

§ 8.01-214. Where real estate to be sold.—Such sheriff shall also sell the real estate levied on in the county wherein the levy was made, if it can be done, and if it cannot he shall make the sale at the courthouse of his own county.

§ 8.01-215. Return of officer when sale not made because of prior encumbrance.—In any case in which an officer, having an execution on behalf of the Commonwealth, shall decline levying it because of any previous conveyance, execution, or encumbrance, a return shall be made setting forth the nature of such conveyance, execution or encumbrance, in whose favor, and for what amount, and the court in which the conveyance or encumbrance

is recorded, or from which the execution issued.

Reviser's Note:

No changes have been made to present §§ 8-774 through 8-778.

§ 8.01-216. Comptroller's power to adjust old claims.—The Comptroller, with the advice of the Attorney General, may adjust and settle upon equitable principles, without regard to strict legal rules, any doubtful or disputed account or claim in favor of the Commonwealth which may have been standing on the books of his office not less than two years, and may, with the like advice, dismiss any proceedings instituted by him; but before such adjustment or settlement can in any wise affect the rights of the Commonwealth it shall be approved and endorsed by the Attorney General and shall then be submitted to the supervision of the judge of the circuit court of the city of Richmond, accompanied by a written statement signed by the Comptroller of the facts and reasons which, in his opinion, render such adjustment or settlement just and proper. When such judge endorses the same with his written approval, signed in his official character, it shall be considered and treated as valid and binding.

Reviser's Note:

This is present § 8-779 without change.

Article 20.

Change of Name.

§ 8.01-217. How name of person may be changed.—Any person desiring to change his own name, or that of his child or ward, may apply therefor to the circuit court of the county or city in which the person whose name is to be changed resides. In case of a minor who has no living parent or guardian, the application may be made by his next friend. In case of a minor who has both parents living, the parent who does not join in the application shall be served with reasonable notice of the application and, should such parent object to the change of name, a hearing shall be held to determine whether the change of name is in the best interest of the minor.

Every application shall be under oath and shall include the place of residence of the applicant, the names of both parents, including the maiden name of his mother, the date and place of birth of the applicant, and if the applicant has previously changed his name, his former name or names. On any such application and hearing, if such be demanded, the court, in its discretion, may order a change of name and the clerk of the court shall spread the order upon the current deed book in his office, index it in both the old and new names, and transmit a certified copy to the State Registrar of Vital Statistics. Such order shall set forth the date and place of birth of the person whose name is changed, and if such person has previously changed his name, his former name or names.

Reviser's Note:

This is present § 8-577.1 with the following changes: (1) notice to the parent not joining in the application shall be served rather than mailed and (2) the penal provision will be transferred to Title 18.2.

Article 21.

Miscellaneous Provisions.

§ 8.01-218. Replevin abolished.—No action of replevin shall be hereafter brought.

§ 8.01-219. Effect of judgment in trover.—A judgment for the plaintiff in an action of trover shall not operate to transfer the title to the property converted unless and until such judgment has been satisfied.

Reviser's Note:

No changes have been made to present §§ 8-647 and 8-648.

Present § 8-649. Seduction. To be deleted.

Reviser's Note:

The civil action for seduction has been abolished. (See subsection (b) of § 20-37.2 and the Reviser's Note for proposed § 8.01-220)

§ 8.01-220. Action for alienation of affection, breach of promise, criminal conversation and seduction abolished.—A. Notwithstanding any other provision of law to the contrary, no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or criminal conversation upon which a cause of action arose or occurred on or after June twenty-eight, nineteen hundred sixty-eight.

B. No civil action for seduction shall lie or be maintained where the cause of acton arose or accrued on or after July one, nineteen hundred seventy-four.

Reviser's Note:

This is present § 20-37.2 without substantive change.

§ 8.01-221. Damages from violation of a statute, remedy therefor and the penalty.—Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, even though a penalty or forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages. And the damages so sustained together with any penalty of forfeiture imposed for the violation of the statute may be recovered in a single action when the same person is entitled to both damages and penalty; but nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes

Reviser's Note:

No change has been made to present § 8-652.

§ 8.01-222. Notice to be given cities and towns of claims for damages for negligence.—No action shall be maintained against any city or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within six months after such cause of action shall have accrued, except if the complainant during such six-month period is able to establish by clear and convincing evidence that due to the injury sustained for which a claim is asserted that he was physically or mentally unable to give such notice within the six-month period, then the time for giving notice shall be tolled until the claimant sufficiently recovers from said injury so as to be able to give such notice; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provision of any city or town.

This section, on and after June thirty, nineteen hundred fifty-four, shall take precedence over the provisions of all charters and amendments thereto of municipal corporations in conflict herewith granted prior to such date. It is further declared that as to any such charter or amendment thereto, granted on and after such date, that any on therein in conflict with this section shall be deemed to be invalid as being in with Article IV, § 12 of the Constitution unless such conflict be stated in the title proposed charter or amendment thereto by the words "conflicting with § 8.01-222 Code" or substantially similar language.

Reviser's Note:

This is § 8-653 without substantive change. The effective date of 954 Acts, June 30, 1954, has been substituted for the words "as ended" in the first line of the second paragraph, and other orming changes have been made.

Present § 8-654.2. Duty of care and liability for damages of landowners to hunters, en, sightseers, etc. To be transferred to Title 29.

§ 8.01-223. Lack of privity no defense in certain cases.—In cases not provided for in 18 where recovery of damages for injury to person, including death, or to property from negligence is sought, lack of privity between the parties shall be no defense.

Reviser's Note:

is present § 8-654.4 without change.

8.01-224. Defense of governmental immunity not available to certain persons in for damages from blasting, etc.—The defense of governmental immunity shall not

be available to any person, firm or corporation in any cause of action for damages to the property of others proximately or directly resulting from blasting or the use of explosives in the performance of work for or on behalf of any governmental agency.

Reviser's Note:

No change has been made to present § 8-654.5.

§ 8.01-225: Reserved.

§ 8.01-226: Reserved.

§ 8.01-227. Remedy by motion on certain bonds given or taken by officers; notice.—The court in which any bond given or taken by an officer is required to be returned, filed or recorded, may, on motion of any person protected by such bond, give judgment in favor of such person for such amount as he would be entitled by virtue of the bond to recover in an action at law. Any such motion shall be made after reasonable notice, not less than ten days, to the obligors on the bond. Service may be in any manner sufficient to support a judgment in personam.

Reviser's Note:

The Revisers have redrafted present §§ 8-140.1 and 8-140.2 into this section. The Revisers had considered deleting these two sections. However, these seemingly unimportant statutes proved to be of value in later stages of the revision such as in forthcoming bonds, attachment bonds, and fiduciary bonds. The proposed statute provides a summary procedure for actions on such bonds. This summary procedure is retained because it is simple and should be favored by members of the bar. Other than the time provision of present § 8-140.1, the Revisers do not recommend retaining other provisions of that statute. An attempt has been made to retain the principles of present § 8-140.2 that are consistent with the intent of the legislature which enacted that section. (For history of § 8-140.2, see *Commonwealth* v. *Hall*, 194 Va. 914.)

Chapter 4.

Limitations of Actions.

Article 1.

In General.

§ 8.01-228. Scope of limitations.—Every action for which a limitation period is prescribed by law must be commenced within the period prescribed in this chapter. As used in this chapter, the term "personal action" shall include an action wherein a judgment for money is sought, whether for damages to person or property.

Reviser's Note:

This chapter has been revised (a) to collect the many statutes of limitations that are scattered throughout the Code, and (b) to classify actions and the periods of limitation along the following lines:

1. general provisions applicable to all actions;

2. actions involving real estate which formerly might have been classified as "real" actions (e.g., trespass upon land, ejectment and unlawful detention);

3. personal actions for:

a. physical injury to the person;

b. injury to property;

c. injury to the reputation.

The provision that limitations prescribed in this chapter apply to suits in equity is not intended to supersede the ancient and established rule of laches as applicable to purely equitable claims. Courts of equity have always applied existing statutes of limitation to legal claims of which they have taken cognizance. It is thought to be advisable to bring attention to this in the wording of the statute, since it does not seem to be generally understood by many modern practitioners. See: Lile's Notes on Equity Jurisprudence, § 113, et seq.

§ 8.01-229. Suspension or tolling of statute of limitations; effect of disabilities; death; injunction; prevention; dismissal, nonsuit or abatement; devise for payment of debts; new promises; debts proved in creditors' suits.—A. Disabilities which toll the statute of limitations. Except as otherwise specifically provided in §§ 8.01-237, 8.01-241, 8.01-242 and other provisions of this Code,

1. if a person entitled to bring any action is at the time the cause of action accrues an infant or of unsound mind, such person may bring it within the prescribed limitation period after such disability is removed; or

2. after a cause of action accrues,

a. if an infant becomes entitled to bring such action, the time during which he is within the age of minority shall not be counted as any part of the period within which the action must be brought; or

b. if a person entitled to bring such action becomes of unsound mind, the time during which he is of unsound mind shall not be computed as any part of the period within which the action must be brought.

For the purposes of subitems 1 and 2 of this subsection, a person shall be deemed of unsound mind if he is adjudged insane by a court of competent jurisdiction to be mentally incapable of rationally conducting his own affairs, or if it shall otherwise appear to the court or jury determining the issue that such person is or was so mentally incapable of

rationally conducting his own affairs within the prescribed limitation period.

3. If a convict is or becomes entitled to bring an action against his committee, the time during which he is incarcerated shall not be counted as any part of the period within which the action must be brought.

B. Effect of death of a party. The death of a person entitled to bring an action or of a person against whom an action may be brought shall toll the statute of limitations as follows:

1. Death of person entitled to bring a personal action. If a person entitled to bring a personal action dies with no such action pending before the expiration of the limitation period for commencement thereof, then an action may be commenced by the decedent's personal representative before the expiration of the limitation period or within one year after his qualification as personal representative, whichever is later.

2. Death of person against whom personal action may be brought. If a person against whom a personal action may be brought dies before the commencement of such action and before the expiration of the limitation period for commencement thereof, then a claim may be filed against the decedent's estate or an action may be commenced against the decedent's personal representative within two years after the qualification of such personal representative. If § 8.01-229 B.1. and 2. are both applicable, then § 8.01-229 B.2. shall control.

3. Effect of death on actions for recovery of realty, or a proceeding for enforcement of certain liens relating to realty. Upon the death of any person in whose favor or against whom an action for recovery of realty, or a proceeding for enforcement of certain liens relating to realty, may be brought, such right of action shall accrue to or against his successors in interest as provided in §§ 8.01-236 through 8.01-242 of Article 2 of this chapter.

4. Accrual of a personal cause of action against the estate of any person subsequent to such person's death. If a personal cause of action shall not have accrued against a decedent before his death, an action may be brought against the decedent's personal representative or a claim thereon may be filed against the estate of such decedent within two years after the cause of action shall have accrued or within two years after the qualification of the decedent's personal representative, whichever occurs later.

5. Accrual of a personal cause of action in favor of decedent. If a person dies before a personal cause of action which survives would have accrued to him, if he had continued to live, then an action may be commenced by such decedent's personal representative before the expiration of the applicable limitation period or within one year after the qualification of such personal representative, whichever occurs later.

6. Delayed qualification of personal representative. If there be an interval of more than two years between the death of any person in whose favor or against whom a cause of action has accrued or shall subsequently accrue and the qualification of such person's personal representative, such personal representative shall, for the purposes of this chapter, be deemed to have qualified on the last day of such period of two years.

C. Suspension during injunctions. When the commencement of any action shall be stayed by injunction, the time of the continuance of the injunction shall not be computed as any part of the period within which the action must be brought.

D. Prevention by defendant. When an action has been commenced and service of process upon a defendant shall be prevented by such defendant.

1. departing from the Commonwealth; or

2. absconding or concealing himself; or

3. filing a petition in bankruptcy or filing a petition for an extension or arrangement under the United States Bankruptcy Act; or

4. Using any other direct or indirect means to obstruct the prosecution of such cause of action;

then the time that such prevention may have continued shall not be counted as any part of the period within which the action must be brought.

E. Dismissal, abatement, or nonsuit.

1. Except as provided in subparagraph 3 of this subsection, if any action is commenced within the prescribed limitation period and for any cause abates or is dismissed without determining the merits, the time such action is pending shall not be computed as part of the period within which such action may be brought, and another action may be brought within the remaining period.

2. If a judgment or decree is rendered for the plaintiff in any action commenced within the prescribed limitation period and such judgment or decree is arrested or reversed upon a ground which does not preclude a new action for the same cause, or if there be occasion to bring a new action by reason of the loss or destruction of any of the papers or records in a former action which was commenced within the prescribed limitation period, then a new action may be brought within one year after such arrest or reversal or such loss or destruction, but not after.

3. If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380 and shall recommence his action within six months, the statute of limitation with respect to such action shall be tolled by the commencement of the nonsuited action.

F. Effect of devise for payment of debts. No provision in the will of any testator devising his real estate, or any part thereof, subject to the payment of his debts or charging the same therewith, or containing any other provision for the payment of debts, shall prevent this chapter from operating against such debts, unless it plainly appears to be testator's intent that it shall not so operate.

G. Effect of new promise in writing.

1. If any person against whom a right of action shall have accrued on any contract, other than a judgment or recognizance, shall, by writing signed by him or his agent, promise payment of money on such contract, the person to whom the right shall have accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained if such promise were the original cause of action. An acknowledgment in writing, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this subsection.

2. The plaintiff may sue on the new promise described in subparagraph 1 of this subsection or on the original cause of action, except that when the new promise is of such a nature as to merge the original cause of action then the action shall be only on the new promise.

H. Suspension of limitations in creditors' suits. When an action is commenced as a general creditors' action, or as a general lien creditors' action, or as an action to enforce a

mechanics' lien, the running of the statute of limitations shall be suspended as to debts provable in such action from the commencement of the action, provided they are brought in before the commissioner in chancery under the first reference for an account of debts; but as to claims not so brought in the statute shall continue to run, without interruption by reason either of the commencement of the action or of the order for an account, until a later order for an account, under which they do come in, or they are asserted by petition or independent action.

In actions not instituted originally either as general creditors' actions, or as general lien creditors' actions, but which become such by subsequent proceedings, the statute of limitations shall be suspended by an order of reference for an account of debts or of liens only as to those creditors who come in and prove their claims under the order and, as to creditors who come in afterwards by petition or under an order of recommittal, or a later order of reference for an account, the statute shall continue to run without interruption by reason of previous orders until filing of the petition, or until the date of the reference under which they prove their claims, as the case may be.

Reviser's Note:

Proposed § 8.01-229 consolidates in one section situations which have the general effect of tolling or suspending the running of the statutes of limitation.

(1) Proposed § 8.01-229 A. Effect of disabilities. This subsection incorporates the major thrust of present §§ 8-8 [adverse possession] and 8-30 [personal actions] by tolling statutes of limitation when the person entitled to bring an action is disabled by infancy or insanity at the time when his cause of action accrues. In addition, the proposal provides that disabilities which arise after the cause of action accrues also suspend the running of the limitation period. No logical argument can be developed to support the arbitrary anomaly presently enacted in Virginia whereby a plaintiff's disability must exist at the time the cause of action accrued in order to suspend the statute of limitation. Fairness to the plaintiff requires that supervening disability toll the statute of limitations as well as disability existing at the time the cause of action accrues. [The effect of such supervening disability upon the stability of land titles would be negligible as discussed in the Reviser's Note to proposed § 8.01-237, infra, because of the maximum limitation of 25 years imposed by proposed § 8.01-237 (i.e., disabilities have no effect as to adverse possession beyond 25 years after the cause of action accrued) and because of the decline in importance of adverse possession as a legal device in modern society.]

The tolling of the running of the statute where a convict has a cause of action against his committee is made necessary by the revision of present § 8-15. See annotation to proposed § 8.01-245. This subsection accordingly provides for the difficulty faced by the convict in discovering and bringing an action against his committee, by in effect giving him the entire limitations period within which to bring the action when he is released. There is no reason for a similar tolling provision with respect to other actions which the convict may bring, since the right to sue by committee is recognized effective in those cases. *Almond* v. *Kent*, 32 F. Supp. 1225 (W. D. Va.,

1970), at page 1227. CF *Almond* v. *Kent*, 459 F. 2d 200 (4th Circ. 1972), where convict may sue personally in federal court for violation of civil rights and Title 42, U.S.C.A. [Similar reservations have been expressed as to the advisability of tolling the statute of limitations for infancy or mental incapacity, since they too have the right to sue during the disability. Here the policy against the enforcement of stale claims is deemed to outweigh the policy protecting an infant or mentally incompetent person against the possibility that a parent, friend, or relative will not see that their rights are enforced.]

(2) Proposed § 8.01-229 B. Effect of death of a party. This subsection: (a) clarifies and consolidates into a single provision present §§ 8-31 and 8-32 and that portion of present § 8-13 dealing with the effects of death on the application of statutes of limitations and (b) indicates the interrelationship between such effects on statutes of limitations and the procedures prescribed in the Rules of Court for substitution of parties and other statutory provisions in the Code regarding the effect of death on the maintenance of actions generally (i.e., statutes relating to survival, revival, and continuance of actions upon death).

(3) Proposed § 8.01-229 B.1. replaces present § 8-31 as to the tolling of the statute of limitations by the death of a party entitled to bring a personal action. Present § 8-31 arbitrarily extends the limitation period one year from the death of the person entitled to bring a personal action, regardless of whether the decedent's personal representative needs such extra time or not. In contradistinction, proposed § 8.01-229 B.1. makes the date of qualification of the decedent's personal representative the critical time rather than the date of death and extends the statute of limitation only as necessary to give reasonable protection to the decedent's successor in interest.

(4) Proposed § 8.01-229 B.2. modifies and simplifies present § 8-13, relating to the effect of death upon statutes of limitations of a party against whom a cause of action exists. The basic purpose of the proposed subparagraph is (a) to preserve the cause of action and right to prove claims against the decedent for a reasonable length of time and (b) to provide a cut-off date after which no action may be brought and no claim against the estate filed in order not to prolong unduly the administration of the decedent's estate. By making the date of the qualification of decedent's personal representative the critical date and by allowing no action to be brought or claim to be filed more than two years after such qualification, the proposed subsection adequately preserves the prospective plaintiff's cause of action or right to prove his claim against the decedent's estate and at the same time provides a cut-off date more in keeping with the needs and realities of efficient probate administration than do present §§ 8-13 and 8-31. The final sentence simply specifies which section—§ 8.01-229 B.1. or § 8.01-229 B.2.—is to apply should both the potential plaintiff and defendant die before the action is commenced.

(5) Proposed § 8.01-229 B.3. references §§ 8.01-236 through 8.01-242 of proposed Article 2 of this chapter indicating that the effect of death on actions for recovery of land and proceedings for

enforcement of certain liens relating to realty will be governed thereby instead of being controlled by subparagraphs 1. and 2. in § 8.01-229. This is consistent with present Virginia practice whereby the tolling of the limitation period by death in adverse possession actions and lien enforcement proceedings cannot extend the statute of limitation beyond the outside maximum set by statute. The provisions of the Reviser's Notes to proposed §§ 8.01-236 and 8.01-237 are equally applicable here.

(6) Proposed § 8.01-229 B.4. concerns the accrual of a cause of action against a person's estate after his death and authorizes the bringing of an action or the filing of a claim against such decedent's estate within two years after the cause of action accrues or within two years after the qualification of the decedent's personal representative, whichever occurs last. Proposed § 8.01-229 B.4. would replace that portion of present § 8-13 which allows five years to sue after the accrual of a post-death cause of action. This proposal is similar in effect to proposed § 8.01-229 B.2. and that Reviser's Note is equally applicable here.

(7) Proposed § 8.01-229 B.5. supplements present §§ 8-21 and 8-32 with regard to the appropriate limitation for causes of action accruing after the death of a prospective plaintiff. The proposal gives the decedent's personal representative at least a year after his qualification, or such longer time as provided by the applicable statute of limitations, in which to bring suit. Present §§ 64.1-144 and 64.1-145 empower a personal representative to sue on "any contract of or with his decedent" or for money damages to any estate of or by the decedent, *Rowe* v. *United States Fid. & Guar. Co.*, 421 F. 2d 937 (4th Cir., 1970). The first sentence of present § 8-32 provides for the application of the appropriate statute of limitations in situations where a person dies before a cause of action would have accrued to him and the qualification of such person's personal representative is delayed more than two years. However, no present Virginia Code provision addresses itself to the general problem of the application of statute of limitations where the cause of action accrues to a decedent's estate under present §§ 64.1-144 and 64.1-145 and there is no delay in the qualification of the decedent's personal representative. Proposed subparagraph B.5. in § 8.01-229 fills this statutory gap and makes general provision for the application of statutes of limitation in such instances along the same line as proposed § 8.01-229 B.1. regarding death of a person in whose favor a cause of action has already accrued, and paragraph (1) of this Reviser's Note is equally applicable here.

(8) Proposed § 8.01-229 B.6. is simply a restatement of the last sentence of present § 8-32, providing that if the qualification of a decedent's personal representative is delayed beyond two years after the decedent's death such personal representative will be deemed to have qualified on the last day of such two-year interval for the purpose of measuring the statute of limitation period [and extensions of such limitation period by §§ 8.01-229 B.1., 2., 4. and 5., for example] . The result is to insure a definite cut-off date for liability of a defendant where no personal representative qualifies or where the qualification of a personal representative is delayed beyond two years.

(9) Proposed § 8.01-229 C. Suspension during injunction. The rationale for this proposal is basically the same as that for present § § 8-33 and 8-34 and for proposed §§ 8.01-229 D. and E., infra, (i.e., when the plaintiff seeks to commence an action within the prescribed limitation period, the plaintiff should not be precluded from recovery by subsequent expiration of the statute of limitations before the merits of the case have been finally adjudicated). The thrust of the proposal is to toll the statute of limitations when commencement of the action is stayed by injunction. Such a result not only is equitable for the plaintiff who has sought to bring a timely action and is prevented from doing so by the injunction, but also does not prejudice the defendant whose notice of the stay constitutes adequate notice of the action against him within the limitation period.

(10) Proposed § 8.01-229 D. Prevention by defendant. This subsection is basically a revision of present § 8-33 with one important exception. This proposal is not limited to defendants "who had before resided in the Commonwealth." Also, it should be noted that the limitation period is not tolled if process can be served despite the defendant's absence—e.g. service of process under the "long-arm" statute. See *Bergman v. Turpin*, 206 Va. 557.

(11) Proposed § 8.01-229 E. Dismissal, abatement, or nonsuit. This subsection expands present § 8-34; the basic rationale of the revision is that after an action has been commenced within the prescribed limitation period, the plaintiff should not be precluded from recovery by subsequent expiration of the statute of limitations before the merits of the case have been finally adjudicated.

(12) Proposed subparagraph E.1. in § 8.01-229 provides for tolling the statute of limitations when an action brought in due time abates or is dismissed without a determination of the merits. The result emphasizes substance over form and would do less violence to the purpose of statutes of limitation than court attempts to avoid the harshness of the restricted tolling rule of present § 8-34. e. g., *Atkin* v. *Schmutz Manufacturing Co.*, 435 F. 2d 527 (4th Cir., 1969) [where cause of action arose in Virginia, insurer was estopped from pleading statute of limitations against double amputee whose initial action for relief in Kentucky Courts had been within due time under the Virginia statute of limitations] . The proposal is analogous to the treatment of wrongful death actions under present § 8-634. See also *Norwood* v. *Buffey* . 196 Va. 1051.

(13) Proposed subparagraph E.2. of § 8.01-229 preserves two provisions of present § 8-34 which are not within the ambit of proposed subparagraph E.1. of § 8.01-229, supra. The same reasoning underlies both proposals, namely that the plaintiff who brings his action within due time should not be denied a decision on the merits because of subsequent procedural developments or fortuities which have no bearing upon the purpose of statutes of limitation.

(14) Proposed subparagraph E.3. of § 8.01-229 qualifies the application of proposed subparagraph E.1. of § 8.01-229 by erence to a planned statute ch will require the plaintiff who

takes a nonsuit to renew his suit within six months or the running of the statute of limitations will not be affected by the commencement of the original action. Since the planned statute will restrict the availability of a voluntary nonsuit to one such suit as a matter of right, the defendant should not be prejudiced by the limited protection afforded the plaintiff by this provision.

(15) Proposed §§ 8.01-229 F., 8.01-229 G. and 8.01-229 H. are simply present §§ 8-29 [effect of devise for payment of debts] , 8-25 and 8-26 [effect of new promise in writing] , and § 8-20 [effect of debts provable in creditors' suits] respectively. The changes in language have been minimal and solely for the purpose of clarity, except that the last sentence of present § 8-26 has been omitted in view of the applicability of Rule of Court 3:12. Thus, unless a defendant pleading the statute of limitations expressly calls for a reply, the plaintiff need give no notice to the defendant that he intends to rely upon a new promise in writing. In addition, the phrase: "or containing any other provision for the payment of debts" has been grafted on the language of present § 8-29 to make it clear that the time-honored words "I direct the payment of my just debts" should not operate to waive the statute of limitations.

§ 8.01-230. Accrual of a cause of action.—In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run when the wrongful act or breach of contract or duty occurs and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C. of § 8.01-245, § 8.01-249, § 8.01-250 or other statute.

Reviser's Note:

This proposal results in the enactment of the traditional rule of Virginia case law as to the time when a cause of action accrues, e.g., *Brunswick Land Corp.* v. *Perkinson*, 153 Va. 603(1930) [cause of action in trespass accrued and statute of limitations began to run when defendant committed wrongful entry] . Until recently Virginia courts uniformly followed the rule that a cause of action accrues when the wrongful act or breach of duty or contract occurs, e.g., *Hawks* v. *DeHart*, 206 Va. 810 (1966). However, Virginia courts have begun to delineate exceptions to the general rule. The prospect is that future litigation will continue to expand these exceptions in order to diminish the harshness of the rule. See § 8.2-725 [cause of action with regard to breach of certain warranties as to future performance does not accrue until latent defect in goods discovered or should have been discovered] ; see also, *Barnes* v. *Sears, Roebuck and Co.*, 406 F. 2d 859 (4th Cir., 1969) and *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11 (1969) [though § 8-24 held to apply to breach of warranty actions for personal injuries, the cause of action was held to accrue when injury occurred and not upon sale of defective product] . Thus, current Virginia case law illustrates the state of flux, if not confusion, surrounding the determination of when the cause of action accrues and the statute of limitations begins to run.

The proposal codifies the general rule but couples with it

statutory exceptions where mitigation is adjudged necessary. Thus, except where explicitly provided otherwise by statute, the limitation period will begin to run at the time the wrongful act or technical breach occurs. However, in areas such as malpractice, products liability, and liability of construction contractors and designers where latent defects or slow-developing injuries are seldom discoverable at the time the wrong or breach is committed, exceptions to this proposed section are proposed to provide that the limitation period begins to run only when the damage or injury is discovered or could with due diligence have been discovered. See proposed § 8.01-249.

Finally, the proposed section also excepts those actions in which equitable relief only is sought. This provision mitigates the effects of proposed § 8.01-228 which requires that the statutes of limitation apply in equity. Consequently, although an action in which equitable relief is sought may be subject to a statute of limitations, the equity court could decide on equitable grounds when the cause of action accrued and the limitation period began to run.

§ 8.01-231. State not within statute of limitations.—No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same. This section shall not, however, apply to agencies of the Commonwealth incorporated for charitable or educational purposes.

Reviser's Note:

This is in substance present § 8-35. The language omitted is considered to be redundant.

§ 8.01-232. Effect of promises not to plead statute.—A. Whenever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate as a fraud on the promisee, the promisor shall be estopped to plead the statute. In all other cases, an unwritten promise not to plead the statute shall be void, and a written promise not to plead such statute shall have the effect of a promise to pay the debt or discharge the liability. No provision of this subsection shall operate contrary to subsections B. and C. of this section.

B. No acknowledgment or promise by any personal representative of a decedent shall charge the estate of the decedent, revive a cause of action otherwise barred, or relieve the personal representative of his duty to defend under § 26-5 of this Code in any case in which but for such acknowledgment or promise, the decedent's estate could have been protected under a statute of limitations.

C. No acknowledgment or promise by one of two or more joint contractors shall charge any of such contractors in any case in which but for such acknowledgment another contractor would have been protected under a statute of limitations.

Reviser's Note:

Proposed § 8.01-232 is essentially the same as present §§ 8-27 and 8-28.

(1) Proposed subsection A. of § 8.01-232 makes no change in the language of present § 8-27 except for the proviso which codifies Virginia case law to make explicit the interrelationship between present §§ 8-27 and 8-28 (adopted in substance as subsections B. and C. of § 8.01-232). *Soble* v. *Herman*, 175 Va. 489 (1940); *Gwinn* v. *Farrier*, 159 Va. 183 (1932). The effect of this subsection is to allow prospective defendants [with the exception of personal representatives and joint contractors who are provided for in subsections B. and C. of § 8.01-232] to bind themselves by written promise not to plead the statute of limitations. Freedom of contract is the rationale for enforcing such a promise, and the result is to allow prospective defendants to alter the statute of limitations by contract.

(2) Proposed subsection B. of § 8.01-232 incorporates the substance of present § 8-28 with regard to personal representatives' incapacity to charge a decedent's estate where the estate could have been protected by pleading the statute of limitations. The language which prohibits the revival of a cause of action otherwise barred is simply a codification of the Supreme Court's interpretation of § 8-28 in *Brown* v. *Rice*, 76 Va. 629 (1883). The reference to the personal representative's duty to defend relates this subsection to § 26-5 which imposes personal liability for damage resulting from failure of a fiduciary to plead the applicable statute of limitations. The result is simply a denial to personal representatives of the power to promise not to plead the statute of limitations.

(3) Proposed subsection C. of § 8.01-232 represents the remaining portion of present § 8-28 which is incorporated without substantial change.

§ 8.01-233. When action deemed brought on counterclaim or cross-claim; when statute of limitations tolled; defendant's consent required for dismissal.—A. A defendant who pleads a counterclaim or crossclaim shall be deemed to have brought an action at the time he files such pleading.

B. If the subject matter of the counterclaim or cross-claim arises out of the same transaction or occurrence upon which the plaintiff's claim is based, the statute of limitations with respect to such pleading shall be tolled by the commencement of the plaintiff's action.

Reviser's Note:

The major thrust of this section deals with the relation back of counterclaims and cross-claims to the date of commencement of the action for the purpose of tolling the statute of limitations. Consequently, its proper place in present Title 8 would seem to be Chapter 2 instead of Chapter 14 on Payment and Set-Off. The proposed section is substantially present § 8-244 with some change in format. Subsection B of the proposal clarifies present § 8-244 by specifically providing for the relation back to the time which the plaintiff's claim is filed of a cross-claim which arises out of the same transaction upon which the plaintiff's claim is based, thereby giving the same treatment to cross-claims as is given to counterclaims

under the present statute.

Tolling of third party claims under Rule of Court 3:10 was considered and rejected. Thus, such claims will be deemed a new action with the limitations applicable thereto being tolled on the date of their being filed with no relation back, e.g., to the plaitiff's claim.

The final sentence of present § 8-244 prohibits the plaintiff from dismissing his action after a defendant has counterclaimed unless that defendant consents to the dismissal. This provision has been amended and is relocated in the proposed nonsuit statute (§ 8.01-380).

§ 8.01-234. Repeal of limitation not to remove bar of statute.—If, after a right of action or remedy is barred by a statute of limitations, the statute be repealed, the bar of the statute as to such right or remedy shall not be deemed to be removed by such repeal.

Reviser's Note:

This is present § 8-36 without substantive change.

§ 8.01-235. Bar of expiration of limitation period raised only as affirmative defense in responsive pleading.—The objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading. No statutory limitation period shall have jurisdictional effects and the defense that the statutory limitation period has expired can not be set up by demurrer. This section shall apply to all limitation periods, without regard to whether or not the statute prescribing such limitation period shall create a new right.

Reviser's Note:

Proposed § 8.01-235 changes present Virginia case law on pleading statutes of limitation. The common law rule adopted by the Supreme Court distinguishes between "pure" statutes of limitations which theoretically affect only the availability of a remedy (and not the underlying right) and "special" limitations prescribed by a statute creating a new right not available at common law (e.g., the wrongful death statute); Virginia courts have held that "special" limitations prescribed by statutes creating a new right must appear on the face of the complaint or be subject to demurrer while a "pure" statute of limitation must be specifically pleaded as an affirmative defense by the party claiming its benefit and cannot be taken advantage of by demurrer. Burks Pleading and Practice, § 236 (4th Ed., 1952); *Branch* v. *Branch*, 172 Va. 413, 2 S.E. 2d 327 (1939). Such a distinction in pleading has been premised on the theory that special statutes of limitations contained in statutes creating a new right not available at common law are jurisdictional in effect. *Branch* v. *Branch*, supra, at 417-418.

The proposed section would overrule *Branch* v. *Branch*, supra. Although the result would be the abrogation of a present rule of

Virginia pleading, the uniformity and simplicity in pleading achieved thereby outweigh the needless complexity and confusion engendered by the old distinction between "pure" and "special" limitations. Moreover, the proposal has the additional advantage of removing jurisdictional considerations from the application of statutes of limitations. Finally, although defendants will be required by the proposal to plead all statutory limitations specifically as affirmative defenses in responsive pleadings and can no longer set up "special" limitations by demurrer, the additional burden placed on defendants is slight compared with the appropriateness and certainty in pleading thus achieved.

Article 2.

Limitations on Recovery of Realty and Enforcement of Certain Liens Relating to Realty.

§ 8.01-236. Limitation of entry on or action for land.—No person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued to such person or to some other person through whom he claims.

Reviser's Note:

This proposal does not change the substance of present § 8-5.

§ 8.01-237. Effect of disabilities upon right of entry on, or action for, land.—Notwithstanding the provisions of subsection A. of § 8.01-229, no disabilities or tacking of disabilities shall preserve to any person or his successors a right to make entry on or bring an action to recover land for more than twenty-five years after such right first accrued, although such person or persons shall have been disabled during the whole of such twenty-five years.

Reviser's Note:

This proposal qualifies the application of proposed § 8.01-229 A. [effect of disabilities on all statutes of limitation] to rights of entry on or actions for land. The Reviser's Note for proposed § 8.01-229 A. explain the rationale for allowing disabilities which arise subsequent to the accrual of a cause of action to toll statutes of limitation generally, and those Notes are applicable here. However, the need for security in land titles requires that some maximum limit be placed on the right to enter on or bring an action for land regardless of the disabilities of persons so entitled. This is analogous to the result achieved by present §§ 8-7 and 8-8 except that the maximum proposed is 25 years instead of the present 20 years under § 8-7.

The change avoids the inequities which arise under the scheme

of present §§ 8-7 and 8-8. In essence, these Code sections arbitrarily stipulate that a disabled person has ten years after the removal of his disability in which to bring an action for recovery of land [present § 8-7] , but then qualify that grant by stipulating that in no case shall an action for recovery be brought more than 20 years after such right of action first accrues. [present § 8-8] Thus, the grant of ten years grace after the removal of disability is both illusory and inequitable where the disability lasts longer than ten years because the grace period will be less than ten years. Additional confusion arises from the language of present § 8-7 whereby the ten-year period granted to the disabled land owner seems on its face to be in lieu of the original fifteen-year limitation period provided in present § 8-5.

The proposal in conjunction with proposed § 8.01-229 A. effects a functional revision. A balance is struck between the need for security of land titles and the need for preserving a cause of action to the disabled plaintiff. Though the proposed 25-year maximum limit is an extension of the present 20-year limit, such an extension should not threaten the security of land titles (e.g., the annotations to present §§ 8-7 and 8-8 show that the Supreme Court has only dealt with disability in adverse possession cases eight times since 1808 and has not done so but once since 1916. Though no lower court statistics are readily available, there can be no doubt that the role of adverse possession continues to decline).

Note: Proposed §§ 8.01-238 through 8.01-242 represent present §§ 8-9 through 8-12 and are simply renumbered without material revision for inclusion in proposed Article 2, except that present §§ 8-10.1 and 8-10.2 are amalgamated into a single section for brevity (see proposed § 8.01-240). Also, the last sentence of present § 8-11 referring to "glebe lands" has been deleted as no longer necessary.

§ 8.01-238. To repeal a grant.—A bill in equity to repeal, in whole or in part, any grant of land by the Commonwealth, shall be brought within ten years next after the date of such grant.

§ 8.01-239. Ground rents.—No action shall be brought for the recovery of any ground rent reserved upon real estate after the expiration of ten years from the time such ground rent becomes due and payable.

§ 8.01-240. Liens for water, sewer, or sidewalk assessments.—No suit shall be brought to enforce the lien of any water, sewer, or sidewalk assessment, heretofore or hereafter made, against lands which have been conveyed by the person owning them at the time of such assessment to a grantee for value unless the same be brought within ten years from the due recordation of the deed from such person to grantee and within twenty years from the due docketing of such assessment.

§ 8.01-241. Limitation of enforcement of deeds of trust, mortgages and liens for unpaid purchase money.—No deed of trust or mortgage heretofore or hereafter given to secure the payment of money, and no lien heretofore or hereafter reserved to secure the payment of unpaid purchase money, shall be enforced after twenty years from the time when the original obligation last maturing thereby secured shall have become due and payable according to its terms and without regard to any provision for the acceleration of such date; provided that the period of one year from the death of any party in interest shall be excluded from the computation of time. The limitations prescribed by this section

may be extended by an endorsement to that effect, entered prior to the expiration of the limitation period prescribed herein upon the margin of the page of the deed book of which the same is recorded, and when such endorsement is duly executed by the party in whom the beneficial title to the property so encumbered is at the time of such endorsement by his duly authorized attorney in fact, or agent, and attested by the clerk of the court in which such lien is recorded, the endorsement shall be held to extend the limitations of the right to enforce the lien for twenty years from the date of such endorsement. The clerk of the court shall index such extension in both names in the index of the deed book and on the general index in his office, and give reference to the book and page in which the original writing is recorded. Unless the deed or deeds executed pursuant to the foreclosure of any mortgage or to the execution of or sale under any deed of trust be recorded in the county or city where the land is situated within one year after the time the right to enforce the mortgage or deed of trust shall have expired as hereinabove provided, such deed or deeds shall be void as to all purchasers for valuable consideration without notice and lien creditors who make any purchase of or acquire any lien on the land conveyed by any such deed prior to the time such deed is so recorded.

§ 8.01-242. Same; when no maturity date is given.—No deed of trust or mortgage given to secure the payment of money, and no lien reserved to secure the payment of unpaid purchase money, in which no date is fixed for the maturity of the debt secured by such deed of trust, mortgage, or lien, shall be enforced after twenty years from the date of the deed of trust, mortgage, or other lien; provided that the period of one year from the death of any party in interest shall be excluded from the computation of time, and provided further that the limitation may be extended by an endorsement within the twenty-year period upon the margin of the page of the deed book on which the instrument is recorded in the manner set forth in § 8.01-241.

Article 3.

Personal Actions Generally.

§ 8.01-243. Personal actions for injury to person or property generally.—Unless otherwise provided by statute, every action for injury to the person, including an action for emotional injuries, whatever the theory of recovery, and every action for injury to property based upon a theory of recovery other than contract must be brought within two years next after the cause of action shall have accrued.

Reviser's Note:

This proposal is comparable to the first sentence in present § 8-24 and represents no change in substance to that provision. The language explicitly making the two-year limitation applicable to all actions for injury to person, whether brought, e.g., in contract or tort, is basically a codification of the rule of *Friedman* v. *Peoples' Service Drug Stores*, 208 Va. 700 (1968). On the other hand, the restriction of the application of the two-year limitation to noncontract actions for injury to property recognizes the traditional distinction in Virginia between actions ex contractu and actions ex delicto. Such a qualification is necessary to clarify the difference between claims for property damage and those for personal injury and to insure that claims for injuries to property resulting from breach of contract (e.g., liability of a bailee for nondelivery) will be subject to the

longer statute of limitations for contract actions [present §§ 8-13 and 8.2-725 and proposed § 8.01-246, infra] rather than the two-year limitation described herein. In practice, with respect to property damage, the two-year limitation generally will apply only to actions involving tortious injury such as fraud, conversion, trespass, and negligence. [See also the Reviser's Note for proposed § 8.01-229 B. which would displace those provisions of present § 8-24 regarding the survival of a cause of action.]

Actions for emotional injuries caused by willful conduct and actions for emotional injury and resulting physical injury caused by negligence have been made subject to the two-year limitation of this section, to avoid the inconsistent result possible if emotional injuries were under a different limitations period. See *Bowles* v. *May*, 159 Va. 419 (1932), and *Hughes* v. *Moore*, 214 Va. 27 (1973), where *Bowles* was interpreted to mean that recovery for emotional injury alone, without physical impact, may be allowed where the conduct producing the injury is willful, wanton, or vindictive. See also, *Moore* V. *Jefferson Hospital, Inc.*, 208 Va. 438 (1967); but where the conduct is merely negligent and there is no physical impact, recovery may be had for the emotional injury only if the resulting physical injury has been the proximate result of such emotional injury. The Supreme Court further clarified these holdings in *Womack* v. *Eldridge*, 215 Va. 338 (1974) in which the court held that a cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are proven. These are: conduct that was (1) intentional or reckless as well as (2) outrageous and intolerable; (3) proximate cause between the conduct and the (4) severe emotional distress.

§ 8.01-244. Actions for wrongful death; limitation.—A. Notwithstanding the provisions of § 8.01-229 B., if a person entitled to bring an action for personal injury dies as a result of such injury with no such action pending before the expiration of two years next after the cause of action shall have accrued, then an action under § 8.01-50 may be commenced within the time limits specified in subsection B. of this section.

B. Every action under § 8.01-50 shall be brought by the personal representative of the decedent within two years after the death of the injured person. If any such action is brought within such period of two years after such person's death and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted as any part of such period of two years and another action may be brought within the remaining period of such two years as if such former action had not been instituted.

Reviser's Note:

Subsection A. of the proposed statute is directed to the situation in which a person suffers a tortious personal injury and subsequently dies from such injury without having commenced an action for damages in his lifetime. If death occurs before the expiration of the limitation period applicable to the tort which caused it, the personal representative of the decedent may bring the appropriate action for wrongful death within the period prescribed for actions for wrongful death as set forth in subsection B.

This subsection and subsection B. standing alone do not change the existing law. However, when read in conjunction with proposed § 8.01-251, it will be readily observed that the time for bringing an action for wrongful death may be considerably extended. This is because § 8.01-251 defers the running of the statute of limitations in certain actions until the injury is, or ought to have been discovered. (See proposed § 8.01-230 with respect to the accrual of causes of action, and modifying statutes therein cited.)

Present § 8-634 contains a provision which tolls the running of the limitation period when a party defendant who departs from the Commonwealth, absconds or conceals himself with the result that he cannot be served with process. This provision has been incorporated into proposed § 8.01-229 D. in this chapter. (See Reviser's Note to that section.)

It should be observed that the Revisers have recommended consolidation of the provisions of existing §§ 8-633 and 8-634, minus the limitation provisions transferred to this section into proposed § 8.01-50. Such limitation provisions have been incorporated into this section, § 8.01-245.

§ 8.01-245. Limitation on actions upon the bond of any fiduciaries or as to suits against fiduciaries themselves; accrual of cause of action where execution sustained.—A. No action shall be brought upon the bond of any fiduciary except within ten years next after the right to bring such action shall have first accrued.

B. When any fiduciary has settled an account under the provisions of Title 26, and whether or not he has given bond, a suit to surcharge or falsify such account, or to hold such fiduciary or his sureties liable for any balance stated in such account, to be in his hands, shall be brought within ten years after the account has been confirmed.

C. In actions upon the bond of any personal representative of a decedent or fiduciary of a person under a disability against whom an execution has been obtained or where a court acting upon the account of such representative or committee shall order payment or delivery of estate in the hands of such committee and representative, the cause of action shall be deemed to accrue from the return day of such execution or from the time of the right to require payment or delivery upon such order, whichever shall happen first.

Reviser's Note:

This proposed section consolidates limitations applicable to fiduciaries into a single section.

Proposed § 8.01-245 A. is necessary to preserve a ten-year limitation period as to actions on the bonds of fiduciaries available now under present § 8-13, since subparagraph 2 of proposed § 8.01-246 does not recognize the seal as affecting the statute of limitations. Of all writings under seal, the bond of a fiduciary is the only one for which a longer statute of limitations is provided than that for other contracts. See Reviser's Note to proposed § 8.01-246, infra.

Proposed § 8.01-245 B. incorporates present § 8-16, without

change in substance, although the wording of present § 8-16 has been revised considerably in the interest of clarity and brevity. The introductory proviso of proposed § 8.01-246 makes it clear that contract limitations do not apply to fiduciaries, and this is in accordance with present § 8-16.

Proposed § 8.01-245 C. simplifies present § 8-15 (when right of action upon bonds of fiduciaries deemed to accrue); see proposed § 8.01-229 A., effect of disabilities on the statute of limitations. Present § 8-15 generally provides that the right against fiduciaries does not accrue until the disability is removed. The cause of action arises under proposed § 8.01-230 when the fiduciary commits a breach of duty, but the statute of limitations is tolled with respect to the cause of action under proposed § 8.01-229 A. until the disability is removed. E.g., the next friend of an infant could bring suit against the fiduciary during the infancy to prevent further breach of duty, yet if the action were not brought, the infant would still have the full limitations period when he reached majority.

The absorption of much of present § 8-15 into these broader statutes creates greater consistency and simplicity by making it part of a general rule rather than an exception, and yet leaves unchanged the spirit of the prior section. What remains in proposed § 8.01-245 C. is the exception existing where an execution against the personal representative or fiduciary has already been obtained, in which case the cause of action accrues immediately upon failure to satisfy the execution or order. Finally, since the various bonded persons described in present § 8-15 are deemed to be fiduciaries, actions against them would also be limited by proposed § 8.01-245 A. and B. without them being specifically mentioned therein.

§ 8.01-246. Personal actions based on contracts.—Subject to the provisions of § 8.01-243 regarding injuries to person and property and of § 8.01-245 regarding the application of limitations to fiduciaries, and their bonds, actions founded upon a contract, other than actions on a judgment or decree, shall be brought within the following number of years next after the cause of action shall have accrued:

1. In actions or upon a recognizance, except recognizance of bail in a civil suit, within ten years; and in actions or motions upon a recognizance of bail in a civil suit, within three years, omitting from the computation of such three years such time as the right to sue out such execution shall have been suspended by injunction, supersedeas or other process;

2. In actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby, or by his agent, within five years whether such writing be under seal or not;

3. In actions by a partner against another for settlement of the partnership account or in actions upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, within five years from the cessation of the dealings in which they are interested together;

4. In actions upon any unwritten contract, express or implied, within three years.

Provided that as to any action to which § 8.2-725 of the Uniform Commercial Code is applicable, that section shall be controlling except that in products liability actions for

injury to person and for injury to property, other than the property subject to contract, the limitation prescribed in § 8.01-243 shall apply.

Reviser's Note:

This proposal attempts to consolidate all the limitations applicable to contract actions in present Chapter 2 of present Title 8 into a single section to facilitate reference and to avoid confusion by making the interrelationship of the various provisions apparent. See present §§ 8-13, 8-17, and 8-23.

As the first proviso states, the proposed section is inapplicable where present § 8.2-725 applies. Similiarly, products liability actions for injuries to person or property, are governed by proposed § 8.01-243.

The basis or meaning of the reference to "award" in present § 8-13 is unknown, and the word "award" does not appear in proposed § 8.01-246.

(1) Proposed subdivision 1. of § 8.01-246 incorporates present § 8-17 without substantial alteration except that the term "motion" has replaced "scire facias". See proposed § 8.01-24. With respect to suspension by injunction, cf. proposed subsection C. of § 8.01-229 (Suspension during injunctions).

(2) Proposed subdivision 2. of this section applies a five-year limitation to all other written contracts regardless of whether such contracts be under seal. The seal has declined so far in legal importance as to become virtually meaningless; the affixing of a seal to a written contract is certainly no basis for doubling the prescribed limitation period, present § 8-13; hence this proposal that the seal have no effect upon statutes of limitation.

(3) Proposed subdivision 3. of this section incorporates present § 8-13 regarding partnership accounts and accounts between merchants. However, instead of listing such accounts as exceptions to the three-year limitation (present § 8-13), in the interest of clarity, the proposal gives such accounts separate status.

(4) Proposed subdivision 4. of this section adopts the same three-year limitation for unwritten contracts as contained in present § 8-13.

(5) The proviso relating to the application of the UCC four-year limitation to contracts for the sale of goods is the same as that contained in present § 8-13, except for the express stipulation that the UCC limitation, like other contract limitations, has no applicability to an action for injuries to person or to actions for injury to property which is not subject to the contract of sale. The distinctions contained in this proviso regarding the types of injury and the applicable statute of limitations in products liability actions are necessary to achieve clarity and in accord with the position of the Virginia courts. Compare *Friedman* v *Peoples' Serv. Drug Stores*, 208 Va.

700 (1968) with *Tyler* v *RR. Street & Co.*, 322 F Supp. 541 (E.D. Va., 1971) [the district court extended the Virginia Supreme Court's ruling that § 8-24 supersedes § 8-13 by holding that § 8-24 overrides § 8.2-725 as well]

In short, only claims for injury to property resulting from breach of contract should be subject to the longer four-year statute of limitation prescribed in the UCC. Keeping in mind that two kinds of property damage may arise from defectively manufactured products, only the injury to the product itself which gives rise to a cause of action in contract is governed by the Uniform Commercial Code's limitation period; injury to other property not subject to the sale contract is governed by the same statutory limitation period and accrues in the same manner as is the case for injury to person resulting from a defective product. Compare *Friedman* v. *Peoples' Serv. Drug Stores*, 208 Va. 700 (1968) and *Caudill* v *Wise Rambler Inc.*, 210 Va. 11 (1969); see also Reviser's Notes to proposed § 8.01-243, and subparagraphs 3 and 4 of § 8.01-249.

§ 8.01-247. When action on contract governed by the law of another state or country barred in Virginia.—No action shall be maintained on any contract which is governed by the law of another state or country if the right of action thereon is barred either by the laws of such state or country or of this Commonwealth.

Reviser's Note:

This proposal restates present § 8-23 relating to foreign contracts. The words "is governed by the law of" are substituted for the present words "was made or was to be performed in," because the former phrase is more in keeping with modern conflicts of laws principles. No change in substance is intended thereby

§ 8.01-248. Personal actions for which no other limitation is specified.—Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued.

Reviser's Note:

Proposed § 8.01-248 is a catch-all provision for actions not otherwise covered by a statute of limitation. If no limitation is prescribed in proposed §§ 8.01-236 [entry on or action for land] , 8.01-243 [personal actions for injury to person or property] , 8.01-245 [actions on the bond of a fiduciary or suits against fiduciaries] , or 8.01-246 [actions based on awards or contracts] , and if no other statute prescribes a different limitation, only then will this proposed section be applicable.

While not specifically set forth in proposed § 8.01-248, actions for the deprivation of civil rights under Title 42 U.S.C.A. are deemed to be bound by the one-year limitation. See *Almond* v *Kent* 459 F 2d 100 (4th Cir 1972), N.3 at p. 203.

§ 8.01-249. When cause of action shall be deemed to accrue in certain personal actions.—The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud, or mistake, and in actions for rescission of contract for undue influence, when such fraud, mistake, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

2. In actions for malpractice against a person who is, or holds himself out to be, a member of a state-licensed profession, when the damage or injury resulting from such malpractice is discovered or by the exercise of due diligence reasonably should have been discovered;

3. In actions on contracts for sale of goods as defined in Title 8.2, as set forth in § 8.2-725, except that a products liability action for injury to the person and for injury to property other than the property subject to the contract of sale shall accrue in accordance with subparagraph 4 of this section;

4. In products liability actions for injury to person and for injury to property other than property subject to the contract of a sale which are based on breach of warranty in the sale of, or negligence in the manufacture of, goods as defined in Title 8.2, when the injury or damage resulting therefrom is discovered or by the exercise of due diligence reasonably should have been discovered;

5. In actions or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, when a request in writing be made therefor by check, order or otherwise;

6. In actions for malicious prosecution, when the relevant criminal action is terminated.

Reviser's Note:

Proposed § 8.01-249 provides that certain causes of action should not accrue for the purpose of applying statutes of limitation until the damage or injury is discoverable by the plaintiff. This represents an exception to the general rule embodied in proposed § 8.01-230 that a cause of action shall be deemed to accrue when the wrong occurs or when the technical breach of contract duty occurs. The concept is not new to the Virginia Code or to Virginia case law E.g., present §§ 8-14 [fraud in the payment of money] , 8-15 [accrual of right of action on bond of fiduciary] , and the proviso in § 8-13 requiring written demand on bank deposits; *Caudill* v *Wise Rambler, Inc.*, 210 Va. 11 (1969), *Payne* v *Piedmont Aviation, Inc.*, 294 F Supp. 216 (E.D. Va. 1968). However, this proposal represents an expansion of the exceptions to the general rule as to accrual of the cause of action.

The rationale behind each of the subparagraphs of the proposal is the equitable need to mitigate the harshness of the general rule as to accrual of the cause of action in instances where the running of the statute might otherwise bar a legitimate claim and give the defendant a windfall in avoiding liability

(1) Proposed subparagraph 1. of § 8.01-249. Fraud, mistake,

undue influence: statutes of limitation do not run until such fraud, mistake or undue influence discoverable. This subparagraph incorporates present § 8-14 which likewise tolls the statute in cases of fraud or mistake in the payment of money and extends the principle to all situations of fraud or mistake. Though not supported by Virginia cases specifically, such an extension is foreshadowed by *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11(1969) and has been adopted by the federal district court for the Eastern District of Virginia in diversity suits despite Virginia case law to the contrary. *Stevens* v. *Abbott, Proctor, & Paine*, 288 F. Supp. 936 (E.D. Va. 1968) [Held: causes of actions for fraud under present § 8-14 do not accrue until such fraud is discovered or ought with the exercise of due diligence to have been discovered] ; cf. *Galumbeck* v. *Suburban Park Stores Corp.*, 214 F. 2d 660 (4th Cir., 1954) [present § 8-13 is not tolled by false representations of the defendant] . The difficulty of detecting fraud or mistake necessitates courts being given the flexibility to toll the statute of limitations for a reasonable period in such cases; otherwise, the defendant does not so much avoid stale claims as become unjustly enriched according to his skill in concealing his wrong. For the same reasons, actions to rescind contracts have been included to provide for the case where a party is under the influence of another, yet might not realize it. If the party were not disabled, the statute would run from the signing of the contract and there might be no remedy when the party realized, or discovered, the duress or influence. In the interest of fairness, the statute will not run until the duress or influence is discoverable by the party, although this would generally be at the signing of the contract.

(2) Proposed subparagraph 2. of this section. Professional malpractice. This subsection would reverse the holding of *Hawks* v. *DeHart*, 206 Va. 810 (1966) [Surgical needle left in patient's throat] . However, compare *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11 (1969) [plaintiff's rights in an action for personal injury accrued at time of injury and not at time of breach of warranty] . Latent injury or damages from professional malpractice are often more difficult to discover than latent product defects, and the defendant should not be protected from the statute of limitations in either case until the injured plaintiff has had reasonable opportunity to discover the injury or damage.

(3) Proposed subparagraphs 3. and 4. of this section. See *Tyler* v. *R. R. Street and Co.*, 322 F. Supp. 541 (E.D. Va., 1971) predicting that the Virginia Supreme Court would apply the limitations period of present § 8-24 and not that of § 8.2-725 to a breach of warranty action for injury to the person. The prediction was based on the holding in *Friedman* v. *Peoples' Service Drug Stores*, 208 Va. 700 (1968), where the personal injury limitation of § 8-24, rather than the contract limitation period of § 8-13, was applied to such a breach of warranty action on the basis that it is the wrong alleged and not the form of the action that determines the applicable statute of limitations. Proposed subparagraphs 3 and 4 carry over the distinction enunciated in proposed §§ 8.01-243 and 8.01-246 between injuries to property arising from breach of the contract of sale (i.e., damage to the defective product) and injuries to person and other property which do not arise out of the contract. As indicated in the Reviser's Notes to proposed §§ 8.01-243 and 8.01-

246, the two-year limitation of proposed § 8.01-243 should be applicable to such injuries whether the theory of recovery be breach of warranty or negligence while the longer contract limitations of proposed § 8.01-246 and present § 8.2-725 (UCC) should apply only to injuries to property specifically subject to the contract.

The scheme of UCC § 8.2-725, followed by reference in proposed subparagraph 3., is that the breach of warranty action will accrue at the easily ascertainable time at which tender of delivery is made, and that the possible unfairness which could result from this arbitrary designation will be for the most part ameliorated by the four-year limitations period of § 8.2-725. Since noncontract injuries are outside of the UCC, the shorter two-year limitation of proposed § 8.01-243 applies. Thus it is deemed equitable to have the cause of action accrue when the injury or damage is discovered or reasonably discoverable.

When these underlying assumptions are coupled with the holding of *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11 (1969) [cause of action accrues at date of injury, not at date of sale] , proposed subparagraphs 3 and 4 are consistent with the thrust of present Virginia case law.

Proposed subparagraph 4. goes beyond present Virginia case law only in providing that the cause of action for injury to person and property in products liability actions shall accrue at the time the injury or damage is discovered or reasonably discoverable rather than at the time the injury occurs. This change is more equitable to the plaintiff and addresses itself to the problem of latent defects and slow-developing injuries which may be discoverable only after the injury has occurred. This would insure that the difficulty of discovering such defects or injuries would not enable a defendant to escape liability in the products liability area just as proposed subparagraph 2. of § 8.01-24 seeks to do in the malpractice area, cf., *Hawks* v. *DeHart*, 206 Va. 810 (1966) [cause of action accrued at date of injury when surgical needle was left in patient's throat and limitation period expired before plaintiff discovered injury and brought action thereon] . See, Reviser's Notes to proposed §§ 8.01-230 and 8.01-250.

(4) Proposed subparagraph 5. of this section is an incorporation without substantive change of the proviso from present § 8-13 regarding the necessity for demand in actions for money on deposit before a cause of action shall be deemed to accrue.

(5) Proposed subparagraph 6. of this section. Malicious prosecution. The proposal clarifies Virginia case law in providing that the statute of limitations, proposed § 8.01-248, does not begin to run until the determination of the associated criminal action (in favor of the criminal defendant who is the plaintiff in the civil action).

While not addressed in the proposal, other states have recognized a cause of action for malicious prosecution of a civil suit, e.g., *Robinson* v. *Goudchaux's*, 307 So. 2d 287 (La. 1975).

§ 8.01-250. Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property.—No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction;

Provided that:

1. If the cause of action is not discovered, and could not reasonably have been discovered, within such period, then such action may be commenced within six months of the date of discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier;

2. In no event may an action be commenced more than ten years after such performance or the furnishing of such services and construction;

3. The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246, subject to the accrual provision of subdivision 4. of § 8.01-249.

Reviser's Note:

The body of proposed § 8.01-250 is substantially the same as present § 8-24.2; however, the three provisos are patterned basically after Code of Ala. Ann., Title 7, § 23(1)(1969) and Page's Ohio Rev. Code Ann. § 2305.131 (1954) and represent an alteration of present § 8-24.2. The first and second provisos establish an exception to the normal five-year limitation on damages arising out of defective or unsafe conditions of improvements to real property. The exception permits recovery of damages more than five years after the completion of performance or furnishing of services in an action brought within six months of the date when the cause of action was first discoverable, with an overall limitation of ten years, after which no action is maintainable.

The allowance of suit upon discovery of the cause of action mitigates the inequity of the five-year limitation of present § 8-24.2 in instances where the running of the period might otherwise bar a legitimate claim and give the defendant who conceals his wrongdoing an undeserved windfall in his avoiding liability. The rationale of the Reviser's Notes to proposed § 8.01-249, particularly subparagraph 3., is also applicable here. Similiarly, the ten-year maximum limitation provided by the second proviso is thought to be more realistic than the five-year period of present § 8-24.2 in view of the average lifetime of real estate improvements. See e.g., Revenue Procedure 62-21, (Supp. I) 1953-2 CB 740 for depreciation guidelines

used by IRS in estimating useful lives of land improvements (20 years) and buildings (40 to 60 years).

The combined net effect of proposed subparagraphs 1. and 2. of this section would be to overrule that line of Virginia cases typified by *Richmond Redevelopment & Housing Authority* v. *Laburnum Construction Corp.*, 195 Va. 827 (1954) whereby the statute of limitations is deemed to have commenced running from the time of negligent performance of construction, installation, or other services. *Laburnum* may be questionable in the light of more recent Virginia breach of warranty cases involving personal injuries. See e.g., *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11 (1969) (*Laburnum* distinguished on basis that some damage to property resulted when gas equipment installed although major damage occurred on explosion years later); *Sides* v. *Richard Machine Works, Inc.*, 406 F 2d 445 (4th Cir. 1969); *Barnes* v. *Sears, Roebuck & Co.*, 406 F. 2d 859 (4th Cir. 1969). See the Reviser's Notes to proposed §§ 8.01-230 and 8.01-249 of this proposal.

The final proviso to this proposal does not alter present Virginia law, but rather makes clear the interrelationship of proposed § 8.01-250 to proposed §§ 8.01-243, 8.01-246 and 8.01-249. Whereas present § 8-24.2 simply states that the limitation regarding defective or unsafe conditions of real property improvements does not apply to actions against persons in actual possession such as tenants, and owners, proposed subparagraph 3 of this section goes further to clarify that suits against such persons in possession and against manufacturers and suppliers of installed equipment and machinery are subject to the limitations prescribed in proposed §§ 8.01-243 and 8.01-246.

Article 4.

Limitations on Enforcement of Judgments and Decrees.

§ 8.01-251. Limitations on enforcement of judgments.—A. No execution shall be issued and no action brought on a judgment including a judgment in favor of the Commonwealth, after twenty years from the date of such judgment, unless the period be extended as hereinafter provided.

B. The limitation prescribed in subsection A. may be extended on motion of the judgment creditor or his assignee with notice to the judgment debtor, and an order of the circuit court of the jurisdiction in which the judgment was entered to show cause why the period for issuance of execution or bringing of an action should not be extended. Any such motion must be filed within the twenty-year period from the date of the original judgment or from the date of the latest extension thereof. If upon the hearing of the motion the court decides that there is no good cause shown for not extending the period of limitation, the order shall so state and the period of limitation mentioned in subsection A. shall be extended for an additional twenty years from the date of filing of the motion to extend. Additional extensions may be granted upon the same procedure, subject in each case to the recording provisions prescribed in § 8.01-458. This extension procedure is subject to the exception that if the action is against a personal representative of a decedent, the motion must be within two years from the date of his qualification, the extension may be for only two years from the time of the filing of the motion, and there may be only one such extension.

C. No suit shall be brought to enforce the lien of any judgment, including judgments in favor of the Commonwealth, upon which the right to issue an execution or bring an action, is barred by other subsections of this section, nor shall any suit be brought to enforce the lien of any judgment against the lands which have been conveyed by the judgment debtor to a grantee for value, unless the same be brought within ten years from the due recordation of the deed from such judgment debtor to such grantee and unless a notice of lis pendens shall have been recorded in the manner provided by § 8.01-268 before the expiration of such ten-year period.

D. In computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted. Sections 8.01-230 (et seq.), 8.01-247 and 8.01-256 shall apply to the right to bring such action in like manner as to any right.

E. The provisions of this section apply to judgments obtained after June twenty-nine, nineteen hundred forty-eight, and to judgments obtained prior to such date which are not then barred by the statute of limitations, but nothing herein shall have the effect of reducing the time for enforcement of any judgment the limitation upon which has been extended prior to such date by compliance with the provisions of law theretofore in effect.

F. This section shall not be construed to impair the right of subrogation to which any person may become entitled while the lien is in force, provided he institutes proceedings to enforce such right within five years after the same accrued, nor shall the lien of a judgment be impaired by the recovery of another judgment thereon, or by a forthcoming bond taken on an execution thereon, such bond having the force of a judgment.

Reviser's Note:

The Revisers have consolidated present §§ 8-393, 8-394, 8-396 and 8-397 in the proposal entitled "Limitations on Enforcement of Judgments".

Subsection A. relates primarily to § 8-397, subsection B. to § 8-396, subsection C. to § 8-393, subsection D. to § 8-397, subsection E. to § 8-396, and subsection F. to § 8-394. The essence of the present sections are set forth in the proposal without substantive change except that the five-year period for extending a judgment against a personal representative has been reduced to two years. The penalty bond procedure presently found in § 8-397 has been deleted since there are other procedures that are more simple and better understood by the bar. Also the reference to § 8-33 (when suit prevented by defendant) found in present § 8-397 has been deleted since the former section expressly excluded § 8-393 which itself relates to § 8-397.

Other minor language changes have been made and the reference to the writ of scire facias (replaced by motion; see proposed § 8.01-24) has been deleted.

§ 8.01-252. Actions on judgments, etc., of another state.—Every action upon a judgment rendered in another state or country shall be barred, if such action would there be barred by the laws of such state or country, and in no event shall an action be brought upon any such judgment rendered more than ten years before the commencement of the action.

Reviser's Note:

This proposed section incorporates the substance of present § 8-22, but has been rewritten to render the present section coherent. The ten-year residency requirement in present § 8-22 has been omitted as irrational and arguably a denial of due process.

Article 5.

Miscellaneous Limitation Provisions.

§ 8.01-253. Limitation of suits to avoid voluntary conveyances, etc.—No gift, conveyance, assignment, transfer, or charge, which is not on consideration deemed valuable in law, or which is upon consideration of marriage, shall be avoided in whole or in part for that cause only, unless within five years from its recordation, and if not so recorded within five years from the time the same was or should have been discovered, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied on by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer, or charge, is declared to be void by § 55-81.

Reviser's Note:

This is present § 8-19 without substantial change.

§ 8.01-254. Limitation on enforcement of bequests and legacies.—Wherever by any will, the testator devises any real estate to some person and requires such person to pay some other person a specified sum of money, or provides a legacy for some person which constitutes a charge against the real estate of the testator, or any part thereof, no suit or action shall be brought to subject such real estate to the payment of such specified sum of money or such legacy, as the case may be, after twenty years from the time when the same shall have been payable, and if the will specifies no time for the payment thereof, it shall be deemed to have been payable immediately upon death of the testator.

Reviser's Note:

This is present § 8-21 without substantial change.

§ 8.01-255. Time for presenting claim against Commonwealth.—Any pecuniary claim authorized to be presented under §§ 2.1-223.1 and 2.1-223.3 shall be barred unless presented in writing to the comptroller or other authorized person no later than five years after the right to such claim shall arise. If such claim be not thus barred, any action thereon against the Commonwealth must be brought no later than three years after disallowance of such claim in whole or in part.

Reviser's Note:

The present statute of limitations for claims against the State

can be found in present §§ 8-752 and 8-757, which are in conflict with each other. In this proposal, the Revisers recommend retaining the three-year period of limitations found in present § 8-752 which will apply to every action brought against the Commonwealth arising from a pecuniary claim after a disallowance thereof, in whole or in part. It is also recommended that any such pecuniary claim shall be presented in writing to the comptroller or other authorized person no later than five years after the right to such a claim arises.

This proposed statute of limitations will be located in the proposed Limitation of Actions chapter. It is noted that § 2.1-223.5 has a ten-year statute of limitations provision in it. Sections 2.1-223.1 and 2.1-223.3 pertain only to a pecuniary claim against the State and therefore, since the statute of limitations in § 2.1-223.5 would be in direct conflict with the proposed statute of limitations for pecuniary claims against the State, the Revisers recommend its repeal.

§ 8.01-255.1. Limitation of action for breach of condition subsequent or termination of determinable fee simple estate.—No person shall commence an action for the recovery of lands, nor make an entry thereon, by reason of a breach of a condition subsequent, or by reason of the termination of an estate of fee simple determinable, unless the action is commenced or entry is made within ten years after breach of the condition or within ten years from the time when the estate of fee simple determinable has been terminated. Where there has been a breach of a condition subsequent or termination of an estate fee simple determinable which occurred prior to July one, nineteen hundred sixty-five, recovery of the lands, or an entry may be made thereon by the owner of a right of entry or possibility of reverter, by July one, nineteen hundred seventy-seven. Possession of land after breach of a condition subsequent or after termination of an estate of fee simple determinable shall be deemed adverse and hostile from the first breach of a condition subsequent or from the occurrence of the event terminating an estate of fee simple determinable.

Reviser's Note:

This is present § 8-5.1 without change.

§ 8.01-255.2. Limitation on motion for new execution after loss of property sold under indemnity bond.—A motion made pursuant to § 8.01-476 shall be made within five years after the right to make the same shall have accrued.

Reviser's Note:

This is the substance of the last sentence of present § 8-408.

§ 8.01-256. As to rights and remedies existing when this chapter takes effect.—No action, suit, scire facias, or other proceeding which is pending before the effective date of this chapter shall be barred by this chapter, and any action, suit, scire facias or other proceeding so pending shall be subject to the same limitation, if any, which would have been applied if this chapter had not been enacted. If a cause of action, as to which no action, suit, scire facias, or other proceeding is pending, exists before the effective date of

this chapter, then this chapter shall not apply and the limitation as to such cause of action shall be the same, if any, as would apply had this chapter not been enacted. Any new limitation period imposed by this chapter, where no limitation previously existed or which is different from the limitation existing before this chapter was enacted, shall apply only to causes or rights of action accruing on or after the effective date of this chapter.

Reviser's Note:

This proposed section represents an updating and substantial wording revision of present § 8-37. The wording alterations of the proposal are intended to insure clarity and certainty in the transition from present Code statutes of limitation provisions upon the enactment of the changes proposed in this revision. Though the "effective date" is an arbitrary point of debarkation, the provisions of the proposal would favor neither plaintiff nor defendant.

CHAPTER 5.

Venue.

§ 8.01-257. Venue generally.—It is the intent of this chapter that every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay. Except where specifically provided otherwise, whenever the word "action(s)" is used in this chapter, it shall mean all actions at law, suits in equity, and statutory proceedings, whether in courts of record or courts not of record.

Reviser's Note:

Chapter 3 of the present Virginia Code contains no definition of venue, a fact which has led to confusion among lawyers and courts as to the relationship of venue to process and to jurisdiction. E.g., *County School Board* v. *Snead*, 198 Va. 100, 02 S.E. 2d 497 (1956).

The proposal defines venue as referring to nothing more than a place of trial which is convenient and fair to all parties. Such a definition is neither conceptually nor historically new, but is rather a restatement of the common law view that venue related only to geographical situs. Furthermore, and unless otherwise provided, the venue provisions of this chapter are to be applicable to all 'civil actions' regardless of the type of proceeding or in which court the action is brought.

§ 8.01-258. Venue not jurisdictional.—The provisions of this chapter relate to venue - the place of trial - and are not jurisdictional. No order, judgment, or decree shall be voidable, avoided, or subject to collateral attack solely on the ground that there was improper venue; however, nothing herein shall affect the right to appeal an error of court concerning venue.

Reviser's Note:

This section distinguishes between jurisdiction and venue. Historically, the concept of venue has dealt with the place where a suit is commenced and jurisdiction deals with service of process and the power of the court to act. Yet, Chapter 3 of the present Virginia Code makes no reference to such a distinction, and confusion has arisen in Virginia because of the multiplicity of venue provisions, the employment of "jurisdiction" when "venue" is meant (E.g., §§ 8-42, 8-133; *Lucas* v *Biller*, 204 Va. 309, 130 S.E. 2d 582 (1963)), and limitations on the service of process (e.g., to the county of commencement in many actions; see present §§ 8-39, 8-47). Moreover, whenever venue is required to be laid in a certain county and the result of improper venue is dismissal or a void judgment, then the effect of venue is jurisdictional. E.g., § 8-38(9) as construed by *Davis* v *Marr*, 200 Va. 479, 106 S.E. 2d 722 (1959(. Thus, in Virginia, venue is often jurisdictional at present, contrary not only to the majority of states and to the contemporary concept of venue, but also to the historical purpose of venue.

Historically, venue related to the geographical situs of the suit and required initially that the suit be tried in the county where the wrongful act allegedly occurred so that the jury members could decide the case on their own personal knowledge. Moreover, service of process involved the presentation of a writ to the defendant because the court's jurisdiction rested upon physical power over the defendant. Both those concepts have undergone significant change. Juries are no longer required to decide cases upon their own knowledge of the facts prior to trial nor are they permitted to do so. Jurisdiction can attach without bringing the defendant physically before the court, and service no longer commands the defendant to appear personally as a prerequisite for the court's jurisdiction, but rather the major purpose of service is to give the defendant notice of the action and reasonable opportunity to defend. Therefore, venue which is jurisdictional (limited by process service and resulting in dismissal when improperly laid) does not serve the purpose of providing a fair and convenient forum.

To clarify the confusion arising from the intermingling of venue, process, and jurisdiction, several changes in the Virginia Code are proposed:

(1) Statewide service of process in all civil actions is authorized (See, proposed § 8.01-292.)

(2) A defendant waives all objection to venue unless raised on or before the day of trial if in a General District Court or if in a Circuit Court within 21 days after service of process commencing the action against him. (See proposed § 8.01-264.)

(3) Proper objection to improper choice of venue results not in dismissal, but rather in transfer of the action to a proper venue with the costs of transfer paid by the party responsible for laying improper venue. (See, e.g., proposed §§ 8.01-264, 8.01-266.)

(4) A judgment is not subject to collateral attack on the sole ground that the suit was commenced in an improper place (i.e. "venue" in its true sense). However, the right to appeal a ruling of the court concerning venue is preserved. (See proposed § 8.01-267.)

§ 8.01-259. Application.—Nothing in this chapter shall apply to venue in the following proceedings:

(1) writs of quo warranto;

(2) suspension or disbarment of attorneys;

(3) habeas corpus;

(4) tax proceedings, other than those in Title 58;

(5) Juvenile and Domestic Relations District Courts proceedings concerning children;

(6) Domestic Relations proceedings;

(7) adoptions; or

(8) injunctions.

In all other actions, venue shall be in accordance with the provisions of this chapter, and, with respect to such actions, in case of conflict between the provisions of this chapter and other provisions outside this chapter relating to venue, all such other provisions are hereby superseded.

Reviser's Note:

This section identifies specific proceedings which are deemed unique in nature so as to merit special statutory treatment apart from this general venue proposal. These proceedings are presently dealt with by special venue statutes. Attempting to consolidate such provisions into a single general venue chapter would render the chapter unduly cumbersome and likely result only in confusion and undue complexity. Moreover, in each of the proceedings, there are complicating factors affecting venue beyond the mere convenience and fairness of the location of trial.

Except for these specified exceptions, it is envisioned that the general venue provisions prescribed in proposed §§ 8.01-260 through 8.01-262 will apply to all other actions and will supplement specific statutory venue provisions for any such actions. See, Reviser's Notes to proposed §§ 8.01-260 through 8.01-262, infra.

§ 8.01-260. Proper venue; preferred forum in certain actions; permissible forums for other actions.—Except for those actions expressly excluded from the operation of this chapter, and subject to the provisions of §§ 8.01-264 and 8.01-265, the venue for any action shall be deemed proper only if laid in accordance with the provisions of §§ 8.01-261 and 8.01-262.

Reviser's Note:

Generally: §§ 8.01-260, 8.01-261 and 8.01-262 constitute a general venue provision which indicates in what forums venue is proper in any action, other than those excluded from its coverage by proposed § 8.01-259.

Sections 8.01-260, 8.01-261 and 8.01-262 are made subject to § 8.01-264 to emphasize that venue not laid in accordance with the provisions of these sections must be objected to before the action will be transferred to a court of proper venue. Also, these three sections are made subject to § 8.01-265 to establish the priority of the forum non conveniens provisions of that section over the more specific venue provisions of §§ 8.01-261 and 8.01-262. Furthermore, while § 8.01-260 states that venue is proper "only" if laid pursuant to §§ 8.01-261 and 8.01-262 it should be clearly understood that §§ 8.01-264 and 8.01-265 prevent any such "preferred" or "permissible" venue from being jurisdictional.

Category A. (§ 8.01-261) Preferred Venue generally lists those actions where so-called "mandatory venue" is applicable under the present Virginia Code; although generally designating the same forums as places of proper venue as is done under the present Code, Category A (§ 8.01-261), like Category B (§ 8.01-262), does not have jurisdictional effect and improper venue is waived if not affirmatively pleaded.

Category B. (8.01-262) Permissible Venue lists those forums in which venue is proper in actions other than those listed in Category A and those excluded by proposed § 8.01-259; thus, Category B will be applicable in the vast majority of Virginia actions. See also the Reviser's Notes to proposed §§ 8.01-258 and 8.01-264 which are equally applicable here with relation to the conceptual distinction between venue and jurisdiction and the nonjurisdictional, and hence waivable, nature of venue under this proposed chapter.

§ 8.01-261. Category A or preferred venue.—In the actions listed in this section, the forums enumerated shall be deemed preferred places of venue such venue being sometimes referred to as "Category A" in this title, and venue laid in any other forum shall be subject to objection, provided that, if more than one preferred place of venue applies, any such place shall be a proper forum. The following forums are designated as places of preferred venue for the action specified:

1. In actions for review of, appeal from, or enforcement of State administrative regulations, decisions, or other orders:

a. if moving or aggrieved party is other than the Commonwealth or an agency thereof, then the county or city wherein such party:

(1) resides; or

(2) regularly or systematically conducts affairs or business activity; or

(3) wherein such party's property affected by the administrative action is located; provided, however, that any petition for a declaratory judgment filed solely for the purpose

of contesting the validity of a regulation having Statewide application shall be filed in the Circuit Court of the City of Richmond.

b. if moving or aggrieved party is the Commonwealth or an agency thereof, then the county or city wherein the respondent or a party defendant:

(1) resides; or

(2) regularly or systematically conducts affairs or business activity; or

(3) has any property affected by the administrative action.

c. if subitems a. and b. do not apply, then the county or city wherein the alleged violation of the administrative regulation, decision or other order occurred.

2. Except as provided in subdivision 1. of this section, where the action is against one or more officers of the Commonwealth in an official capacity, the county or city where any such person has his official office.

3. The county or city wherein the subject land, or a part thereof, is situated in the following actions:

a. to recover or partition land;

b. to subject land to a debt;

c. to sell, lease or encumber the land of persons under disabilities;

d. to release the dower or curtesy of a spouse under disability;

e. to sell wastelands;

f. to establish boundaries;

g. for unlawful entry or detainer;

h. for ejectment;

i. to remove clouds on title.

4. In actions in which an order of publication may be issued against the defendant under § 8.01-316, in the county or city in which the plaintiff resides.

5. In actions for writs of mandamus, prohibition, or certiorari, except such as may be issued by the Supreme Court, the county or city wherein is the record or proceeding to which the writ relates.

6. In actions on bonds required for public contract, the county or city in which the public project, or any part thereof, is situated.

7. In actions to impeach or establish a will, the county or city wherein the will was probated, or, if not probated at the time of the action, where the will may be properly offered for probate.

8. In actions to assign or recover dower or curtesy, the county or city:

a. wherein the will of the deceased spouse is admitted to record; or

b. wherein the administration of the estate of the deceased spouse is granted; or

c. where the conveyance of an alienee is recorded.

9. In actions to waive jointure and demand dower and in actions to assign dower or curtesy the county or city wherein the writing creating jointure was admitted to record or wherein the deceased spouse resided at the time of death.

10. In actions on any contract between a transportation district and a component government, any county or city any part of which is within such transportation district.

11. In attachments,

a. with reference to the principal defendant and those liable with or to him, venue shall be determined as if the principal defendant were the sole defendant; or

b. in the county or city in which the principal defendant has estate or has debts owing to him.

12. In actions to partition personal property, whether tangible or intangible, the county or city:

a. wherein such property is physically located; or

b. wherein the evidence of such property is located;

c. and if subsections a. and b. do not apply, wherein the plaintiff resides.

13. a. In any action for the collection of State, county or municipal taxes, any one of the following counties or cities shall be deemed preferred places of venue:

1. Wherein the taxpayer resides; or

2. Wherein the taxpayer owns real or personal property; or

3. Wherein the taxpayer has a registered office, or regularly or systematically conducts business; or

4. In case of withdrawal from the Commonwealth by a delinquent taxpayer, wherein venue was proper at the time the taxes in question were assessed or at the time of such withdrawal.

b. In any action for the correction of an erroneous assessment of State taxes and tax refunds, any one of the following counties or cities shall be deemed preferred places of venue:

1. Wherein the taxpayer resides;

2. Wherein the taxpayer has a registered office, or regularly or systematically conducts business;

3. Wherein the taxpayer's real or personal property involved in such a proceeding is located.

Reviser's Note:

(A) Proposed § 8.01-261. Category A or Preferred Venue. Category A lists certain actions and denominates specific forums as the proper venue for those actions (subject to proposed §§ 8.01-264 and 8.01-265). Under present Virginia statutes and case law in the situations listed in Category A, venue is generally exclusive or mandatory, and timely objection to venue improperly laid would result in dismissal of the action. Also, if no timely objection were brought and such an action proceeded to judgment, such judgment would be void and subject to collateral attack. E.g., (1) § 8-38(9) as construed in *Davis* v. *Marr*, 200 Va. 479, 106 S.E. 2d 722 (1959); (2) § 8-38(5) as construed in *Dowdy* v. *Fanklin*, 203 Va. 7, 121 S.E. 2d 817 (1961); (3) §§ 8-38(4), 8-690, 8-674, 8-675, 8-688, 41.1-5, 8-836, 8-789, 8-798, 55-155; See also, *Livingston* v. *Jefferson*, 15 F. Cas. 660 (no. 8411) (C.C.D. Va. 1811); (4) § 20-98 as construed in *White* v. *White*, 181 Va. 162, 24 S.E. 2d 448 (1943); (5) § 8-42; *County School Board* v. *Snead*, 198 Va. 100, 92 S.E. 2d 497 (1956); (6) §§ 11-20, 11-23; (7) § 64.1-89; *Gilford* v. *Hayes*, 17 F. Supp. 535 (E.D. Va., 1936); (8) §§ 64.1-30, 64.1-34; (9) § 15.1-1360; (10) § 58-1015.

Thus, mandatory venue according to the language and construction of such present Virginia statutes relates more to jurisdiction than to venue. See Reviser's Note to proposed § 8.01-258, supra. In an effort to further clarify the distinction between venue and jurisdiction, Category A uses the term "preferred" venue to refer to those situations in which venue has heretofore generally been denominated as "mandatory" or "exclusive." Neither dismissal of the action nor voiding the judgment rendered is necessary to protect the defendant from an inconvenient or unfair forum (i.e., the sole purpose of venue), and the result of such practice at present may be to deprive the plaintiff of any forum at all (e.g., when the statute of limitations expires before the defendant attacks the judgment). Improper venue is an easily remediable defect, "preferred" venue as delineated in this proposed section would not be jurisdictional since, under proposed §§ 8.01-258 and 8.01-264, dismissal is not available as a remedy for improper venue and a judgment rendered cannot be voided or collaterally attacked on such grounds. Instead, upon timely objection, the action will be transferred to a "preferred" forum under this section, and, if no timely objection is made, the venue defect is waived. See Reviser's Note to proposed § 8.01-264.

(1) Subdivision 1. of proposed § 8.01-261. Actions for Review of, Appeal from, and Enforcement of Administrative Decisions, Orders, and Regulations. - The proposed subdivision is present § 9-6.14:5 of the Administrative Process Act 1975. In general, this subdivision has eliminated the necessity for citizens being forced to come to Richmond in order to challenge administrative actions or to protect their rights against adverse administrative decisions.

(2) Subdivision 2. of proposed § 8.01-261. Actions against Commonwealth. - Under present §§ 8-38(9), 8-40 and 8-752, venue is proper only in the Circuit Court of the City of Richmond in actions against the State, certain public officers, or public corporations and

in actions to recover claims against the State. This subdivision changes the present venue in these cases by establishing proper venue as the county or city where any defendant public officer has his official office. This provision comports with proposed subdivision 1. of § 8.01-261 that citizens will no longer be required to travel to Richmond to bring an action against the Commonwealth.

(3) Subdivision 3. of proposed § 8.01-261. Actions involving land. - This proposal collects in a single provision those "local actions" where the situs of realty has traditionally been considered the preferred place of venue.

(4) Subdivisions 4. through 10. proposed § 8.01-261. - With the exception of proposed subdivision 8. of § 8.01-261, these proposals merely designate preferred venue in certain actions where mandatory venue is provided by the present Virginia Code. As to actions to assign or recover dower, proposed subdivision 8. of § 8.01-261 also consolidates venue references of present §§ 64.1-24, 64.1-30 and 64.1-34 (probate of a will is not included; for venue, see present § 64.1-75).

(5) Subdivision 11 of proposed § 8.01-261. Attachments. - This proposal restates the concept of present § 8-522. The language of present § 8-522 pertaining to the principal defendant "and those jointly liable with him" has been changed to "those liable with or to him". This change is made to clarify the concept that potential defendants are not only those primarily liable with the principal debtor but also those who are indebted to the principal debtor.

(6) Subdivision 12. of proposed § 8.01-261. Partition of Personal Property. - Present § 8-703 states that such proceedings should be brought in the "jurisdiction wherein the property, or the greater part thereof, is located". In order for the court to avoid having to determine where the greatest share of the property is to be found, the proposal permits venue where any part of the personal property in question is located. This is the same venue criterion applied to the recovery of personal property, see proposed subdivision 5. of § 8.01-262, infra, and is considered to be equally applicable in actions to partition such property.

Because the property to be partitioned may be distinct and separately located from the evidence of that property, (e.g. stock certificate as evidence of corporate ownership), subsection (b) permits the latter as an additional venue site.

So that the party seeking to partition personal property will be insured of a forum in which to proceed, if venue cannot lie pursuant to subitems a. and b., subitem c. permits venue where the plaintiff resides.

(7) Subdivision 13. of proposed § 8.01-261. Tax Proceedings. - The Revisers originally felt that tax proceedings under Title 58 were significantly unique to dictate venue treatment outside of this chapter. However, subject to extensive deliberation and in order to comport to the drafters' effort to localize venue provisions within

this chapter, the provisions of Title 58 concerning the venue of suits for collection of State taxes (See §§ 58-1014 through 58-1021) and of those relating to the correction of erroneous assessment and tax refunds were amended and transferred to this chapter. (See §§ 58-1118 through 58-1140.1, and § 58-1153.)

As to the collection of State taxes, the venue provisions of § 58-1015 are altered by the deletion of the forum where the taxes were assessed or payable; this provision is replaced with subitem a. which locate venue in the county or city where the delinquent taxpayer is located (or owns property) at the time of the action to collect the taxes. Only if the taxpayer has left the Commonwealth does the time of assessment become pertinent as to venue.

In actions to correct erroneous assessments and tax refunds, the present venue provisions of § 58-1130 have also been altered by subitem b. The proposed subdivision makes no reference to the court in which the officer who made the assessment gave bond, qualified, or where certificate of qualification was returned and make no distinction as to venue between domestic and foreign corporations. Also, § 58-1153 as to venue is amended by the deletion as a proper forum of the county or city wherein the assessment was made.

Therefore, in these tax proceedings, the proposed subitem generally bases venue on the location of the taxpayer instead of the location of the tax assessment. These forums will be less onerous on the taxpayer and will likely facilitate such proceedings by locating venue in the county or city where it is most probable that the necessary parties and/or evidence will be found.

§ 8.01-262. Category B or permissible venue.—In any actions to which this chapter applies except those actions enumerated in Category A where perferred venue is specified, one or more of the following counties or cities shall be permissible forums, such forums being sometimes referred to as "Catagory B" in this title:

1. Wherein the defendant resides or has his principal place of employment;

2. Wherein the defendant has a registered office, has appointed an agent to receive process, or such agent has been appointed by operation of the law; or, in case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

3. Wherein the defendant regularly or systematically conducts affairs or business activity, or in the case of withdrawal from this Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

4. Wherein the cause of action, or any part thereof, arose;

5. In actions to recover personal property, whether tangible or intangible, wherein such property is physically located;

6. In actions against a fiduciary as defined in § 8.01-2 appointed under court authority, the county or city wherein such fiduciary qualified;

7. In actions for improper message transmission or misdelivery wherein the message

was transmitted or delivered or wherein the message was accepted for delivery or was misdelivered;

8. In actions arising from the delivery of goods, wherein the goods were received;

9. If there is no other forum available in subdivisions 1. through 8. of this Category, then the county or city where the defendant has property or debts owing to him subject to seizure by any civil process; or

10. In actions in which all of the defendants are unknown or are nonresidents of the Commonwealth, or if there is no other forum available under any other provisions of §§ 8.01-260, 8.01-261, or this section, then the county or city where any of the plaintiffs reside.

Reviser's Note:

(B) Proposed § 8.01-262, Category B of permissible venue. - As indicated in the initial portion of this Reviser's Note, under this proposal "permissible" venue is applicable to the vast majority of actions in Virginia - specifically to those actions for which no preferred forum is designated in Category A, § 8.01-261, and which are not excluded from the operation of this chapter by proposed § 8.01-259. Moreover, by providing that "one or more" of the forums listed in subdivisions 1. through 9. of § 8.01-262 are permissible makes venue in those forums cumulative; that is, the choice of the forums enumerated is at the option of the plaintiff. Proposed subdivision 10. of this section is a last resort provision, giving the plaintiff a forum where no forum is available under any other provision of §§ 8.01-260 through 8.01-262.

Proposed subdivision 1. of § 8.01-262. Where defendant resides or is employed. - Together with proposed § 8.01-263, this proposal incorporates present § 8-38(1) (i.e., the residence of any defendant) and adds the defendant's place of employment. Present § 16.1-76 provides for venue at the defendant's place of employment in actions in courts not of record, and proposed subdivision 1. of § 8.01-262 simply provides the same for courts of record. Though an additional forum for the plaintiff, the defendant's place of employment is not deemed less convenient or fair for the defendant then his residence.

(2) Proposed subdivsion 2. of § 8.01-262. Where defendant has registered office, etc. - Along with the provision for venue when the defendant has withdrawn from the State, this proposal incorporates the thrust of present § 8-38(2) and (6). However, the proposal applies not only to corporations, but to all defendants, i.e., it provides plaintiffs with at least one forum against parterships, unincorporated associations, and individuals, as well as corporations, which are engaged in activities requiring registration or appointment of agents for service of process. For example, nonresident insurers, brokers, and agents by conducting certain business activities within Virginia appoint the clerk of the State Corporation Commission as their agent for the service of process. (§ § 38.1-64, 38.1-70.2) Similarly, § 8-656.1 provides for the

appointment of the clerk of the State Corporation Commission as an agent for the service of process in the case of unincorporated associations which have their principal place of business outside the State. The proposed subdivision would provide venue in all such suits regardless of whether the defendant be an insurance broker or agent, an unincorporated association, or a corporation whereas present § 8-38(2) and (6) provide venue only if such defendant is incorporated.

The present provision for "principal office" in § 8-38(2) is deleted as redundant because it is covered adequately in proposed subdivision 3. of § 8.01-262, infra. The provision of present § 8-38(2) for venue where a corporation's "mayor, rector, presdient or other chief officer resides" was deleted from this proposal as irrelevant to the convenience or fairness of parties or witnesses. Moreover, since proposed subdivision 1. of § 8.01-262, supra, proposed subdivisions 3. and 10. of § 8.01-262, infra, combine to provide at least one forum for the plaintiff against resident or nonresident defendants, there is no need for such a provision.

(3) Proposed subdivision 3. of § 8.01-262. Where defendant regularly does business, etc. - The concept of "minimum business contacts" with the forum is the basis of the expansion of State court jurisdiction under the authority of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) and of State long-arm statutes (e.g., §§ 8-81.1 to 8-81.5). Present § 8-81.4 provides that venue is proper under certain circumstances in the county or city where the plaintiff resides. There should be less chance of serious inconvenience for a defendant, corporate or not, to defend in a forum where such defendant "regularly or systematically transacts business activity."

(4) Proposed subdivision 4. of § 8.01-262. Where cause of action arose. - The proposal incorporates § 8-39. However, present § 8-47 limits service of process to the bailiwick where actions are commenced under § 8-39. Such a limitation on process is arbitrary, circumscribes the scope of present § 8-39, is jurisdictional in effect, and often creates a procedural trap for the practitioner. See Reviser's Notes to proposed § 8.01-292. By adoption of proposed § 8.01-292 permitting Statewide service of process, this subdivision can create an additional forum though the wording is no different than current § 8-39. The result is not deemed unfair to the defendant who might well expect to answer for any civil wrong in the place where the wrong was committed and where witnesses will often be present.

(5) Proposed subdivision 5. of § 8.01-262. Recovery of personal property. - The proposal reflects common law practice in that the most convenient forum for such actions is often the forum wherein such property is located. Unlike realty in local actions, personal property is not subject to an extensive title system and is movable. Thus, venue for personal property actions is not limited solely to the geographical location of the property. Hence, this provision is permissible rather than preferred.

(6) Proposed subdivision 6. of § 8.01-262. Actions against fiduciary. - This proposal is essentially a restatement of present § 8-

38(5) and provides a permissible forum for fiduciaries in the city or county of qualification. [Venue under this subdivision is the same as venue based on a fiduciary's "residence" under proposed subdivision 1. of this section. *Dowdy* v. *Franklin* 203 Va. 7 (1961). Venue based on the fiduciary's place of employment under proposed subdivision 1. of this section can, however, be different than that based on the place of qualification or "residence".]

(7) Proposed subdivision 7. of § 8.01-262. Actions involving message transmission. - The proposal incorporates present § 56-474 by providing additional forums in actions against telephone and telegraph companies for improper transmission of messages. It is assumed that such actions may be fairly and conveniently brought where the message was accepted, transmitted, or misdelivered in addition to other available forums; e.g. proposed subdivision 3. of this section (where the defendant regularly and systematically conducts business) and subdivision 4. of this section (wherein the cause of action, or any part thereof, arose).

(8) Proposed subsection 8. of § 8.01-262. Actions involving the delivery of goods. - Although analogous to present § 3.1-720 (providing a forum for the farmer at the place where a commission merchant receives produce in actions arising from the sale of farm products), the proposal goes beyond the present provision to make the place of receipt a place of permissible venue in any action arising from the delivery of goods. Such a forum is deemed necessary to give the Virginia retailer as well as the Virginia farmer a convenient place of suit in actions against middlemen, particularly nonresident middlemen. Moreover, the place of receipt or delivery of the goods may be the most relevant forum in such suits because witnesses and tangible evidence of defective delivery or tender often will be found at the place of delivery and the seller will normally avail himself of his resale remedy there. See generally, §§ 8.2-308, 8.2-706 and 3.1-720.

(9) Proposed subdivisions 9. and 10. of § 8.01-262. Where no other forum available. - The proposal contains two secondary venue alternatives. Proposed subdivision 9. is available only if the plaintiff cannot properly lay venue under proposed subdivisions 1. through 8. of this section. Proposed subdivision 10. is a "last chance" venue provision which gives the plaintiff a forum where he might otherwise go without one and where the provision of such a forum, though perhaps less convenient than others, would be less unfair than the plaintiff's having a right without remedy.

(a) Proposed subdivisions 9. of § 8.01-262. - This provision is primarily applicable to in personam actions where seizure is used as a means of bringing a nonresident defendant before the court. The forums already available to the plaintiff under proposed subdivisions 1. through 8. of § 8.01-262 will usually encompass the place where the defendant has property or debts subject to seizure, and this proposal, subdivision 9., does not curtail the plaintiff's right to use seizure in such actions. Rather, the proposal refers to the laying of venue where such property or debts are subject to seizure. It assumes that the forums enumerated in proposed subdivisions 1. through 8. are more convenient and fairer to both parties and

witnesses than a forum where the only basis for venue is that the defendant has debts or property located therein. Hence, only when no other forum is available under the first eight subdivisions of § 8.01-262 does the location of defendant's debts or property become a basis of venue.

(b) Proposed subdivision 10. of § 8.01-262. - This subdivision seeks to provide the plaintiff with at least one forum, i.e., in the county or city where he resides when all the defendants are nonresidents or are unknown and when there is no other forum available under any other provision of proposed §§ 8.01-260 through 8.01-262. This proposed subdivision includes the venue provisions of the present Virginia long-arm statute [§ 8-81.4 and the nonresident and unknown motor vehicle statutes §§ 8-38(6a) and (6b); 38.1-381(e)].

§ 8.01-263. Multiple parties.—In actions involving multiple parties, venue shall not be subject to objection:

1. If one or more of the parties is entitled to preferred venue, and such action is commenced in any such forum; provided that in any action where there are one or more residents and one or more nonresidents or parties unknown, venue shall be proper (preferred or permissible, as the case may be) as to at least one resident defendant;

2. In all other cases, if the venue is proper as to any party.

Reviser's Note:

Proposed § 8.01-263 is necessary in order for the other venue provisions of this proposal to function effectively in multiple party situations. By providing that preferred venue prevails when any party is entitled to such, proposed subdivision 1. of § 8.01-263 prevents the upsetting of the balance established between preferred and permissible venue in proposed §§ 8.01-261 and 8.01-262. To allow plaintiffs to avoid preferred venue provisions by joining additional defendants would render meaningless any priority intended by such provisions. The proviso to proposed subdivision 1. of § 8.01-263 reflects present law, § 8-38(7), which gives preference to resident defendants when both resident and non-resident defendants are involved in an action. Such a provision is desirable since Virginia should be more concerned with the convenience of residents than nonresidents, and since a plaintiff should not be able to choose a forum less convenient to a resident defendant by joining a nonresident. As to all other cases, proposed subdivision 2. of § 8.01-263 simplifies matters by recognizing no priorities. It allows the action to be maintained so long as venue is proper as to any one party.

§ 8.01-264. Venue improperly laid; objection.—Venue laid in forums other than those designated by this chapter shall be subject to objection, but no action shall be dismissed solely on the basis of venue if there be a forum in the Commonwealth where venue is proper. In actions where venue is subject to objection, the action may nevertheless be tried where it is commenced, and the venue irregularity shall be deemed to have been waived unless the defendant objects to venue by motion filed, as to actions in circuit courts, within

twenty-one days after service of process commencing the action, and as to actions in general district courts on or before the day of trial. This time shall not be extended in any case. Such motion shall set forth where venue is proper and shall be promptly heard by the court upon reasonable notice by any party. The court shall hear the motion only on the basis of the action as commenced against the original defendant and not on the basis of subsequent joinder or intervention of any other party. If such motion is sustained, the court shall order the venue transferred to a proper forum under the appropriate provisions of §§ 8.01-260, 8.01-261 and 8.01-262.

Reviser's Note:

Proposed § 8.01-263 distinguishes venue from jurisdiction by making transfer rather than dismissal the remedy for improperly laid venue. See Reviser's Notes to proposed §§ 8.01-258 and 8.01-261 supra. Transfer provides a better remedy than dismissal because it decreases the costs of litigation and is more efficient than instituting a second suit in the proper venue. Possible abuse will be avoided by making the party responsible for improper venue liable for the transfer costs. See proposed § 8.01-266, infra.

In Virginia, judicial construction has resulted in treating objections to venue not raised by plea in abatement as waived, but this applies only to non-exclusive venue. See present § 8-133; *Solomon* v. *Atlantic Coastline R. Co.*, 187 Va. 240, 46 S.E. 2d 369 (1948). Currently, where venue is exclusive it cannot be waived and if no objection is made, the judgment is subject to collateral attack. See present § 8-40; *Lucas* v. *Biller*, 204 Va. 309, 130 S.E. 2d 582 (1963). In such instances a suit commenced in an improper forum is fatally defective without regard to whether the defendant objects or whether the forum selected is unfair or inconvenient. Such a result has no relation to venue (i.e., a fair and convenient location for trial), but is rather a jurisdictional limitation.

In order to keep venue and jurisdiction conceptually separate, proposed § 8.01-264 provides that improper venue, whether "preferred" or "permissible," is waived if the defendant does not make timely objection. The result is that improper venue under the proposed section is not a fatal defect. This is consonant with the definition of venue in proposed § 8.01-257, and it affords the defendant adequate protection against the plaintiff's choosing an unfair or inconvenient forum, since objection to improper venue will always result in transfer to a proper forum.

Objection to venue is timely if made on or before the day of trial if the action is commenced in a General District Court. Similarly, objection to venue is timely if made within 21 days after service of process commencing an action in a circuit court (thus, this objection is timely even if other pleadings are filed by the defendant prior to the expiration of the 21-day period; cf Rule 3:6).

§ 8.01-265. Transfer of venue by court.—In addition to the provisions of § 8.01-264 and notwithstanding the provisions of §§ 8.01-260, 8.01-261 and 8.01-262, the court wherein an action is commenced may, upon motion by any defendant and for good cause shown, transfer the action to any fair and convenient forum having jurisdiction within the

Commonwealth, or the court, on motion of a plaintiff and for good cause shown, may retain the action for trial; provided that, except by agreement of all parties, no action ennumerated in Category A, § 8.01-261, shall be transferred to or retained by a forum not enumerated in such Category. Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of inconvenience to the parties or the witnesses.

Reviser's Note:

This proposal consolidates the forum non conveniens transfer provisions of present §§ 8-38(10) and 8-157(a) and also readopts former § 8-158 which was repealed in 1966. The result is a statutory affirmation of the transfer provisions inherent in the English common law courts. Venue generally may be transferred if it is improperly laid under the provisions of §§ 8.01-260, 8.01-261 and 8.01-262 and objection is made by the defendant pursuant to § 8.01-264. However, if the venue is preferred and is properly laid under § 8.01-261, the court may transfer the motion only upon agreement of all parties. If an action is not within Category A, § 8.01-21, though the venue may be improperly laid, the court may, on motion of the plaintiff and for good cause, retain the action for trial. The definition of good cause in the proposal encompasses present § 8-38(10) (provision for transfer where judge is interested in case) as well as the convenience of witnesses and parties and the interest of justice of present § 8-157(a). The adjectives "fair and convenient" used to describe the transferee forum in the proposed section give more guidance than the words "any other forum" used in present § 8-157(a). The words "having jurisdiction" connote jurisdiction over the subject matter of the proceeding; and no court in the Commonwealth is prevented by any provision of this chapter from having such jurisdiction.

Note: Though not specifically provided, it is envisioned that the clerk's duties will be as set forth in present § 8-159 (Procedure and costs on removal).

§ 8.01-266. Costs.—In any action which is transferred or retained for trial pursuant to this chapter, the court in which the action is initially brought shall award an amount necessary to compensate a party for such inconvenience, expense, and delay as he may have been caused by the commencement of the suit in a forum to which an objection, pursuant to § 8.01-264, is sustained or by the bringing of a frivolous motion to transfer. In addition, the court may award those attorney's fees deemed just and reasonable which are occasioned by such commencement of a suit or by such motion to transfer. The awarding of such costs by the transferor court shall not preclude the assessment of costs by the clerk of the tranferee court.

Reviser's Note:

This proposal provides sanctions necessary to make transfer operable as a remedy for improper venue. See also Reviser's Notes to proposed §§ 8.01-264 and 8.01-265, supra. Placing costs upon the party which improperly lays venue or makes a frivolous motion to

transfer should discourage plaintiffs from carelessness in selecting a forum and will prevent abuse of the transfer provision by defendants. By providing that the court "shall award" reasonable actual costs, the proposed section makes the imposition of such costs mandatory (i.e., the court has discretion to transfer, but not as to the imposition of costs). Additionally, the court is granted discretion to award attorney's fees. The costs to be imposed are only those which have been actually incurred up to the point in time of the granting of transfer or denial of such a motion. If transfer of the action is granted, costs should include those fees of the transferor court necessary to implement the order. Thereafter costs are to be awarded in accordance with present §§ 8-159 and 14.1-177 et seq.

§ 8.01-267. Discretion of judge.—Both the decision of the court transferring or refusing to transfer an action under § 8.01-265 and the decision of the court as to amount of costs awarded under § 8.01-266 shall be within the sound discretion of the trial judge. However, nothing herein shall affect the right to assign as error a court's decision concerning venue.

Reviser's Note:

This proposal provides that certain discretionary decisions of the trial judge may be appealable only for abuse of such discretion; e.g., (1) whether to transfer an action for reasons of forum non conveniens (Proposed § 8.01-264); or (2) the amount of costs awarded upon transfer (Proposed § 8.01-266). In the first instance, the question decided by the court is not whether venue laid by the plaintiff is proper, but whether to transfer to a more convenient or desirable forum. Such questions cannot be answered by reference to any specific standard (i.e., other venue statutes), but must be left to the discretion of the court. The same is true with regard to the court's assessment of costs because, though proposed § 8.01-266 requires that the court assess costs in certain instances, the reasonable amount of such costs must depend upon the facts of each individual case.

Since neither transfer nor refusal to transfer are immediately appealable, the proposed section favors neither plaintiff nor defendant while leaving the court free to assure that a fair and convenient forum is available for trial of every action. However, the trial judge is limited by the fact that his decision is ultimately reviewable on the grounds that he abused his discretion, or that the forum to which the action was transferred or in which the action was allowed to remain was not a proper place of venue under proposed §§ 8.01-260, 8.01-261 and 8.01-262.

Related Sections from Title 16.1 to be amended.

Proposed § 16.1-76. Venue.—In all civil actions over which the courts not of record have jurisdiction pursuant to § 16.1-77, venue shall be determined in accordance with the provisions of §§ 8.01-260, 8.01-261 and 8.01-262.

The change in § 16.1-76 is made necessary by the proposed revisions of present Chapters 3 (Venue) and 4 (Process and Order of Publication) of Title 8. In the proposed Venue Chapter, Chapter 5 proposed §§ 8.01-260, 8.01-261 and 8.01-262 (Proper Venues, Categories A and B, respectively) incorporates all forums currently allowed by § 16.1-76; the Reviser's Notes to those proposed sections are also appropriate herein. In the proposed Process Chapter, Chapter 8, proposed § 8.01-292 (To whom process directed; when to issue; when returnable) establishes Statewide service of process and deletes those restrictions found currently in § 16.1-76; the Reviser's Note to proposed § 8.01-292 is also applicable here. Finally, existing § 16.1-76 prescribes venue only for "actions at law"; the proposed statute relates to all civil actions and thereby prescribes venue for all statutory proceedings over which the courts not of record have jurisdiction.

§ 16.1-92. Removal of action involving more than $500.—When the amount in controversy in any action at law except cases of unlawful entry and detainer in a ~~court not of record~~ *general district court* exceeds the sum of five hundred dollars, ~~exclusive~~ of interest, attorney's fees contracted for in the instrument, and costs, the judge shall, at any time on or before the return day of the process, or within ten days after such return day, if trial of the case has not commenced or if judgment has not been rendered, upon the application of any defendant, the filing by him of an affidavit of himself, his agent or attorney, that he has a substantial defense to the action, which affidavit shall state the grounds of such defense, and the payment by him of the costs accrued to the time of removal, the writ tax as fixed by law, and the costs in the court to which it is removed as fixed by subsection (17) of § 14.1-112, remove the action and all the papers thereof to a court having jurisdiction of appeals from the court wherein the action was brought; and the clerk if there be one, or the judge if there be no clerk of the court, shall promptly transmit the papers in the case and the writ tax and costs to the clerk of the court to which the action is removed. If the defendant fails to pay the accrued costs, writ tax, and the costs in the court to which the case is removed at the time the application for removal is filed, the judge shall proceed to try the case.

On the trial of the case in the circuit court the proceedings shall conform as nearly as may be to proceedings prescribed by the Rules of Court for other actions at law, but the court may permit all necessary amendments, enter such orders, and direct such proceedings as may be necessary or proper to correct any defects, irregularities and omissions in the pleadings and bring about a trial of the merits of the controversy.

In no event shall an objection to venue be considered by the circuit court unless raised by a defendant in his affidavit of substantial defense filed in the general district court.

Reviser's Note:

The proposed chapter on Venue requires that objection to improper venue be timely raised; if not, the objection is waived. The proposed amendment to this section comports with that policy by requiring an objection to venue be raised in the affidavit of substantial defense.

Proposed § 16.1-106. Appeals from courts not of record in civil cases.—From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty dollars, exclusive of interest, any attorney's fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or by-law of a municipal corporation, there shall be an appeal of right, if taken within ten days after such order or judgment, to a court of record. Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken.

Reviser's Note:

Present § 16.1-106 distinguishes between appeals from county courts and those from municipal courts. However, with the 1973 Circuit Court Act and the jurisdiction granted thereunder (§ 17-123), such a distinction is no longer necessary. Also, the proviso of existing § 16.1-106 has been deleted to remove any city charter proscriptions regarding where appeals from courts not of record may be taken; thus the last sentence in the proposal controls. Otherwise, there is no change in substance.

Chapter 6.

Notice of Lis Pendens or Attachment.

§ 8.01-268. When and how docketed and indexed.—No lis pendens or attachment shall bind or affect a subsequent bona fide purchaser of real or personal estate for valuable consideration and without actual notice of such lis pendens or attachment, until and except from the time a memorandum setting forth the title of the cause or attachment, the general object thereof, the court wherein it is pending, the amount of the claim asserted by the plaintiff, a description of the property, and the name of the person whose estate is intended to be affected thereby, shall be admitted to record in the clerk's office of the circuit court of the county or the city wherein the property is located; or if it be in that part of the city of Richmond lying north of the south bank of the James river and including the islands in such river, in the clerk's office of the Circuit Court, Division I, of such city, or if it be in the part of the city of Richmond lying south of the south bank of the James river, in the clerk's office of the Circuit Court, Division II, of such city. Such memorandum shall not be deemed to have been recorded unless and until indexed as required by law.

Reviser's Note:

This is present § 8-142 without change.

§ 8.01-269. Dismissal or satisfaction of same.—If such attachment be quashed or dismissed or such cause be dismissed, or judgment or final decree in such attachment or

cause be for the defendant or defendants, the court shall direct in its order that such attachment or lis pendens be released; whereupon it shall become the duty of the clerk in whose office such attachment or lis pendens is recorded, to enter on the margin of the page of the book in which the same is recorded, such fact, together with a reference to the order book and page where such order is recorded; provided, however, that in any case in which an appeal or writ of error from such judgment or decree or dismissal would lie, the clerk shall, after the expiration of the time in which such appeal or writ of error may be applied for, or if applied for after refusal thereof, or if granted, after final judgment or decree is entered by the appellate court, forthwith make such entry.

In any case in which the debt for which such attachment is issued, or suit is brought and notice of lis pendens recorded is satisfied by payment, it shall be the duty of the creditor, within ten days after payment of same to mark such notice of lis pendens or attachment satisfied on the margin of the page of the deed book in which the same is recorded.

Reviser's Note:

This is present § 8-143 without change.

Chapter 7.

Civil Actions:

Commencement, Pleadings, and Motions.

Article 1.

Civil Actions Generally, Commencement Thereof.

§ 8.01-270. Transfer of cases from one side of the court to the other.—No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice; and, without such direction, any party to the suit or action shall have the right at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit or action was not brought on the right side of the court.

After any such amendment has been made, the case shall be placed by the clerk on the proper docket of the court and proceed and be determined upon such amended pleadings.

The defendant shall be allowed a reasonable time after such transfer in which to prepare the case for trial.

Reviser's Note:

This is present § 8-138 without change.

Present § 8-138.1. Transfer of cases from courts not having both law and equity jurisdiction to courts having such jurisdiction. To be deleted.

Present § 8-138.2. Transfer of cases where court is abolished or jurisdiction removed or deprived. To be deleted.

Article 2.

Pleadings Generally.

§ 8.01-271. Other pleadings.—Subject to the provisions of this title, pleadings shall be in accordance with Rules of the Supreme Court.

Reviser's Note:

This proposed section is simply a statement of current Virginia practice - i.e., the broad outline of pleading is prescribed by statute while most of the details as to the form and the filing of pleadings are left to the Rules of Court. Additionally, proposed § 8.01-271 recognizes the right of the Supreme Court, subject to the provisions of Article VI, § 5 of the Virginia Constitution and of proposed § 8.01-3, to modify and change pleading and practice by the adoption of rules of court.

§ 8.01-272. Pleading several matters; joining tort and contract claims.—In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurence. The court, in its direction, may order a separate trial for any claim.

Reviser's Note:

This proposal extends present § 8-134 and expressly overrules the long-standing prohibition against the joinder of tort and contract claims found in Virginia case law. [e.g., *Kavanaugh* v. *Donovan*, 186 Va. 85,93, 41 S.E.2d 489, 493(1947); *Standard Products* v. *Woolridge*, 214 Va. 476, 201 S.E.2d 801(1974).]

The doctrine prohibiting the joinder of tort and contract claims has long been criticized as exalting form over substance and as producing multiple litigation with regard to substantially similar claims and facts. See 35 Va. L. Rev. 384(1949). [See, e.g., *Kavanaugh*, supra. and *Standard*, supra.]

Advocates of the joinder of claims refer to the case of *DuPont* v. *Universal Moulded Products*, 191 Va. 525, 62 S.E.2d 233(1950), in which the court allowed the joinder of counts in warranty with those for fraud and negligence. However, in subsequent decisions the court distinguished this decision by stating that the causes of action involved only one right and that the misjoinder was one of form, not

of substance. See *Daniels* v. *Truck Corporation*, 205 Va. 579, 584, 139 S.E.2d 31 (1974).

Despite the case law sustaining the principle of non-joinder, it is an anomaly of Virginia procedure that a defendant may file counterclaims against a plaintiff in both contract and tort while a plaintiff may not do so in his motion for judgment. See Rule of Court 3:8. The proposal grants the same right to the plaintiff. While not expressly stating so, the term claim encompasses any claim, counterclaim, cross-claim, or third-party claim. However, proposed § 8.01-272 does not go as far as FRCP 18(a) in that it restricts the joinder to claims arising out of the same transaction or occurrence. Also, the court may, upon motion, sever such claims for separate trial.

Finally, the matter eliminated from the first sentence of existing § 8-134 - i.e. provisions regarding the filing by a defendant of pleas in bar and pleas in abatement - is believed to be unnecessary in light of Rules 2:11, 3:5, 3:6, and 3:7.

§ 8.01-273. Demurrer; form, grounds to be stated; amendment.—A. In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court. A demurrer may be amended as other pleadings are amended.

B. Wherever a demurrer to any pleading has been sustained, and as a result thereof the demurree has amended his pleading, he shall not be deemed to have waived his right to stand upon his pleading before the amendment, provided the order of the court shows that he objected to the ruling of the court sustaining the demurrer. On any appeal of such a case the demurree may insist upon his original pleading, and if the same be held to be good, he shall not be prejudiced by having made the amendment.

Reviser's Note:

Proposed subsection A. of § 8.01-273 replaces present § 8-99, but is essentially a codification of current Virginia practice under that section. Minor language changes have been made to the present section. Subsection B. incorporates the provisions of present § 8-120 with minor language modifications.

Present § 8-99, with its provision for a brief form of a general demurrer, has several objectives, e.g., to prevent reliance on an undisclosed objection to a mere matter of form which is capable of correction by amendment, and to prevent the demurrant from presenting, on appeal, grounds for the demurrer not relied on before the trial court. See *Morris* v. *White*, 146 Va. 553, 131 S.E.835(1926). However, under current practice, the specific grounds of a demurrer need not be stated unless a party to the action by motion, or the court, requires it. If a specific statement is not required, the objectives of the statute are circumvented.

The proposal requires the demurrant to state in writing the specific grounds of demurrer. Additionally, only those grounds stated in the demurrer will be considered; this codifies applicable case law. See *Virginia & Southwestern Railway Company* v. *Hollingsworth*, 107 Va. 359, 363-364(1907); *Klein* v. *National Toddle House Corp.*, 210 Va. 641(1970). Finally, to require a demurrant to state the grounds relied on is in keeping with the spirit of clearly informing the court and the parties to the action of the true nature of the claim or defense. See Rule of Court 1:4.

This proposed section does not change the current practice which permits a demurrer only to a bill, bill of review, cross bill, or other aggressive pleading. (See Lile's § 188.) By statute, a defensive pleading in equity is tested by a motion to strike. As a result of case law, such a pleading at law is similarly tested. No change is proposed in this practice. (See proposed § 8.01-274 and Reviser's Note thereto.)

The proposal makes no mention of the joinder in demurrer provided for in present § 8-99 which has long been in disuse in Virginia; the Revisers recommend the deletion of that provision. Furthermore, the reference to demurrers in criminal cases in present § 8-99 has been deleted as inappropriate for inclusion in the civil procedure title.

§ 8.01-274. Motion to strike defensive pleading in equity and at law; exceptions abolished.—Exceptions to answers for insufficiency are abolished. The test of the sufficiency of any defensive pleading in any suit in equity or action at law shall be made by a motion to strike; if found insufficient, but amendable, the court may allow amendment on terms. If a second answer is adjudged insufficient, the defendant may be examined upon interrogatories and committed until he answer them, or on motion of the plaintiff the court may strike out the answer and take the bill or motion, whichever the case may be, for confessed.

Reviser's Note:

Present § 8-122 provides that a challenge for insufficiency either of law or fact directed to a defensive pleading in equity must be made by "motion to strike" rather than by demurrer. However, the demurrer would be appropriate in an action at law. This distinction seems to be peculiar to Virginia practice.

The proposed section abolishes this dichotomy in procedure. A challenge to a defensive pleading, whether in equity or at law, shall be made by a motion to strike. When combined with proposed § 8.01-273, a uniform procedure for challenging pleadings in a civil action, whether in equity or at law, is established—i.e., agressive pleadings are to be challenged by the demurrer, and defensive pleadings by the motion to strike.

§ 8.01-275. When action or suit not to abate for want of form; what defects not to be regarded.—No action or suit shall abate for want of form where the motion for judgment or bill of complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the

pleading, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given.

Reviser's Note:

Proposed § 8.01-275 combines present §§ 8-102 and 8-109, and deletes the reference to a demurrer which reference is unnecessary. In accord with abolition of the plea in abatement, the exception made in present § 8-109 for demurrer to a plea in abatement has been abolished.

§ 8.01-276. Abolition of certain pleadings: demurrer to evidence and plea in abatement; motion to strike the evidence and written motion.—Demurrers to the evidence and pleas in abatement are hereby abolished.

Any matter that heretofore could be reached by a demurrer to the evidence may hereafter be subject to a motion to strike the evidence.

Any defense heretofore required or permitted to be made by plea in abatement may be made by written motion stating specifically the relief demanded and the grounds therefor. Except when the ground of such motion is the lack of the court's jurisdiction over the person of an indispensible party, or of the subject matter of the litigation, such motion shall be made within the time prescribed by Rules of the Supreme Court.

If the motion challenges the venue of the action, the movant shall state therein why venue is improperly laid and what place or places within the Commonwealth would constitute proper venue for the action.

Reviser's Note:

This proposed section abolishes two cumbersome and obsolete forms of procedure. The objectives of these two pleadings can be better served by simpler and more direct forms of pleading.

(1) Proposed § 8.01-276 abolishes the obsolete demurrer to the evidence of present § 8-140 and, in its place, recognizes the more common pleading of the motion to strike the evidence, Virginia's analogue to the federal motion for directed verdict. Substantively, however, this is not a drastic change in Virginia practice; it has long been the rule that a motion to strike the evidence is available whenever a demurrer to the evidence would lie. See *Green* v. *Smith*, 153 Va. 675 (1930). Since the motion to strike the evidence is utilized far more extensively than the demurrer to the evidence, the latter is hereby abolished.

(2) Proposed § 8.01-276 also abolishes pleas in abatement; instead, a written motion stating specifically the relief demanded and the grounds therefor is required. The specificity will permit an expeditious determination of the exact issues raised by the motion. (Accordingly present § 8-133, Exception to jurisdiction; plea in abatement, has been deleted.)

Being dilatory and technical in form, pleas in abatement are not looked upon with favor by Virginia courts. Most frequently, the plea has been used to question venue. See Burks Pleading & Practice, § 203, p. 333-334. Proposed Chapter 5 on Venue allows transfer of the action for improper venue rather than its dismissal; also, the irregularity of improper venue is deemed waived unless timely objection is made. See proposed §§ 8.01-264 and 8.01-265. In keeping with these changes, the method by which improper venue may be challenged has been simplified by the proposal.

Finally, the third paragraph recognizes the change made in Virginia law by Rule 3:9A (Joinder of Additional Parties) and its introduction of the concept of "indispensible party".

§ 8.01-277. Defective process; motion to quash; amendment.—A person, upon whom process to answer any action has been served, may take advantage of any defect in the issuance, service or return thereof by a motion to quash filed prior to or simultaneously with the filing of any pleading to the merits. Upon sustaining the motion, the court may dismiss the action or permit amendment of the process or its return as may seem just.

Reviser's Note:

Under present § 8-118 there is a problem in distinquishing between defective and invalid process which is further aggravated by the necessity of the pleader's using a plea in abatement when the process is defective and amendable and a motion to quash when the process is invalid and thus not amendable. Only one form of motion is needed to bring process questions before the court, and the revisers have adopted the motion to quash. The court will then decide either that the error in process or the return is curable by amendment and permit correction or that the error is not curable and that the action should therefore be dismissed.

§ 8.01-278. When plea of infancy not allowed; liability of infants for debts as traders; liability of infants on loans to defray expenses of education.—A. If any minor now transacting business or who may hereafter transact business as a trader fails to disclose (i) by a sign in letters easy to be read, kept conspicuously posted at the place wherein such business is transacted and (ii) also by a notice published for two weeks in a newspaper meeting the requirements of § 8.01-324, the fact that he is a minor, all property, stock, and choses in action acquired or used in such business shall as to the creditors of any such person be liable for the debts of such person, and no plea of infancy shall be allowed.

B. If any minor shall procure a loan upon the representation in writing that the proceeds thereof are to be expended by such minor to defray any or all expenses incurred by reason of attendance at an institution of higher education, which has been approved by any regional accrediting association which is approved by the United States Office of Education, or by reason of attendance at any school eligible for the guarantee of the State Education Assistance Authority, such minor shall be liable for the repayment thereof as though he were an adult, and no plea of infancy shall be allowed.

Reviser's Note:

This proposed section combines present §§ 8-135 and 8-135.1. In that minors under the age of sixteen are now attending institutions of higher education, the reference to age in present § 8-135.1 has been deleted. Otherwise, no change in substance is intended.

§ 8.01-279. When proof is unnecessary unless affidavit filed: writing; ownership; partnership or incorporation.—A. Except as otherwise provided by § 8.3-307, when any pleading alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting shall be required, unless it be denied by an affidavit accompanying the plea putting it in issue.

B. When any pleading alleges that any person, partnership, corporation, or unincorporated association at a stated time, owned, operated, or controlled any property or instrumentality, no proof of the fact alleged shall be required unless an affidavit be filed with the pleading putting it in issue, denying specifically and with particularity that such property or instrumentality was, at the time alleged, so owned, operated, or controlled.

C. When parties sue or are sued as partners, and their names are set forth in the pleading, or when parties sue or are sued as a corporation, it shall not be necessary to prove the fact of the partnership or incorporation unless with the pleading which puts the matter in issue there be filed an affidavit denying such partnership or incorporation.

Reviser's Note:

Proposed § 8.01-279 combines present §§ 8-114, 8-115, and 8-116 which dispense with the proof of certain facts alleged in pleadings unless the verity of such facts is put in issue by an affidavit. The only substantive change has been to expand subsection B. (formerly § 8-115) to include partnerships and unincorporated associations.

§ 8.01-280. Pleadings may be sworn to before clerk; affidavit of belief sufficient.—Any pleading to be filed in any court may be sworn to before the clerk or any officer authorized to administer oath thereof; and when an affidavit is required in support of any pleading or as a prerequisite to the issuance thereof, it shall be sufficient if the affiant swear that he believes it to be true.

Reviser's Note:

Proposed § 8.01-280 is present § 8-131 with minor language changes. The Revisers believe that this section continues to have utility.

§ 8.01-281. Pleading in the alternative.—A. A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence.

B. The court may, upon motion of any party, order a separate trial of any claim, counterclaim, cross-claim, or third-party claim, and of any separate issue or of any number of such claims.

Reviser's Note:

Present § 8-96.1 restricts pleading in the alternative to actions arising out of a motor vehicle accident. Proposed § 8.01-281 removes this restriction.

This proposal grants a party asserting any claim or defense the right to join alternative claims or defenses - i.e. to present alternative statements of the facts or alternative legal theories. Thus, if a plaintiff does not know which of two defendants - the gunsmith or the manufacturer of the weapon - was responsible for the malfunction which injured him, he may allege the act against either or both; if he does not know on what ground he may recover, he may allege the alternatives of breach of warranty and of negligence.

Although subsection A. permits the pleading of alternative sets of facts and theories of recovery and alternative defendants, separate trial of these claims may be appropriate, e.g. for convenience, to avoid prejudice, for judicial efficiency, to promote justice, etc. Thus, subsection B. provides that upon motion of any party the court may sever claims for a separate trial.

A Rule of Court may be necessary to specify how these alternative pleadings are to be set forth - e.g. in separate counts. See FRCP 8(e)(2).

Note: Class actions are not comtemplated under this proposal.

Article 3.

Particular Equity Provisions.

§ 8.01-282. Motion to strike evidence in chancery causes.—In any chancery cause when a defendant moves the court to strike out all of the evidence, upon any grounds, and such motion is overruled by the court, such defendant shall not thereafter be precluded from introducing evidence in his behalf, and the procedure thereon shall be the same and shall have the same effect as the motion to strike the evidence in an action at law.

Reviser's Note:

Use of the motion to strike the evidence in chaneery cases is relatively new and of limited utility. Generally, a party could accomplish the same result by moving for a decree on the pleadings and the evidence adduced, and this practice is still available in equity. Nevertheless, the motion to strike may be useful when a jury trial is allowed in equity such as under the provisions of present § 8-213 (Trial by jury and plea in equity) and § 55-153 (Removal of Cloud on Title). Only a minor language change is recommended in present § 8-122.1 in order to clarify the section.

§ 8.01-283. Effect of answer as evidence or affidavit; bills of discovery, etc.—Unless a complainant in a suit in equity shall, in his bill, request an answer or answer under oath to certain specified interrogatories, the answer of the defendant, though under oath, shall not be evidence in his favor, unless the cause be heard upon bill and answer only; but may, nevertheless, be used as an affidavit with the same effect as heretofore upon a motion to grant or dissolve any injunction, or upon any other incidental motion in the cause; but this section shall not apply to either pure bills of discovery or what are known as mixed bills of discovery, and shall not prevent a defendant from testifying in his own behalf, where he would otherwise be a competent witness.

Reviser's Note:

Although it is believed that present § 8-123 is obsolete due to modern discovery proceeding, the section codifies the modern practice of permitting the party defendant to testify, and it's retention is therefore recommended.

§ 8.01-284. Order for interrogatories after bill taken for confessed.—Although a bill be taken for confessed as to any defendant, the plaintiff may have an order for him to be brought in to answer interrogatories.

Reviser's Note:

This is present § 8-130 from which the last sentence has been deleted.

The following present Title 8 sections are to be deleted:

§ 8-98. Plea in abatement to be verified.

Reviser's Note:

The plea in abatement is abolished by proposed § 8.01-276.

§ 8-105. Unnecessary to aver jurisdiction to make profert.

Reviser's Note:

The provisions of this section are well incorporated into modern Virginia practice, thereby making the section unnecessary; however, by its deletion the Revisers do not mean to indicate that it is now necessary to aver jurisdiction.

The portion of the statute that relates to profert and oyer is taken care of by appropriate Rules of Court and the procedure for discovery; therefore it is repealed as being unnecessary.

§ 8-106. When place of contract, etc., need not be set forth.

Reviser's Note:

The Revisers believe this provision to be obsolete and to be entirely unnecessary as its provisions are well embodied in modern practice. Furthermore, venue is a matter for the defendant to assert as a defense and is not the plaintiff's problem.

By the deletion of this section the Commission does not wish to indicate that it is now necessary to make such pleading.

§ 8-111. Court may require particulars of claim or defense.

Reviser's Note:

The Revisers recommend that this section be deleted as unnecessary in view of Rule of Court 3:16.

Under the statute, if the bill of particulars is judged to be insufficient, the Court may only reject the evidence that is offered pursuant to that insufficient pleading.

Under the Rules of Court, the procedure is better outlined and sanctions are stricter. Under the Rules, if the bill of particulars ..ot adequate to meet the standard of the Rules of Court, then the Court can order another bill. Should that second bill of particulars fail to properly amplify the pleadings, the Court can dismiss them.

§ 8-119. Amendment of pleadings; immaterial errors or defects.

Reviser's Note:

The Revisers recommend the deletion of this provision in view of Rule 1:8; the Rule applies to all proceedings in courts of record and is not different in substances from the provisions of the statute.

§ 8-133. Exceptions to jurisdiction; plea in abatement.

Reviser's Note:

The plea in abatement is to be abolished by § 8.01-276.

§ 8-138.1. Transfer of cases from courts not having both law and equity jurisdiction to courts having such jurisdiction.

§ 8-138.2. Transfer of cases where court is abolished or jurisdiction removed or deprived.

§ 8-139. Enforcement of process of contempt.

Reviser's Note:

The manner is covered by other statutes. (See, e.g. §§ 18.2-456 and 19.2-11.)

§ 8-141. Control by court over proceedings in office.

Reviser's Note:

References to "the court in vacation" have been deleted.

Chapter 8.

Process.

Article 1.

General.

§ 8.01-285. Definition of certain terms for purposes of this chapter; action, person, process, return, sheriff, statutory agent.—For the purposes of this Chapter:

1. the term "action" shall be deemed to include all civil actions and proceedings whether at law, in equity, or statutory in nature and whether in courts of record or courts not of record;

2. the term "person" shall be deemed to include individuals, trusts, estates, partnerships, associations, orders, corporations, or any other legal or commercial entity subject to the provisions of this Chapter;

3. the term "process" shall be deemed to include notice;

4. the term "return" shall be deemed to include the term "proof of service;"

5. the term "sheriff" shall be deemed to include deputy sheriffs and such other persons as may be designated by §§ 15.1-48 and 15.1-77 of this Code;

6. the term "statutory agent" shall include:

a. The Commissioner of the Division of Motor Vehicles and the Secretary of the Commonwealth, and the successors of either, when appointed pursuant to §§ 8.01-308, 8.01-309, and 8.01-329 for the purpose of service of process on the nonresident defined in subdivision 2. of § 8.01-307; and

b. the Clerk of the State Corporation Commission, and his successor, when appointed pursuant to §§ 8.01-306, 13.1-11, 13.1-111, 13.1-210, and 13.1-274 for the purpose of service of process on foreign and domestic stock or non-stock corporations.

Reviser's Note:

In order to avoid undue repetition, proposed § 8.01-285 defines terms that are used repeatedly throughout this Chapter.

§ 8.01-286. Forms of writs.—Subject to the provisions of § 8.01-3 of this Code, the Supreme Court may prescribe the forms of writs, and where no such prescription is made, the forms of writs shall be the same as heretofore used.

Reviser's Note:

Proposed § 8.01-286 amends present § 8-43 to account for the changes made in proposed Chapter 1 of this Title.

§ 8.01-287. How process to be served.—Upon commencement of an action, process shall be served in the manner set forth in this chapter and by the Rules of the Supreme Court.

Reviser's Note:

Proposed § 8.01-287 restates present § 8-56.

§ 8.01-288. Process received in time good though neither served nor accepted.—Except for process commencing actions for divorce or annulment of marriage, process which has reached the person to whom it is directed within the time proscribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.

Reviser's Note:

Proposed § 8.01-288 qualifies § 8.01-287 by stating that any process which reaches the person to whom it is directed shall be sufficient even though it had not been served or accepted as specified in this chapter or the Rules of Court. Proposed § 8.01-288 amends present § 8-53 which applied this concept but only to individuals. Proposed § 8.01-288 applies to every type defendant, e.g., a corporation, not just to an individual, who is a defendant. The exception provided for divorce and annulment actions parallels the mandate of Rules of Court 2:4 and 2:9.

§ 8.01-289. No service of process on Sunday.—No civil process shall be served on Sunday, except in cases of persons escaping out of custody, or where it is otherwise expressly provided by law.

Reviser's Note:

Proposed § 8.01-289 is present § 8-4.2 without substantive change.

Article 2.

How Process Is Issued.

§ 8.01-290. Plaintiffs required to furnish full name and last known address of defendants, etc.—Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or in the papers the address or other identifying facts furnished. Failure to comply with the requirements of this section shall not affect the validity of any judgment.

Reviser's Note:

Proposed § 8.01-290 is present § 8-46.1 without significant change.

§ 8.01-291. Copies to be made.—The clerk issuing any such process unless otherwise directed shall deliver or transmit therewith as many copies thereof as there are persons named therein on whom it is to be served.

Reviser's Note:

This is present § 8-57 without change.

§ 8.01-292. To whom process directed and where executed.—Process from any court, whether original, mesne, or final, may be directed to the sheriff of, and may be executed in, any county, city, or town in the Commonwealth.

Reviser's Note:

Proposed § 8.01-292 modifies present law to allow unrestricted Statewide service of process. Present § 8-44 permits such service generally, but where venue is based on where the cause of action arises (present § 8-39), with certain exceptions present § 8-47 restricts process to the bailiwick of the court wherein the action is filed. This restriction is anachronistic and illogical. Thus it is eliminated by the proposal.

Note: Present §§ 8-47 and 8-47.1 are to be deleted.

Article 3.

Who and Where to Serve Process.

§ 8.01-293. Who may serve process.—The following persons shall be eligible to serve process:

1. the sheriff within such territorial bounds as described in § 8.01-295; or

2. any person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy, provided that such person shall not be eligible to serve process which commences divorce or annulment actions.

Reviser's Notes:

The proposal combines portions of present §§ 8-52 and 8-54.

The final proviso of proposed subdivision 2 relating to suits for annulment and divorce, retains from present § 8-54 only the requirement that service of original process in divorce suits be by the sheriff. Present law is changed to the extent that other service in divorce suits, e.g., notice for the taking of depositions where the other party is not represented by counsel, is not required to be served by the sheriff. The definition of the term "sheriff" in § 8.01-285 eliminates any need for the exception clause of present § 8-54 (i.e., the reference to present § 15.1-77).

§ 8.01-294. Sheriff to get from clerk's office process and other papers.—Every sheriff who attends a court shall, every day when the clerk's office is open for business, go to the office and receive all process, and other papers to be served by him, and give receipts therefor. For any failure to do so, he shall forfeit fifty dollars.

Reviser's Note:

The requirement that the sheriff go to the clerk's office to receive process every day that the clerk's office is open modifies the existing requirement of once per week in present § 8-49.

§ 8.01-295. Territorial limits within which sheriff may serve process in his official capacity; process appearing to be duly served.—The sheriff may execute such process throughout the political subdivision in which he serves and any contiguous county or city. If the process appears to be duly served, and is good in other respects, it shall be deemed valid although not directed to an officer, or if directed to any officer, though executed by some other person.

Reviser's Note:

Present § 8-50 permits only a county sheriff to execute process outside of the political subdivision in which he serves, and then only in cities contiguous to his county. Proposed § 8-50 amends the present section such that the territorial limits for service of process by a sheriff of either a county or a city is expanded to include "any contiguous county or city."

Article 4.

Who to be Served.

§ 8.01-296. Manner of serving process upon natural persons.—Process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. by delivering a copy thereof in writing to the party in person; or

2. by substituted service in the following manner:

a. if the party to be served be not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or

b. if such service cannot be effected under subitem a. of subdivision 2., then by posting a copy of such process at the front door of such place of abode, provided that not less than ten days before judgment by default may be entered, the party causing service mails to the party served a copy of the pleading and thereafter files in the office of the clerk of the court a certificate of such mailing;

c. the person executing such service shall note the date of such service on the copy of the process so delivered or posted under this paragraph 2.

3. If service cannot be effected under subdivisions 1. and 2. of this section, then by order of publication in appropriate cases under the provisions of §§ 8.01-316 through 8.01-320.

Reviser's Note:

To increase the likelihood of actual notice, proposed § 8.01-296 revises present § 8-51 to require mailing of process to the defendant's last known address, in addition to posting at his abode, when personal service or service on a family member cannot be obtained. This changes present § 8-51 which requires only the posting of process on the front door of the defendant's usual place of abode as a means of substituted service.

Otherwise, proposed § 8.01-296 essentially incorporates present § 8-51 and makes it clear that the section applies only to service of process on natural persons. Proposed subdivision 3. of § 8.01-296 interrelates the publication provisions of §§ 8.01-316 through 8.01-320 with the provisions of subdivisions 1. and 2. of § 8.01-296 regarding personal and substituted service and stipulates when service by publication is available on natural persons.

Service on the judgment debtor in garnishment proceedings is provided in § 8.01-511.

§ 8.01-297. Process on convict defendant.—In all actions against one who has been convicted of a felony and is confined in a local or regional jail or State correctional institution, process shall be served on such convict and, subject to § 8.01-9, a guardian ad litem shall be appointed for him. Such service may be effected by delivery to the officer in charge of such jail or institution whose duty it shall be to deliver forthwith such process to

the convict.

Reviser's Notes:

Proposed § 8.01-297 expands present § 8-55 (Service on Convicts in Divorce Actions) by providing for service on incarcerated felons in all actions.

Notice to a representative of a convict also is contemplated since the proposal requires appointment of a guardian ad litem unless the convict is represented by an attorney pursuant to present § 8-9 who would himself receive notice of the action. This procedure does not require service on the convict's committee and to this extent represents a departure from the requirement of present § 8-55 when alimony is sought from the convict.

§ 8.01-298. How summons for witness or juror served.—In addition to the manner of service on natural persons prescribed in § 8.01-296, a summons for a witness or for a juror may be served:

1. at his or her usual place of business or employment during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge of such business or place of employment; or

2. in the case of a juror, by mailing a copy of the summons by registered or certified mail, with return receipt requested, to the person being served, at least seven days prior to the day he is summoned to appear.

Reviser's Note:

Proposed § 8.01-298 is present § 8-58 without material change but supplemented by a portion of present § 8-208.16.

§ 8.01-299. How process served on domestic corporations generally.—Except as prescribed in § 8.01-300 as to municipal and quasi-governmental corporations, process may be served on a corporation created by the laws of this State as follows:

1. by personal service on any officer, director, or registered agent of such corporation; or

2. by substituted service on stock corporation in accordance with § 13.1-11 and on nonstock corporations in accordance with § 13.1-210.

Reviser's Notes:

Proposed § 8.01-299 revises present § 8-59. The proposal, coupled with Statewide service under proposed § 8.01-292, provides for personal service upon a corporate officer, director or registered agent anywhere in Virginia. The rationals for Statewide service in the Reviser's Note to proposed § 8.01-292 is equally applicable here.

Such service eliminates the process traps inherent in present § 8-59 where service is attempted on a corporate officer outside the bailiwick where the action is brought, *Periera* v. *Davis Financial Agency*, 146 Va. 215, 135 S.E. 823, (1926), or with respect to an insurance company, when such officer is outside the bailiwick where the chief office of the company is located.

Also the proposal provides for personal service on registered agents of domestic corporations as opposed to service on a variety of agents under present § 8-59. Limiting service to an officer, director or registered agent is deemed to be more rationally related to providing actual notice to a corporation than service on any of its agents.

By not listing in detail the titles of the corporate officers to be served, the proposal reduces emphasis on job titles and allows the court to define the term "officer" so as to insure that service complies with the constitutional requirement for service reasonably calculated to give actual notice and opportunity to defend.

The references to present §§ 13.1-11 and 13.1-210 are included to make it clear that such substituted service is an alternative method of service on domestic corporations. While not changing present law, the references clarify the interrelationship of the Process chapter of Title 8.01 and the Process provisions in Title 13.1.

§ 8.01-300. How process served on municipal and county governments and on quasi-governmental entities.—Notwithstanding the provisions of § 8.01-299 for service of process on other domestic corporations, process shall be served on municipal and county governments and quasi-governmental bodies or agencies in the following manner:

1. if the case be against a city or a town, on its mayor, manager, attorney, councilman, or trustee of such town or city; and

2. if the case be against a county, on its treasurer, attorney, Commonwealth's Attorney, or any supervisor, or commissioner of revenue of such county; and

3. if the case be against any political subdivision, or any other public governmental entity created by the laws of the Commonwealth and subject to suit as an entity separate from the Commonwealth, then on the director, commissioner, chief administrative officer, attorney, or any member of the governing body of such entity.

Provided that service under this section may be made by leaving a copy with the person in charge of the office of any officer designated in subdivisions 1. through 3.

Reviser's Note:

Proposed § 8.01-300 supersedes those provisions of present § 8-59 which specify how service should be made in suits against municipalities; the proposed section expands present § 8-59 by stipulating how service shall be made in suits against a county or against a public or quasi-governmental corporate body. The proposal clarifies present Virginia practice by removing doubt as to

how service is to be effected in such cases.

§ 8.01-301. How process served on foreign corporations generally.—Service of process on a foreign corporation may be effected in the following manner:

1. by personal service on any officer, director or on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth, and by personal service on any agent of a foreign corporation transacting business in the Commonwealth without such authorization, wherever any such officer, director, or agents be found within the Commonwealth; or

2. by substituted service on a foreign corporation in accordance with §§ 13.1-111 and 13.1-274, if such corporation is authorized to transact business or affairs within the Commonwealth; or

3. by substituted service on a foreign corporation in accordance with § 8.01-329 where jurisdiction is authorized under § 8.01-328, regardless of whether such foreign corporation is authorized to transact business within the Commonwealth; or

4. by order of publication in accordance with §§ 8.01-316 and 8.01-317 where jurisdiction in rem or quasi in rem is authorized, regardless of whether the foreign corporation so served is authorized to transact business within the Commonwealth.

Reviser's Notes:

Proposed § 8.01-301 clarifies the methods of service on foreign corporations. Generally, the proposal does not change present law; but, by consolidation and cross-reference, it indicates in a single section the interrelationship among present process provisions of Title 13.1 (§§ 13.1-111 and 13.1-274), of the Virginia Long-Arm Statute (§§ 8-81.2 and 8-81.3), for orders of publication (§§ 8-71 and 8-72), and for personal service in § 8-60. Proposed subdivision 4 of this section also seeks to delineate when service by publication is available on foreign corporations.

Proposed § 8.01-301 effects a substantive change in present law by allowing service in the alternative [i.e., at the option of the plaintiff under Title 13.1 (§§ 3.1-111 and 13.1-274) or under the Long-Arm Statute (§§ 8-81.2 and 8-81.3)] in cases where the prerequisites are met for long-arm jurisdiction over foreign corporations. This is contrary to present § 8-81.3 whereby substituted service is available only where service cannot otherwise be effected under the Code. The result of the present statutory scheme is that where present §§ 13.1-111 and 13.1-274 are applicable (i.e., to foreign corporations authorized to transact business within the State), substituted service can always be made thereunder on the clerk of the State Corporation Commission and, thus, service under present § 9-81.3 on the Secretary of the Commonwealth is never available in such cases. On the other hand, where the foreign corporation to be served is not authorized to do business within the State, service under §§ 13.1-111 and 13.1-274 is not available, and service on such foreign corporation can be had by vice on the Secretary of the Commonwealth under present § 8-3. One purpose of the proposed revision is to eliminate such

unnecessary intricacies in cases where long-arm jurisdiction applies by allowing the plaintiff to choose to effect service under either the Long-Arm Statute or Title 13.1. In addition, there seems to be no logical reason for designating a different statutory agent for foreign corporations solely upon the basis of whether or not such corporation is authorized to do business within this State.

Another substantive change comports with the change permitting Statewide service under proposed § 8.01-292. The proposal allows service on a corporation to be made personally anywhere within the State (1) on an officer, director, or registered agent of a foreign corporation authorized to do business in Virginia and (2) on an officer, director, or any agent of a foreign corporation which is not authorized to do business within Virginia. Thus, although proposed § 8.01-301 retains the distinction between registered and unregistered corporations, the effect of proposed § 8.01-292 is to make all personal service under proposed § 8.01-301 sufficient so long as the officer, director, registered or other agent is served within the State.

§ 8.01-302. Service of certain process on foreign or domestic corporations.—In addition to other provisions of this Chapter for service on corporations, process in attachment or garnishment proceedings, and notice by a creditor of judgment obtained and execution thereon issued in his favor, may be served on any agent of a foreign or domestic corporation wherever such agent may be found within the Commonwealth. Service so made shall constitute sufficient service upon such corporation; provided that notice of judgment obtained and execution issued shall comply in all respects to the provisions of §§ 8.01-502, 8.01-503 and 8.01-504.

Reviser's Note:

Present § 8-63 seeks to delineate the reach of process in garnishment (see also §§ 8.01-511 et seq.), attachment, and execution proceedings by defining the word "agent" in terms of a list of job titles which are themselves undefined and nonexclusive. The proposal provides that service on "any agent" is sufficient thereby leaving to the courts the interpretation of the term "agent". The proposed section allows the court the discretion and flexibility to go behind the job title and determine if service on an agent meets the constitutional requisite of being reasonably calculated to give actual notice to the principal of such agent.

§ 8.01-303. On whom process served when corporation operated by trustee or receiver.—When any corporation is operated by a trustee or by a receiver appointed by any court, in any action against such corporation, process may be served on its trustee or receiver; and if there be more than one such trustee or receiver, then service may be on any one of them. In the event that no service of process may be had on any such trustee or receiver, then process may be served by any other mode of service upon corporations authorized by this Chapter.

Reviser's Note:

Proposed § 8.01-303 updates present § 8-64. References to lessees in present § 8-64 are eliminated as no longer appropriate, since lessees should not be agents for the service of process on lessors. Service on the receiver or trustee of the Corporation is the primary means of obtaining jurisdiction, but if unavailable then process may be served by any other appropriate method. The only substantive change is the deletion of the last sentence of present § 8-64 which makes service by publication against a receiver or trustee the equivalent of personal service. Such a provision is deemed unnecessary and constitutionally suspect [i.e., *Pennoyer* v. *Neff*, 95 U.S. 714 (1878) held that no personal jurisdiction can be accorded by an order of publication].

§ 8.01-304. How process served on copartner or partnership.—Process against a copartner or partnership may be served upon a general partner, and it shall be deemed service upon the partnership and upon each partner individually named in the action, provided the person served is not a plaintiff in the suit and provided the matter in suit is a partnership matter.

Provided further that process may be served upon a limited partner in any proceeding to enforce a limited partner's liability to the partnership.

Reviser's Notes:

Proposed § 8.01-304 draws a distinction between general partnerships and limited partnerships. The proposal makes no substantive change to present § 8-59.1 but clarifies the manner in which service may be made on a limited partnership as provided by present § 50-69. Because the general partner controls the business, process must be served on a general rather than a limited partner unless the action is to enforce the limited partner's liability to the partnership.

Note: Present § 8-65 is deleted by this revision because of Statewide service under proposed § 8.01-292. The Reviser's Note to proposed § 8.01-302 is applicable here as to the reasons for not attempting to define the word "agent" in terms of job classifications.

§ 8.01-305. Process against unicorporated associations or orders, or unincorporated common carriers.—Process against an unincorporated (i) association, (ii) order, or (iii) common carrier, may be served on any officer, trustee, director, staff member or other agent.

Reviser's Note:

This section consolidates present §§ 8-66 and 8-67. The first sentence of present § 8-66 is eliminated and relocated in the chapter on parties. The advent of Statewide service under proposed § 8.01-292 and the availability of orders of publication under proposed § 8.01-316 make associated portions of present § 8-67 redundant. The terms listed in the proposed section are substituted for and inclusive of the job titles specified in present § 8-66.

§ 8.01-306. Same; principal office outside Virginia in business transactions in Virginia.—If an unincorporated (i) association, (ii) order, or (iii) common carrier has its principal office outside Virginia and transacts business or affairs in the Commonwealth, process may be served on any officer, trustee, director, staff member, or agent of such association, order, or carrier in the city or county in which he may be found or on the clerk of the State Corporation Commission, who shall be deemed by virtue of such transaction of business or affairs in the Commonwealth to have been appointed statutory agent of such association, order, or carrier upon whom may be made service of process. When served with such process, the clerk of the State Corporation Commission shall forthwith comply with § 8.01-312. Service, when duly made, shall constitute sufficient foundation for a personal judgment against such association, order or carrier. If service may not be had as aforesaid, then on affidavit of that fact an order of publication may be awarded as provided by §§ 8.01-316 and 8.01-317.

Reviser's Note:

While present § 8-66.1 provides that a record be kept, the proposed section keys to proposed § 8.01-312 which requires that an affidavit of compliance must be filed by the clerk of the State Corporation Commission in the office of the clerk of the court in which the action is pending. This change conforms with the procedure for proposed §§ 8.01-307 through 8.01-313.

§ 8.01-307. Definition of terms "motor vehicle" and "nonresident" in motor vehicle and aircraft accident cases.—For the purpose of §§ 8.01-308 through 8.01-313:

1. the term "motor vehicle" shall mean every vehicle which is self-propelled or designed for self-propulsion and every vehicle drawn by or designed to be drawn by a motor vehicle and includes every device in, upon, or by which any person or property is or can be transported or drawn upon a highway, except devices moved by human or animal power and devices used exclusively upon stationary rails or tracks.

2. the term "nonresident" includes any person who, though a resident of the Commonwealth when the accident or collision specified in § 8.01-308 or § 8.01-309 occurred, has been continuously outside the Commonwealth for at least sixty days next preceding the date when process is left with the Commissioner of the Division of Motor Vehicles or the Secretary of the Commonwealth and includes any person against whom an order of publication may be issued under the provisions of § 8.01-64.

See Reviser's Note to § 8.01-313.

§ 8.01-308. Service on Commissioner of Motor Vehicles as agent for nonresident motor vehicle operator.—Any operation in the Commonwealth of a motor vehicle by a nonresident, including those non-residents defined in subdivision 2. of § 8.01-307, either in person or by an agent or employee, shall be deemed equivalent to an appointment by such nonresident of the Commissioner of the Division of Motor Vehicles, and his successors in office, to be the attorney or statutory agent of such nonresident for the purpose of service of process in any action against him growing out of any accident or collision in which such nonresident, his agent, or his employee may be involved while operating motor vehicles in this Commonwealth. Acceptance by a nonresident of the rights and privileges conferred by Article 7 (§ 46.1-131, et seq.) of Chapter 3 of Title 46.1 shall have the same effect under this section as the operation of such motor vehicle, by such nonresident, his agent, or his employee.

See Reviser's Note to § 8.01-313.

§ 8.01-309. Service on Secretary of Commonwealth as agent of nonresident operator or owner of aircraft.—Any nonresident owner or operator of any aircraft that is operated over and above the land and waters of the Commonwealth or uses aviation facilities within the Commonwealth, shall by such operation and use appoint the Secretary of the Commonwealth as his statutory agent for the service of process in any action against him growing out of any accident or collision occurring within or above the Commonwealth in which such aircraft is involved.

See Reviser's Note to § 8.01-313.

§ 8.01-310. How service made on Commissioner and Secretary; appointment binding.—A. Service of process on either the Commissioner of the Division of Motor Vehicles as authorized under § 8.01-308 or on the Secretary of the Commonwealth as authorized under § 8.01-309, shall be made by leaving a copy of such process together with a fee of three dollars, plus one dollar for each party over one to be thus served, in the hands, or in the office, of such Commissioner or such Secretary and such service shall sufficient upon the nonresident.

B. Appointment of the Commissioner or Secretary as attorney or agent for the service of process on a nonresident under § 8.01-308 or § 8.01-309 shall be irrevocable and binding upon the executor or other personal representative of such nonresident:

Where a nonresident has died before the commencement of an action against him re[illegible]g an accident or collision under § 8.01-308 or § 8.01-309 shall be irrevocable and binding upon the executor or other personal representative or such nonresident; or

2. Where a nonresident dies after the commencment of an action against him regarding an accident or collision under § 8.01-308 or § 8.01-309, the action shall continue and shall be irrevocable and binding upon his executor, administrator, or other personal representative with such additional notice of the pendency of the action as the Court deems proper.

See Reviser's Note to § 8.01-313.

§ 8.01-311. Continuance of action where service made on Commissioner or Secretary.—The Court, in which an action is pending against a nonresident growing out of an accident or collision as specified in §§ 8-60.1 and 8-60.2, may order such continuances as necessary to afford such nonresident reasonable opportunity to defend the action.

See Reviser's Note to § 8.01-313.

§ 8.01-312. Effect of service on statutory agent; duties of such agent.—A. Service of process on the statutory agent shall have the same legal force and validity as if served within the Commonwealth personally upon the person for whom it is intended.

Provided that such agent shall forthwith send by registered or certified mail, with return receipt requested, a copy of the process to the person named therein and for whom the statutory agent is receiving the process.

Provided further that the statutory agent shall file an affidavit of compliance with this section with the papers in the action; this filing shall be made in the office of the clerk of the court in which the action is pending.

3. Unless otherwise provided by § 8.01-313 and subject to the provisions of § 8.01-

316, the address for the mailing of the process required by this section shall be that as provided by the party seeking service.

See Reviser's Note to § 8.01-313.

§ 8.01-313. Specific addresses for mailing by statutory agent.—A. For the statutory agent appointed pursuant to §§ 8.01-306, 8.01-308 and 8.01-309, the address for the mailing of the process as required by § 8.01-312 shall be the last known address of the nonresident or, where appropriate under subdivisions 1. or 2. of § 8.01-310 B., of the executor, administrator, or other personal representative of the nonresident; provided that upon the filing of an affidavit by the plaintiff that he does not know and is unable with due diligence to ascertain any post office address of such nonresident, service of process on the statutory agent shall be sufficient without the mailing otherwise required by this section. Provided further that:

1. in the case of a nonresident defendant licensed by the Commonwealth to operate a motor vehicle, the last address reported by such defendant to the Division of Motor Vehicles as his address on an application for or renewal of an operator's or chauffeur's license shall be deemed to be the address of the defendant for the purpose of the mailing required by this section if no other address is known, and, in any case in which the affidavit provided for in § 8.01-316 of this chapter is filed, such a defendant, by so notifying the Division of such an address, and by failing to notify the Division of any change therein, shall be deemed to have appointed the Commissioner of Motor Vehicles his statutory agent for service of process in an action arising out of operation of a motor vehicle by him in the Commonwealth, and to have accepted as valid service such mailing to such address; or

2. in the case of a nonresident defendant not licensed by the Commonwealth to operate a motor vehicle, the address shown on the copy of the report of accident required by § 46.1-400 filed by or for him with the Division, and on file at the office of the Division, or the address reported by such a defendant to any State or local police officer, or sheriff investigating the accident sued on, if no other address is known, shall be conclusively presumed to be a valid address of such defendant for the purpose of the mailing provided for in this section, and his so reporting of an incorrect address, or his moving from the address so reported without making provision for forwarding to him of mail directed thereto, shall be deemed to be a waiver of notice and a consent to and acceptance of service of process served upon the Commissioner of Motor Vehicles as provided in this section.

B. For the statutory agent appointed pursuant to the provisions of Title 13, the address for the mailing of the process as required by § 8.01-312 shall be the address of the corporation's registered office most recently filed with the State Corporation Commission.

Reviser's Note:

Proposed §§ 8.01-307 through 8.01-313 condense present §§ 8-67.1 through 8-67.4 without altering the substance of the present provisions. Though the revision has significantly altered the wording and organization of the present sections, proposed §§ 8.01-307 through 8.01-313 do not change the procedure or substance of present law.

§ 8.01-314. Service on attorney after entry of general appearance by such attorney.—When an attorney authorized to practice law in this Commonwealth has entered a general

appearance for any party, any process, order or other legal papers to be used in the proceeding may be served on such attorney of record. Such service shall have the same effect as if service had been made upon such party personally.

Provided that if such attorney objects by motion within five days after such legal paper has been so served upon him, the court shall enter an order in the proceeding directing the manner of service of such legal paper.

Reviser's Note:

The only significant change in present § 8-69 accomplished by proposed § 8.01-314 is the inversion of the present provision requiring five days notice before entry of an order directing service on the attorney of record so that, under this proposal, service on the attorney of record would be good without more unless such attorney objected within five days of receiving such service. Such an alteration is purely procedural, and allows the same amount of time for the attorney served to act, but requires service to be made only once rather than twice as under the present statute. Service would be made in accordance with Supreme Court Rule 1:12. The result would be a reduction in expense on the party seeking service with no prejudice to the rights of the party against whom service is sought.

§ 8.01-315. Notice to be mailed defendant when service accepted by another.—No judgment shall be rendered upon, or by virtue of, any instrument in writing authorizing the acceptance of service of process by another on behalf of any person who is obligated upon such instrument, when such service is accepted as therein authorized, unless the person accepting service shall have made and filed with the court an affidavit showing that he mailed or caused to be mailed to the defendant at his last known postoffice address at least ten days before such judgment is to be rendered a notice stating the time when and place where the entry of such judgment would be requested.

Reviser's Note:

This is present § 8-70 without change.

§ 8.01-316. Service by publication; when available.—An order of publication may be entered against a defendant in the following manner:

1. An affidavit by a party seeking service stating one or more of the following grounds:

a. that the party to be served is a foreign (i) corporation, (ii) unincorporated association, order, or unincorporated common carrier, or (iii) is a nonresident individual; o.

b. that diligence has been used without effect to ascertain the location of the party to be served; or

c. that the last known residence of the party to be served was in the county or city in which service is sought and that a return has been filed by the sheriff that the process has been in his hands for twenty-one days and that he has been unable to make service; or

2. In any action, when (i) a pleading states that there are or may be persons, whose names are unknown, interested in the subject to be divided or disposed of; (ii) briefly describes the nature of such interest; and (iii) makes such persons defendants by the general description of "parties unknown"; or

3. In any action, when (i) the number of defendants upon whom process has been served exceeds ten, and (ii) it appears by a pleading, or exhibit filed, that such defendants represent like interests with the parties not served with process.

Under subdivisions 1. and 2., the order of publication may be entered by the clerk of the court. Under subdivision 3. such order may be entered only by the court.

Every affidavit for an order of publication shall state the last known postoffice address of the party against whom publication is asked, or if such address is unknown, the affidavit shall state that fact.

Reviser's Note:

Proposed § 8.01-316 amends present § 8-71 in two primary respects: (1) in subdivision 1. a., foreign unincorporated associations, orders and common carriers are added to the list of parties which can be served by order of publication (cf., present § 8-66.1); (2) subdivision 1. c. of § 8.01-316 which consolidates present § 8-71 and Rule of Court 2:6(b) does not substantially change present practice, because the "twice delivered" requirement of present § 8-71 has been modified by Rule of Court 2:6 pursuant to present § 8-1.2.

There are two minor changes updating existing law: (1) the deletion of the paragraph in present § 8-71 which allows entry of orders of publication by the court in term or in vacation, and (2) the elimination of the requirement in equity suits or proceedings by petition for the party seeking service by publication against unknown parties to allege that there are parties unknown both by his bill or petition and by affidavit. In other respects, the substance of present § 8-71 is retained.

§ 8.01-317. What order of publication to state; how published; when publication in newspaper dispensed with.—Every order of publication shall give the abbreviated style of the suit, state briefly its object, and require the defendants, or unknown parties, against whom it is entered to appear and protect their interests on or before the date stated in the order which shall be no sooner than forty days after entry of the order of publication. Such order of publication shall be published once each week for four successive weeks in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct, and shall be posted at the front door of the courthouse wherein the court is held; also a copy of such order of publication shall be mailed to each of the defendants at the post office address given in the affidavit required by § 8.01-316. The clerk shall cause copies of the order to be so posted, mailed, and transmitted to the designated newspaper within ten days after the entry of the order of publication. Upon completion of such publication, the clerk shall file a certificate in the papers of the case that the requirements of this sction have been complied with. Provided, the Court may, in any case where deemed proper, dispense with such publication in a newspaper.

Reviser's Note:

Proposed § 8.01-317 revises present § 8-72 to require that the order of publication contain a specific date by which the party served is required to appear and defend his interests. The proposal clarifies the confusion under present § 8-72 which required the defendant to appear within 10 days after the last or fourth week of publication and not stipulating when such period is required to commence; instead, under the proposed section publication is required to commence within 10 days of, and the defendant served thereby is required to appear within 40 days of, the date the order of publication is entered. The proposal instills certainty where the present law gives none by giving the clerk of the court issuing such a publication order a method of computing the time allowed for appearance and by giving the party served by publication a definite date by which he must appear to defend his interest or suffer a default judgment.

The proposed section deletes references to "rule day" and "vacation" which are obsolete under current practice. Otherwise, no change in substance is intended, although the proposal revises the language of present § 8-72 in the interests of brevity and simplicity.

8.01-318. Within what time after publication case tried or heard; no subsequent publication required.—If after an order of publication has been executed, the defendants or unknown parties against whom it is entered shall not appear on or before the date specified in such order, the case may be tried or heard as to them. When the provisions of § 8.01-317, or, if applicable, the provisions of § 8.01-321, have been complied with, no other publication or notice shall thereafter be required in any proceeding in court, or before a commissioner, or for the purpose of taking depositions, unless specifically ordered by the court as to such defendants or unknown parties.

Reviser's Notes:

Proposed § 8.01-318 revises present § 8-73 to conform to alterations made by proposed § 8.01-317 and to conform with current practice. With regard to notice subsequent to the date specified in the order, the provisions of current Rule of Court 2:17 and present § 8-73 are retained and no other notice is required for default judgment unless specifically ordered by the court.

Note: Present § 8-73.1 is deleted by this proposal because the statute is superfluous in light of the discretion granted the court to dispense with publication altogether under proposed § 8.01-317.

§ 8.01-319. Publication of interim notice.—In any case in which a nonresident party or party originally served by publication has been served as provided by law, and notice of further proceedings in the case is required but no method of service thereof is prescribed either by statute or by order or rule of court, such notice may be served by publication thereof once each week for two successive weeks in a newspaper published or circulated in the city or county in which the original proceedings are pending; provided that if the original proceedings were instituted by order of publication, then the publication of such notice of additional or further proceedings shall be made in the same newspaper. A party,

who appears pro se in an action, shall file with the clerk of the court in which the action is pending a written statement of his place of residence and mailing address, and shall inform the clerk in writing of any changes of residence and mailing address during the pendency of the action. The clerk and all parties to the action may rely on the last written statement filed as aforesaid. The court in which the action is pending may dispense with such notice for failure of the party to file the statement herein provided for or may require notice to be given in such manner as the court may determine.

Reviser's Note:

The proposal substantially revises present § 8-76 and makes it plain that the publication relates only to interim notices after process has been legally served in the original action. Such interim notice has been principally utilized in divorce actions, and there should be a cross reference to this provision in Title 20.

§ 8.01-320. Personal service outside of Virginia equivalent to order of publication.—Personal service of a process may be made by any person qualified under subdivision 2. of § 8.01-293 on a nonresident defendant out of the Commonwealth and such service shall have the same effect, and no other, as an order of publication duly executed, or the publication of a copy of process under this chapter, as the case may be.

Any defendant served pursuant to the provisions of this section prior to January one, nineteen hundred seventy, (when under prior law affidavit required stating time and place of service and that the defendant was a nonresident) shall be deemed to have been a nonresident of the Commonwealth even though the return fails to state that the defendant so served was a nonresident of the Commonwealth.

Reviser's Note:

This section makes minor changes to present § 8-74, including the word "date" being substituted for the word "time."

Note: Present § 8-75 (Judgment, etc., in proceeding under preceding sections) has been deleted as unnecessary.

§ 8.01-321. Orders of publication in proceedings to enforce liens for taxes assessed upon real estate.—Whenever an order of publication is entered in any proceeding brought by any county, city or town to enforce a lien for taxes assessed upon real estate, such order need not be published more than once a week for two successive weeks. The party served by publication shall be required to appear and protect his interest by the date stated in the order of publication which shall be not less than twenty-four days after entry of such order. The publication shall in other respects conform to § 8.01-317, and when such publication so conforms, the provisions of § 8.01-318 shall apply.

Reviser's Note:

Proposed § 8.01-321 revises present § 8-77 to require that the order of publication in tax lien cases contain a specific date by which the party served thereby is required to appear and defend his

interests. The rationale in the Reviser's Notes to proposed § 8.01-317 is equally applicable here. The "24-day" period enunciated in this proposed section is the shortest period possible under present § 8-77 which requires the defendant to appear within ten days after the last or second week of publication.

§ 8.01-322. Within what time case reheard, and any injustice corrected.—If a party against whom service by publication is had under this chapter did not appear before the date of judgment against him, then such party or his representative may petition to have the case reheard, may plead or answer, and may have any injustice in the proceeding corrected within the following time and not after:

1. within two years after the rendition of such judgment, decree or order; but

2. if the party has been served with a copy of such judgment, decree, or order more than a year before the end of such two-year period, then within one year of such service.

For the purpose of subdivision 2. of this section, service may be made in any manner provided in this chapter except by order of publication, but including personal or substituted service on the party to be served, and personal service out of the Commonwealth by any person of eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy.

Reviser's Note:

This proposal makes no substantial change to present § 8-78. The enumeration of the alternative possibilities as to when a rehearing is available clarifies the impact of the present statutory scheme. The revision makes clear that personal service out of State is sufficient.

Present § 8-79 is to be deleted.

§ 8.01-323. In what counties city newspapers deemed published for purpose of legal advertisements.—Any newspaper published in a city adjoining or wholly or partly within the geographical limits of any county shall be deemed to be published in such county or counties as well as in such city, for the purpose of legal advertisements.

Reviser's Note:

This is present § 8-80 without change.

§ 8.01-324. Newspapers which may be used for legal notices and publications.—Whenever any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such newspaper, in addition to any qualifications otherwise required by law, shall:

1. have a bona fide list of paying subscribers;

2. have been published and circulated at least once a week for six months without interruption for the dissemination of news of a general or legal character; and

3. have a circulation reasonably calculated to give notice to the public or parties to whom such legal ordinances, resolutions, notices or advertisements are directed.

Reviser's Note:

The proposal simplifies present § 8-81: (1) the cumbersome language of the first sentence of present § 8-81 is eliminated. Instead the proposed section simply states whenever law requires publication in a newspaper, the section's provisions will obtain; (2) the requirement that the newspaper be printed in the English language is eliminated. If the party to be served by publication does not understand English, requiring publication in an English language newspaper is not deemed reasonably calculated to give him notice; (3) reference to postal laws and regulations as a basis for defining newspapers is deleted. Such postal regulations are subject to change and may have no functional relationship to the circulation of a newspaper or to the possibility of giving notice to the party to be served.

§ 8.01-325. Return by person serving process.—Unless otherwise directed by the court, the person serving process shall make return thereof promptly to the clerk's office stating thereon the date and manner of service and the name of the party served. Such proof of service shall be in the following manner:

1. if service by sheriff, the return of such sheriff as provided by the Rules of the Supreme Court; or

2. if service by any other person qualified under § 8.01-293, whether service made in or out of the Commonwealth, his affidavit of such qualifications as well as the date and manner of service and the name of the party served; or

3. in case of service by publication, the affidavit of the publisher or his agent giving the dates of publication and an accompanying copy of the published order.

Reviser's Note:

Proposed § 8.01-325 consolidates in a single section present provisions of present §§ 8-52 and 8-329 regarding the method of return of service. Though the language of subdivisions 1. and 2. of § 8.01-72 is more concise than that of present § 8-52, no change in substance is intended. The reference in subdivision 1. of proposed § 8.01-72 to the Rules of Court relates to Rules 2:5 and 3:4. Proposed subdivision 3. of § 8.01-72, in requiring an affidavit by the publisher or his agent, alters present § 8-329 which, though designating certain publication officials, provides that affidavit of any other person is also sufficient to evidence service by publication. By restricting proof of service by publication to the publisher or his agent and requiring a copy of the published order to accompany such affidavit, the proposed subsection provides a method of return which is better evidence of service than that provided by present § 8-329.

Notes: (1) While there is no reference to proposed subdivision 2. a. of § 8.01-296 in proposed § 8.01-325, under the former section substituted service by posting additionally requires the mailing of a copy of the process. This mailing must be properly documented in the return in order to be valid service.

(2) The third sentence of present § 8-44 providing for the time when process is returnable has been deleted as being unnecessary. See, e.g., Rule of Court 3:2 (second paragraph), present §§ 8-296 and 8-301.

§ 8.01-326. Return as proof of service.—No return shall be conclusive proof as to service of process. The return of a sheriff shall be prima facie evidence of the facts therein stated, and the return of a qualified individual under subdivision 2. of § 8.01-293 shall be evidence of the facts stated therein.

Reviser's Note:

Proposed § 8.01-326 alters present Virginia case law by abolishing the anachronistic verity rule and providing that a return by any qualified person shall constitute evidence of service and that a sheriff's return shall constitute prima facie evidence of service. The proposal overrules the line of cases represented by *Caskie* v. *Wortham*, 152 Va. 345, 147 S.E. 112 (1929) [Officer's return upon process, although it be false, is conclusive] . Most states have abolished verity rules on the basis that making a sheriff's return conclusive and, therefore, immune to attack is not logically defensible. The proposed trend joins this and makes returns no more than a rebuttable presumption of service in the case of the sheriff and merely evidence of service in the case of the qualified individual.

§ 8.01-327. Acceptance of service of process.—Service of process may be accepted by the person for whom it is intended by signing the proof of service, provided that service of process in divorce or annulment actions may be accepted only as provided by § 20-99.1.

Reviser's Note:

The proposal stipulates how service of process may be accepted. The proviso recognizes the specific requirement of present § 20-99.1 in suits for divorce or annulment (cf. present § 20-99).

Article 5.

Privilege from Civil Arrest.

§ 8.01-327.1. Definition of "arrest under civil process."—The terms "arrest under civil process" and "civil arrest" shall be synonymous and shall be the apprehending and detaining of a person pursuant to specific provisions of this Title to achieve the following:

1. a full and proper answer or response to interrogatories under §§ 8.01-274 and 8.01-506;

2. his obedience to the orders, judgments, and decrees of any court.

§ 8.01-327.2. Who are privileged from arrest under civil process.—In addition to the exemptions made by §§ 30-4, 30-6, 30-7, 30-8, 19.2-280, and 44-97, the following persons shall not be arrested, apprehended, or detained under any civil process during the times respectively herein set forth, but shall not otherwise be privileged from service of civil process by this section:

1. The President of the United States, and the Governor of the Commonwealth at all times during their terms of office;

2. The Lieutenant Governor of the Commonwealth during attendance at sessions of the General Assembly and while going to and from such sessions;

3. Members of either house of the Congress of the United States during the session of Congress and for fifteen days next before the beginning and after the ending of any session, and during any time that they are serving on any commitee or performing any other service under an order or request of either house of Congress;

4. A judge, grand juror or witness, required by lawful authority to attend any court or place, during such attendance and while going to and from such court or place;

5. Members of the national guard or naval militia while going to, attending at, or returning from, any muster or court-martial;

6. Ministers of the gospel while engaged in performing religious services in a place where a congregation is assembled and while going to and returning from such place; and

7. Voters going to, attending at, or returning from an election. Such privilege shall only be on the days of such attendance.

Reviser's Note:

Privilege from being taken into custody or imprisoned. In *Commonwealth* v. *Ronald*, 4 Call (8 Va.) 97 (1786), *Wheeler* v. *Flintoff*, 156 Va. 923 (1931), and *Davis* v. *Hackney*, 196 Va. 651 (1955), there are discussions and holdings of the privilege from service of civil process of judges, parties, and witnesses while attending and going to and from court; and of the exemption from attachment of the property of out-of-state witnesses. A West Virginia case, *Tikle* v. *Barton*, 142 W. Va. 188 touches on the invalidity of process served upon a non-resident lured into the State by trick in order to obtain service of process.

No attempt is made in the proposed legislation to repudiate the common law. With the advent of long-arm statutes, it will be easier for Virginia courts to acquire jurisdiction over non-resident defendants; and the highly developed use of discovery depositions and their introduction into evidence should also make the grant of immunity from service of process less important in securing the testimony of non-resident witnesses. It is recommended that the

development of the law in these areas can be left to the courts.

It is also believed that, until the situation in Virginia changes because of the advent of professional process servers or otherwise, it is unnecessary to prevent service of process under inappropriate circumstances, since it is assumed that sheriffs and their deputies will continue to use discretion in refraining from disturbing relgious services, court proceedings, voters in the booths, and others, where such disturbances would be out of order or constitute a comtempt of court.

The proposed legislation consequently deals only with actual arrests under civil process in a few limited situations which have been and are thought to be properly privileged.

Note: (a) Members of the General Assembly, clerks and other; military personnel. Existing legislation contained in Chapter 1 of Title 20, relating to exemption of members of the General Assembly and others engaged in the legislative process, is continued in effect at its present location in Title 30. A cross reference in the annotation to the proposed legislation should serve to alert one doing research on this subject to Title 30; and it would seem that no damage is done to the fundamental concept of placing all statutes relating to a particular subject in the same place in the Code, since most of the provisions concerning members of the General Assmebly are in Title
Section 44-97 contains provisions relating to arrest of military personnel in civil as well as criminal proceedings, and so is left in effect, and also left in the title dealing with military personnel.

(b) Privilege from service as a witness. The proposed legislation contains no privilege to anybody from being subpoenaed as a witness. Section 30-6 provides such privilege for the Lieutenant Governor, members of the General Assembly, the Clerks thereof and their assistants; but this is limited to the sessions of the General Assembly with a five day period before and after. Perhaps some limited privilege may be granted others, but it is felt that the matter could best be left for the time being to the discretion of attorneys initially and the Courts secondarily.

(c) *Existing § 8-4.3* is deleted because the revisers feel that it is unnecessary in light of the discretion implied in existing § 8-210.2 and Rule 4:10(a).

CHAPTER 9.

Personal Jurisdiction in Certain Actions.

Reviser's Note:

§§ 8.01-328 and 8.01-328.1. These sections are present §§ 8-81.1 and 8-81.2 without change.

§ 8.01-329. This is present § 8-81.3 which has been changed such that process under the long arm provisions may be served under the

provisions of Chapter 8 (Process), or on any Virginia agent of the defendant, or on the Secretary of the Commonwealth. This proposal changes present § 8-81.3 by removing any proscriptions with respect to service on the Virginia agent or the Secretary. Either of them may be served without first determining that there is no other applicable provision of the Code permitting service which would yield personal jurisdiction over the non-resident party.

Present § 8-81.4. Venue. This section is to be deleted since venue is incorporated in proposed § 8.01-262, subdivision 10.

§ 8.01-330. This is present § 8-81.5 without change.

§ 8.01-328. Person defined.—As used in this chapter, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State.

§ 8.01-328.1. When personal jurisdiction over person may be exercised.—A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

1. Transacting any business in this State;

2. Contracting to supply services or things in this State;

3. Causing tortious injury by an act or omission in this State;

4. Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

5. Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

6. Having an interest in, using, or possessing real property in this State; or

7. Contracting to insure any person, property, or risk located within this State at the time of contracting.

B. When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him; provided, however, nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this State over foreign corporations which are subject to service of process pursuant to the provisions of any other statute.

§ 8.01-329. Service of process or notice.—A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in Chapter 8 of this title in any other case in which personal jurisdiction is exercised over such a nonresident party, or process or notice may be served on any agent of such person in the county or city in this State in which he

resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary", who, for this purpose, shall be deemed to be the statutory agent of such person.

B. Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with the fee prescribed in § 14.1-103 in the hands of the Secretary or in his office in the city of Richmond, Virginia, and such service shall be sufficient upon the nonresident, provided that notice of such service and a copy of the process or notice are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the defendant or defendants at such defendant's or defendants' last known post-office address, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action.

§ 8.01-330. Jurisdiction on any other basis authorized.—A court of this State may exercise jurisdiction on any other basis authorized by law.

CHAPTER 10.

Dockets.

See end of chapter for Reviser's Notes.

§ 8.01-331. Entry of cases on current dockets.—When any civil action is commenced in a circuit court, or any such action is removed to such court and the required writ tax fees thereon paid, the clerk shall enter the same in either the "current law docket" or "current chancery docket" as deemed appropriate according to the case. These dockets may be either a substantial, well bound loose-leaf book or a visible card index. Each case shall be entered on a separate sheet, on which shall be entered:

1. The names of the parties,

2. The short style of the suit or action,

3. The names of the attorneys,

4. The nature of the suit or action,

5. The date filed,

6. The date of the issuance of the process,

7. A memorandum of the service of the process, and

8. A memorandum of the orders and proceedings in the case,

Or so much thereof as may be applicable to the case. The clerk may enter the clerk's fees in the case on such docket instead of in the fee book prescribed by § 14.1-168.

§ 8.01-332. Calling the current docket and notice of trial date by court.—The current docket shall be called at the beginning of each term of the court and at such intervals during the term as deemed necessary and directed by the court. Precedence shall be given to actions or motions in which the Commonwealth is interested. The court may for good cause take up any case out of its order. Notice of the date, time and place of trial or any

hearing or calling of the docket on a date other than the first day of the term shall be given by the court to all parties or their counsel of record.

§ 8.01-333. Calling the current chancery docket.—The current chancery docket shall be called at every term of the court and the cases disposed of as speedily as the business of the court will admit.

§ 8.01-334. Entries in dockets after adjournment of term; ended cases.—After the adjournment of every term of the court, the clerk shall enter in the dockets memoranda of the proceedings entered or had in each case on the dockets; and he shall transfer from each current docket all cases which have been ended and in which final orders have been entered to substantial, well bound loose-leaf books, to be known as the "ended law docket" and "ended chancery docket," respectively, in which the cases shall be indexed or alphabetically arranged.

§ 8.01-335. Certain cases struck from dockets after certain period; reinstatement.—A. Any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this section may be reinstated, on motion, and after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

B. Any court in which is pending a case wherein for more than five years there has been no order or proceeding, except to continue it, may, in its discretion, upon notice as in subsection A. herein order it to be struck from its docket; and it shall thereby be discontinued.

C. Upon the discontinuance or dismissal of any case under the provisions of this section where there has been a lis pendens filed and recorded in such action or suit the clerk shall, upon being furnished with the extract of judgment or a certified copy of the extract, note such discontinuance or dismissal on the margin of the page of the deed book where the lis pendens has been recorded.

Reviser's Notes:

Present §§ 8-160 and 8-165 have been combined in proposed § 8.01-331. The reference to "jurisdiction" has been deleted as unnecessary since all circuit courts now have general civil jurisdiction. Also, the term "action" has been inserted in lieu of "any complaint, petition, appeal, or warrant" and encompasses all cases removed from a district court to a circuit court. Finally, subdivision 5. has been changed to require the noting of the date on which the action was filed instead of the date docketed. The former is the more significant date.

Several changes have been made to present § 8-162 which is proposed § 8.01-332. The precedence given to actions of forcible or unlawful entry and detainer by the circuit court has been abolished. However, the precedence granted proceedings in which the Commonwealth is interested is retained so that criminal cases may be heard first. Also, proposed § 8.01-332 requires the court to

provide notice of a hearing or of calling the docket if such is to take place on a date other than the first day of the term.

Present § 8-163, which permits a court located in a city of more than 100,000 people to call the docket "at such intervals as may be directed by an order of court", is to be deleted. Proposed § 8.01-332 makes this section unnecessary because it gives all courts this discretion.

Proposed § 8.01-333 is present § 8-167 without change.

Proposed § 8.01-334 combines present §§ 8-164 and 8-168. Although minor language changes have made to these sections, no change in the substance is intended.

The subject matter of present § 8-154 relates to dockets; therefore, it has been removed from present Chapter 7 and located here as proposed § 8.01-335. The present language has been altered to better distinguish between a dismissal and a discontinuance, when each is available, and the effect of each.

Present § 8-161 (Separate volumes for unmatured law cases) and present § 8-166 (Separate volumes for unmatured chancery cases). To be deleted.

Reviser's Note:

It is believed that the maintenance of these separate volumes is unnecessary.

Chapter 11.

Juries.

Note: Present § 19.2-260 of the Criminal Procedure Title effective October 1, 1975 provides that trial by jury in criminal cases shall be regulated by the provisions of Title 8 unless specifically provided otherwise within Article 4 of Title 19.2. Thus, the reference to criminal cases in many provisions of this chapter. (See §§ 19.2-260 to 19.2-264.)

Article 1.

When Jury Trial May Be Had.

§ 8.01-336. Jury trial of right; waiver of jury trial; court ordered jury trial; trial by jury of plea in equity; issue out of chancery.—A. The right of trial by jury as declared in § 11, Article I, of the Constitution of this Commonwealth and by statutes thereof shall be preserved inviolate to the parties.

B. Waiver of jury trial.—In any action at law in which the recovery sought is greater than one hundred dollars, exclusive of interest, unless one of the parties demand that the

case or any issue thereof be tried by a jury, or in a criminal action in which trial by jury is dispensed with as provided by law, the whole matter of law and fact may be heard and judgment given by the court.

C. Court ordered jury trial.—Notwithstanding any provision in this Code to the contrary, in any action at law in which there has been no demand for trial by jury by any party, a circuit court may on its own motion direct one or more issues, including an issue of damages, to be tried by a jury.

D. Trial by jury of plea in equity.—In any action in which a plea has been filed to an equitable claim, and the allegations of such plea are denied by the plaintiff, either party may have the issue tried by jury.

E. Issue out of chancery.—In any suit in equity, the court may, of its own motion or upon motion of any party, supported by such party's affidavit that the case will be rendered doubtful by conflicting evidence of another party, direct an issue to be tried by a jury.

Reviser's Note:

Proposed § 8.01-336 draws upon provisions of present §§ 8-211 (When, in an action at law, there may be trial by jury), 8-212 (Trial of issues, or inquiry of damages, by jury), 8-213 (Trial by jury of plea in equity), 8-214 (Trial of issue out of chancery) and 8-208.21 (Waiver of jury trial)..., as well as FRCP 38 (Jury trial of right), to define the role of the jury trial in a civil action in this Commonwealth.

A. Jury trial of right. Subsection A. generally adopts the wording of FRCP 38(a), but substitutes appropriate reference to the "Commonwealth" in lieu of "the United States."

The proposal cites § 11, Article I, of the Virginia Constitution. This constitutional provision recognizes the historical background of the right to trial by jury. In *Bowman* v. *Virginia State Entomologist*, the Virginia Supreme Court stated:

> "It has long been well settled that neither the State nor federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these Constitutions were adopted." 128 Va. 351 (1920)

Therefore, if an issue was tried by jury at common law in 1776 when Virginia adopted its first constitution, the right to jury trial of those issues is preserved.

Within the Constitutional framework, any change in this right can only be made by the legislature; thus the reference in the proposed section to statutes of the Commonwealth. The General Assembly, in its creation of a new action or remedy, has wide discretion and latitude to determine whether the right to a jury trial will be granted. Generally, if the right addressed by an action is not analogous to a common law action, the right to a jury trial can be denied. If the General Assembly fails to indicate how this new

action or remedy is to be tried, the courts look to the nearest historical analogy to determine whether there is a right to a jury trial (See Fleming James, Jr., *Civil Procedure*, § 8.2.)

Problems in determining the jury trial right arise infrequently. Charles Alan Wright, addressing the historical test of the Seventh Amendment to the U.S. Constitution, states:

> "But the number of cases in which existence of a jury right will be difficult to determine is very small. In many cases jury trial will not be demanded. Where it is demanded, in most instances it will be obvious that there is or is not a right to trial by jury. Thus the vast and controversial literature that has developed as to the scope of the jury right is, fortunately, not in proportion to the practical importance of the problem in the actual working of the courts." (See, Wright, *Federal Courts*, § 92, p. 405.)

B. Waiver of jury trial. This proposed subsection combines present § 8-211 with § 8-208.21 (which became effective October 1, 1975). If a civil action or an issue of the action is triable of right by jury under subsection A., unless a party to such action requests that the action or issue be so tried he waives that right. The twenty dollar amount in present § 8-211 has been increased to one hundred in the proposal.

The Revisers believe proposed § 8.01-336 accomplishes everything that can now be accomplished under present §§ 8-211, 8-212, 8-213 and 8-214. Subsection D. incorporates present § 8-213, (Trial by Jury of Plea in Equity) with only minor language changes. Subsection E. incorporates present § 8-214 (Issue out of Chancery). Again, only minor language changes were made.

Article 2.

Jurors.

§ 8.01-337. Who liable to serve as jurors.—All citizens over eighteen years of age who shall have been residents of the Commonwealth one year, and of the county, city or town in which they reside six months next preceding their being summoned to serve as such, and competent in other respects, except as hereinafter provided, shall remain and be liable to serve as jurors. Military personnel of the United States army, air force or navy shall not be considered residents of this Commonwealth by reason of their being stationed herein.

Reviser's Note:

The term "State" has been replaced with "Commonwealth". Otherwise no change is made to present § 8-208.2.

§ 8.01-338. Who disqualified.—The following persons shall be disqualified from serving as jurors:

1. Persons adjudicated mentally incompetent;

2. Persons convicted of treason or a felony; or

3. Any other person under a disability as defined in § 8.01-2 and not included in subdivisions 1. or 2. above.

Reviser's Note:

Subdivision 3. of present § 8-208.3 has been deleted as obsolete. Added is proposed subdivision 3. which disqualifies as jurors all persons under a disability as defined in proposed § 8.01-2.

§ 8.01-339. No person eligible for whom request is made.—No person shall be eligible to serve on any jury when he, or any person for him, solicits or requests a jury commissioner to place his name in a jury box or in any way designate such person as a juror.

Reviser's Note:

No change is made in present § 8-208.4.

§ 8.01-340. No person to serve who has case at that term.—No person shall be admitted to serve as a juror at a term of a court during which he has any matter of controversy which has been or is expected to be tried by a jury during the same term.

Reviser's Note:

No change is made in present § 8-208.5.

§ 8.01-341. Who are exempt from jury service.—The following shall be exempt from serving on juries in civil and criminal cases:

1. The President and Vice-President of the United States,

2. The Governor and Lieutenant Governor of the Commonwealth,

3. The members of both houses of Congress and their respective officers,

4. The members of the General Assembly,

5. Licensed practicing attorneys,

6. Licensed practicing physicians,

7. Licensed practicing optometrists,

8. Licensed practicing dentists,

9. Officers of any court, provided such officers are in actual service as such and

receive compensation therefor,

10. Train dispatchers while in actual service as such, and trainmen employed in train service,

11. Maritime and commercial airline pilots licensed under the laws of the United States or of the Commonwealth,

12. Customhouse officers,

13. Mariners actually employed in maritime service,

14. The clerks of both houses of the General Assembly,

15. The judge of any court and members of the State Corporation Commission,

16. All ministers of the gospel licensed to preach according to the rules of their sect,

17. Sheriffs, deputy sheriffs, State Police, and police and magistrates in counties, cities and towns,

18. All persons while actually engaged in harvesting or securing grain, fruit, potatoes or hay or in cutting or securing tobacco, and, during the tobacco marketing season at any tobacco warehouse, warehousemen and persons employed at such warehouse or engaged in purchasing or handling of tobacco thereat,

19. Keepers of the jails of counties, cities and towns,

20. Superintendents and employees of public hospitals and mental hospitals,

21. The superintendent of the penitentiary and his assistants and the persons composing the guard,

22. All professors, tutors and pupils of public or private institutions of learning, while such institutions are actually in session,

23. Ferrymen actually employed in that capacity,

24. Undertakers who pay a license tax as such, and their regularly employed assistants,

25. Persons on active duty with the armed forces of the United States or the Commonwealth,

26. Any persons who notify the jury commissioners within the time and in the manner prescribed by § 8.01-345 that they have legal custody of and are necessarily and personally responsible for a child or children sixteen years of age or younger or a person having a physical or mental impairment requiring continuous care by them during normal court hours,

27. Any person over seventy years of age,

28. All persons who hold certificates to practice and are practicing veterinary medicine or surgery,

29. Regularly employed members of any fire department of any political subdivision

or governmental agency,

30. Registered pharmacists while engaged in the practice of their profession.

The citizens of Tangier Island in Accomack County and of Broad Water and Cobb Islands in the county of Northampton shall be exempt from jury service, except service on grand juries.

Reviser's Note:

No change is made to present § 8-208.6 except for the insertion of "magistrates" for "justice of the peace" in subdivision 17. However, it should be noted that, as under present law, the exemption granted by this statute is not absolute. (See, *Burks Pleading & Practice*, § 265.)

§ 8.01-342. Restrictions on amount of jury service permitted.—A. The jury commissioner shall not include on the jury list provided for in § 8.01-345 the name of any person who has been called and attended court for jury duty at any time during the period of one year next preceding the date of completion of such jury list.

B. Should such person who has been called for jury duty serve as a juror in the trial of any case, either civil or criminal, at any one term of a court, then he shall not be permitted to serve as a juror in any civil or criminal case, at any other term of that court during the one-year period set forth in subsection A. of this section, unless all the persons whose names are in the jury box have been drawn to serve during such one-year period, and provided that such person shall be permitted to serve on any special jury ordered pursuant to § 8.01-362 and on any grand jury.

Reviser's Note:

Proposed subsections A. and B. of § 8.01-342 combine the last paragraph of present § 8-208.10 and the first paragraph of present § 8-208.7, respectively. Minor language changes have been made for clarity and are not intended to alter the substance of the present sections.

The last paragraph of present § 8-208.7 has been combined with certain provisions in present §§ 8-208.27 and 8-208.29 and appears as proposed § 8.01-352 (Objections to jury lists irregularities or to any legal disability; effect thereof).

Article 3.

Selection of Jurors.

§ 8.01-343. Appointment of jury commissioners.—The judge of each circuit court in which juries are impaneled shall, prior to the first day of October in each year, appoint for the next ensuing year ending on the following first day of October not less than two nor more than nine persons as jury commissioners, who shall be competent to serve as jurors

under the provisions of this chapter, and shall be citizens of intelligence, morality, and integrity. No practicing attorney-at-law, however, shall be appointed as a jury commissioner. Such appointment shall be certified by the judge to the clerk of the court for which the appointment is made, who shall enter the same on the common law order book of such court. No jury commissioner shall be eligible to reappointment for at least two years after the expiration of the year for which he was appointed. For the purpose of this section, the two divisions of the Circuit Court of the city of Richmond shall be deemed to be separate courts.

Reviser's Note:

The term "court of record" in present § 8-208.8 has been replaced with "circuit court".

§ 8.01-344. Notification of jury commissioners; their oath.—Such commissioners shall be immediately notified of their appointment by the clerk, and before entering upon the discharge of their duties shall take and subscribe an oath or affirmation before the clerk of such court in the following form: "I do solemnly swear (or affirm) that I will honestly, without favor or prejudice, perform the duties of jury commissioner during the year; that in selecting persons to be drawn as jurors, I will not select any person I believe to be disqualified or exempt from serving as a juror; that I will select none whom I have been requested to select; and that in all my selections I will endeavor to promote only the impartial administration of justice."

Reviser's Note:

No change is made to present § 8-208.9.

§ 8.01-345. Lists of qualified persons to be prepared by jury commissioners; random selection process.—The commissioners shall, not later than the first day of December following their appointment, submit a list showing the names, addresses and, if available, the occupations of such of the inhabitants of their respective counties or cities as are well qualified under § 8.01-337 to serve as jurors and are not excluded or exempt by §§ 8.01-338 to 8.01-342, such list to become effective January first following. The number of persons selected for each court shall be as specified in the order appointing the commissioners.

When authorized by the chief judge of the circuit, the jury commissioners may utilize random selection techniques, either manual, mechanical or electronic, using a current voter registration list and other such lists as may be approved by the judge, to select the jurors to be placed on the master jury list. After such random selection, the commissioners shall apply such statutory exceptions and exemptions as may be applicable to the names so selected. When such random selection method is used, the judge shall promulgate such procedural rules as are necessary to ensure the integrity of the random selection process and to ensure compliance with other provisions of law with respect to jury selection and service.

Substantially the same percentage of population shall be taken from each magisterial district, borough, ward or precinct if there be no wards. The inhabitants of a city, however, which borders in whole or in part on a county shall not be placed on the lists for such county except in those cases in which the circuit court of the county and the circuit court of the city have concurrent jurisdiction of both civil and criminal cases arising within the

territorial limits of such county or city and in such cases the city shall be considered as a magisterial district, or the equivalent of a magisterial district, of the county for the purpose of the jury list.

Reviser's Note:

This is present § 8-208.10, the last paragraph of which has been relocated in proposed § 8.01-342.

§ 8.01-346. Lists to be delivered to clerk and safely kept by him; addition and removal of names.—The list so prepared shall be delivered to the clerk of the court to be safely kept by him. The judge may from time to time order the commisioners to add to the list such additional number of jurors as the court shall direct and to strike therefrom any who have become disqualified or exempt.

Reviser's Note:

No change is made to present § 8-208.11.

§ 8.01-347. How names put in jury box.—When such list is made out, the commissioners shall cause all the names thereon to be fairly written, each on a separate paper or ballot, and shall so fold or roll up the ballots that they will resemble each other as nearly as may be and the names written thereon will not be visible on the outside, and shall deposit the ballots with the list in a secure box prepared for that purpose. Such box shall be locked and safely kept by the clerk of such court and opened only by the direction of the judge thereof.

Reviser's Note:

No change is made in present § 8-208.12.

§ 8.01-348. How names of jurors drawn from box.—Prior to or during any term of court at which a jury may be necessary, the clerk, in the presence of the judge or, in his absence, a commissioner in chancery appointed for the purpose by the judge, shall, after thoroughly mixing the ballots in the box, openly draw therefrom such number of ballots as are necessary for the trial of all cases during the term or as the judge shall direct; provided, however, that no such commissioner shall be eligible to witness the drawing of a jury to be used in the trial of any case in which he shall be interested as attorney or otherwise.

Reviser's Note:

No change is made to present § 8-208.13.

§ 8.01-349. Notations on ballots drawn; return to box; when such ballots may be drawn again.—If any ballot drawn from the box shall bear the name of a person known by the clerk or other person attending the drawing to be deceased, exempt or disqualified by law, not a resident of the county or city, or physically or mentally incapacitated for jury

service, an appropriate notation on the ballot, as well as opposite the name of such person on the jury list, shall be made and the ballot shall be placed by the clerk in an envelope kept for that purpose. The other ballots, marked "drawn," shall be placed in a separate envelope and a notation of the date of the drawing shall be made on the jury list opposite the name of each juror drawn. The envelope shall be kept in the box. After all ballots have been drawn from the box, the ballots marked "drawn" may be again drawn subject to the provisions hereof applying to the original drawing.

Reviser's Note:

No change is made in present § 8-208.14.

§ 8.01-350. Selection of jurors by mechanical or electronic techniques for the term of court.—Notwithstanding the provisions of §§ 8.01-347 through 8.01-349, if random selection of jurors has been made by mechanical or electronic techniques as provided by § 8.01-345, the chief judge may order that selection of the list of jurors necessary for the trial of all cases during any term of court for that year be made mechanically or electronically.

Reviser's Note:

No change is made in present § 8-208.14:1.

§ 8.01-351. Preparation and disposition of list of jurors drawn.—The clerk shall make and sign a list of the names on the ballots in alphabetical order showing the address and occupation of each juror, and shall deliver an attested copy of the list to the sheriff. The list shall be signed also by the judge or the commissioner in chancery appointed by the judge. The list shall be available in the clerk's office for inspection by counsel in any case to be tried by a jury during the term.

Reviser's Note:

No change is made in present § 8-208.15.

§ 8.01-352. Objections to jury lists irregularities or to any legal disability; effect thereof.—A. Prior to the jury being sworn, the following objections may be made without leave of court: (i) an objection specifically pointing out the irregularity in any list or lists of jurors made by the clerk from names drawn from the jury box, or in the drawing, summoning, returning or impaneling of jurors or in copying or signing or failing to sign the list, and (ii) an objection to any juror on account of any legal disability; after the jury is sworn such objection shall be made only with leave of court.

B. Unless objection to such irregularity or disability is made pursuant to subsection A. herein and unless it appears that the irregularity was intentional or that the irregularity or disability be such as to probably cause injustice in a criminal case to the Commonwealth or to the accused and in a civil case to the party making the objection, then such irregularity or disability shall not be cause for summoning a new panel or juror or for setting aside a verdict or granting a new trial.

Reviser's Note:

Proposed § 8.01-352 consolidates provisions found in present §§ 8-208.7, 8-208.27, and 8-208.29. Under the proposed section, objections to any irregularity in the jury list etc. or to any legal disability generally must be made before the jury is sworn. Thereafter, such objections may be made only with leave of court. This alters present § 8-208.27 which permits objection only before the jury is sworn. Likewise, the failure to make such objections has the same effect. Also this places an "exception" (objection) to a legal disability of present § 8-208.29 on the same footing as an objection to jury list irregularity of present § 8-208.27. The term "legal disability" used herein is meant to incorporate all exemptions or disqualifications from jury service found in present §§ 8-208.3 through 8-208.7.

Finally, the provision in present § 8-208.7 relating to reversible error has been deleted. The revisers do not believe that violation of the proscription in that section - i.e., service as a juror twice within a one-year period - is so serious that it should "of itself" constitute reversible error.

Article 4.

Jury Service.

§ 8.01-353. Notice to jurors; objection to notice.—A. The sheriff shall notify the jurors on the list, or such number of them as the judge may direct to appear in court on such day as the court may direct. Such notice shall be given a juror as provided by § 8.01-298. Verbal direction given by the judge, or at his direction, to a juror who has been given notice as hereinbefore provided that he appear at a later specified date, shall be a sufficient notice. Any notice given as provided herein shall have the effect of an order of court. No particular time in advance of the required appearance date shall be necessary for verbal notice hereunder, but the court may, in its discretion, excuse from service a juror who claims lack of sufficient notice.

B. No judgment shall be arrested or reversed for the failure of the record to show that there was service upon a juror of notice to appear in court unless made a ground of exception in the trial before the jury is sworn.

Reviser's Note:

Proposed § 8.01-298 provides for service on jurors; therefore it is referenced in this section and the provisions in present § 8-208.16 pertaining to how service shall be made have been deleted. The second paragraph adopts the service of notice irregularity provision found in present § 8-208.27; it has been located here because it is more closely related to the subject of this section. Also, the reference "for term" has been deleted; instead the court is to prescribe the day jurors are to appear in court.

§ 8.01-354. "Writ of venire facias" defined.—The term "writ of venire facias" for the purpose of this chapter shall be construed as referring to the list or lists of jurors made by the clerk from names drawn from the jury box and notice to appear in court served or mailed as provided herein shall be equivalent to summoning such juror in execution of a writ of venire facias.

Reviser's Note:

This is present § 8-208.24 which has been relocated to follow those sections to which it applies.

§ 8.01-355. Jurors on list to be used for trial of cases during term; discharge or dispensing with attendance of jurors; drawing additional jurors.—Jurors whose names appear in the list provided for under §§ 8.01-348, 8.01-350 and 8.01-351 shall be used for the trial of cases, civil and criminal, to be tried during the term. The judge shall direct the selection of as many jurors as may be necessary to appear for the trial of any case. Any court shall have power to discharge persons summoned as jurors therein, or to dispense with their attendance on any day of its sitting. When by reason of challenge or otherwise a sufficient number of jurors summoned cannot be obtained for the trial of any case, the judge may select from the names on the jury list provided for by § 8.01-345 the names of as many persons as he deems necessary and cause them to be summoned to appear forthwith for the trial.

Reviser's Note:

No change is made in present § 8-208.17.

§ 8.01-356. Failure of juror to appear.—If any juror who has been given due notice to appear in court shall fail to do so without sufficient excuse, he shall be fined not less than twenty-five dollars nor more than one hundred dollars.

Reviser's Note:

No change is made in present § 8-208.18.

§ 8.01-357. Selection of jury panel.—On the day on which jurors have been notified to appear, jurors not excused by the court shall be called in such manner as the judge may direct to be sworn on their voir dire until a panel free from exceptions shall be obtained. Upon motion of any party the jurors shall be selected by lot. The remaining jurors may be discharged or excused subject to such orders as the court shall make.

Reviser's Note:

No change is made in present § 8-208.19.

§ 8.01-358. Voir dire examination of persons called as jurors.—The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is

related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

Reviser's Note:

The first paragraph of this proposed section makes no change to present § 8-208.28. The second paragraph is present § 8-215 without change.

§ 8.01-359. Trial; Numbers of jurors in civil cases; how jurors selected from panel.—A. Five persons from a panel of eleven shall constitute a jury in a civil case when the amount involved exclusive of interest and costs is less than five thousand dollars. Seven persons from a panel of thirteen shall constitute a jury in all other civil cases except that when a special jury is allowed, twelve persons from a panel of twenty shall constitute the jury.

B. The parties or their counsel, beginning with the plaintiff, shall alternately strike off one name from the panel until the number remaining shall be reduced to the number required for a jury.

C. In any case in which there are two or more parties on the same side, if counsel or the parties are unable to agree on the full number to be stricken, or, if for any other reason a party or his counsel fail or refuse to strike off the full number of jurors allowed such party, the clerk shall place in a box ballots bearing the names of the jurors whose names have not been stricken and shall cause to be drawn from the box such number of ballots as may be necessary to complete the number of strikes allowed the party or parties failing or refusing to strike. Thereafter, if the opposing side is entitled to further strikes, they shall be made in the usual manner.

D. In any civil case in which the consent of the plaintiff and defendant shall be entered of record, it shall be lawful for the plaintiff to select one person who is eligible as a juror and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall constitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven.

Reviser's Note:

No changes are recommended in subsections (2), (3), (4), and (5) of present § 8-208.21. The one thousand dollar amount in present subsection (2) has been changed to five thousand dollars in proposed subsection A. Subsection (1) of present § 8-208.21 has been incorporated into proposed § 8.01-336 B. and C.

§ 8.01-360. Alternate jurors when trial likely to be protracted.—Whenever in the opinion of the court the trial of any criminal or civil case is likely to be a protracted one,

the court may, immediately after the jury is impaneled and sworn, direct the selection of one or two additional jurors to be known as "alternate jurors" who shall be drawn from the same source and in the same manner and have the same qualifications, and be considered and treated in every respect as regular jurors and be subject to examination and challenge as such jurors. For the panel from which such alternate jurors are to be selected there shall be drawn two more veniremen than the number of alternate jurors desired. The plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one peremptory challenge. If, before final submission of the case, a regular juror dies or is for good cause discharged or excused, the court shall order the alternate juror, if there be one, to take his place in the jury box. If there be two alternate jurors the court shall select one by lot, who shall then take his place in the jury box.

Reviser's Note:

No change has been made in present § 8-208.22.

§ 8.01-361. New juror may be sworn in place of one disabled; when court may discharge jury.—If a juror, after he is sworn, be unable from any cause to perform his duty, the court may, in its discretion, cause another qualified juror to be sworn in his place, and in any case, the court may discharge the jury when it appears that they cannot agree on a verdict or that there is a manifest necessity for such discharge.

Reviser's Note:

No change is made in present § 8-208.23.

§ 8.01-362. Special juries.—Any court in a civil case in which a jury is required may allow a special jury, in which event the court shall order such jurors to be summoned as it shall designate, and from those summoned, a jury shall be made in accordance with the provisions of § 8.01-359 A. The court may, in its discretion, cause the entire cost of such jury to be taxed as a part of the cost in such action, and to be paid by the plaintiff or defendant as the court shall direct.

Revisers' Note:

Except for correcting an erroneous cross-reference, no change is made to present § 8-208.25.

§ 8.01-363. When impartial jury cannot be obtained locally.—In any case in which qualified jurors who are not exempt from serving and who the judge is satisfied can render a fair and impartial trial cannot be conveniently found in the county or city in which the trial is to be, the court may cause so many jurors as may be necessary to be summoned from any other county or city by the sheriff thereof, or by its own officer, from a list prepared pursuant to Article 3 of this chapter and furnished by the circuit court of the county or city from which the jurors are to be summoned.

Reviser's Note:

This is present § 8-208.26 without substantive change.

Present § 8-208.32. Sufficient compliance with requirement that jury be kept together. To be deleted.

Reviser's Note:

This section is to be deleted because basically it is applicable only to criminal cases. A similar provision applicable to criminal proceedings is in present § 19.2-264.

Note: (a) Present §§ 8-208.33 through 8-208.38, which follow, are to be transferred to Title 14.1.

(b) Throughout these sections the phrase "county or city/corporation" has been replaced with "political subdivision". Other changes are made in the respective sections and noted in the Reviser's Notes.

§ 8-208.33. Compensation, mileage, etc., of jurors; expenses of keeping jury together; fees of jury commissioners.—Every person summoned as a juror in a civil or criminal case shall be entitled to twelve dollars for each day of attendance upon the court as well as daily mileage for travel to and from court by the most direct route, and other necessary and reasonable costs as the court may direct. Jurors summoned from another political subdivision pursuant to § 8.01-363 may be allowed by the court, in addition to the above per diem, their actual expenses. When kept together overnight, suitable board and lodging when so confined shall, under the supervision of the court, be furnished for such jurors and the sheriff, or his deputies so keeping the jury. Such board and lodging shall not exceed twenty dollars per day for each person. Compensation, mileage and other costs will be allowed a juror in only one case the same day.

Every person serving as a jury commissioner may be allowed, by the court appointing him, a fee not exceeding fifteen dollars per day for the time actually engaged in such work.

Reviser's Note:

The words "misdemeanor or felony" and "corporation" as they appear in the present section, § 8-208.33, have been deleted and the words "or criminal" and "city" substituted in the place of each respectively. These changes conform with modern practice.

Also, present § 8-208.33 has been rewritten to remove the very detailed provisions pertaining to jurors' expenses, etc. These expenses and sequestering cost will vary greatly throughout the Commonwealth. The proposed section relies on the court to adequately reimburse jurors and to provide suitable board and lodging. The court may spend up to twenty dollars per day per juror and sheriff personnel in order to provide this board and lodging.

§ 8-208.34. How compensation, mileage, etc., paid.—The compensation, mileage and allowances of persons attending the court as jurors in all felony cases shall be paid by the

Commonwealth; jurors in misdemeanor cases shall be paid by the Commonwealth unless the charge is written on a local warrant or summons, in which case the jurors shall be paid by the political subdivision in which the summons is issued. Jurors in all civil cases shall be paid by the political subdivision in which the summons is issued. Payment in all cases shall be by negotiable check, or warrant, upon the Commonwealth, or the political subdivision, as the case may be.

When, during the same day any juror is entitled to compensation from both the Commonwealth and from the political subdivision in which he has served, the court shall divide the pay and mileage for such day between the Commonwealth and the political subdivision; and it shall be the duty of the sheriff at the term of the court during which an allowance is made or has been made under this section, to furnish the clerk of the court with a statement showing the number and names of the jurors in attendance upon the court, and the number of miles, respectively, of travel. In every case the claim of the juror for mileage shall be verified by his affidavit.

Reviser's Note:

Reference to a summons has been added in the second sentence.

§ 8-208.35. When juror not entitled to compensation.—No person shall be entitled to receive any compensation for service as a juror if he shall depart without the leave of the court, or, being summoned as a witness for the Commonwealth, shall charge for his 'tendance as such.

§ 8-208.36. Clerk to make entry on minutes stating amount due and by whom payable.—The clerk of any court in which juries are impaneled shall, before its final adjournment at each term, and under the direction of the court, make an entry upon its minutes stating the amount to which each juror is entitled for his services or attendance during the term, and specifying how much is payable by the Commonwealth, and how much by the political subdivision.

§ 8-208.37. Clerk to transmit orders making allowances to Comptroller, treasurer and jurors.—Such clerk shall immediately, after the adjournment of the court, transmit to the Comptroller a list of all orders under the preceding section (§ 8-208.36) making allowances against the Commonwealth, and to the treasurer of the political subdivision a list of all such orders making allowances against the political subdivision, with a certificate to the correctness of the list and the aggregate amount thereof annexed thereto and signed by the judge of the court and himself, and such clerk shall also deliver to each juror certified copies of any orders making an allowance to him, whether the same be payable by the Commonwealth or by the political subdivision.

§ 8-208.38. Payment of allowances.—The treasurer of such political subdivision shall upon demand pay to such juror the amount allowed him by negotiable check, which shall be repaid to such treasurer out of the public treasury or out of the political subdivision levy, as the case may be, upon the production of satisfactory proof that the same has been actually paid by him. But such treasurer shall not be repaid any allowance made against the Commonwealth unless it appear on the list directed to be sent to the Comptroller. No such allowance shall be paid unless presented within two years from the time of rendering the service.

CHAPTER 12.

Interpleader; Claims of Third Parties to Property

Distrained or Levied on, etc.

Article 1.

Interpleader.

§ 8.01-364. Interpleader.—A. Whenever any person is or may be exposed to multiple liability through the existence of claims by others to the same property or fund held by him or on his behalf, such person may file a pleading and require such parties to interplead their claims. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant in an action who is exposed to similar liability may likewise obtain such interpleader. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in § 8.01-5.

B. The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by any other section of this Code.

C. In any action of interpleader, the court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of the Commonwealth affecting the property involved in the interpleader action until further order of the court.

Such court shall hear and determine the case and may discharge the appropriate party from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

D. A person interpleading may voluntarily pay or tender into court the property claimed, or may be ordered to do so by the court; and the court may thereupon order such party discharged between the claimants of such property.

Reviser's Note:

Note: The revisions regarding Interpleader are not intended to authorize "class actions".

This proposed section is designed to give Virginia a modern interpleader practice; the section creates a comprehensive interpleader remedy and is in keeping with the modern trend in the vast majority of American jurisdictions wherein statutory interpleader has been extended on practical grounds far beyond the traditional remedy in equity and the early ancillary statutory interpleader at law. Beckman, *Interpleader*, 16 U. Cin. L. Rev 117 (1942).

At present, Virginia interpleader is controlled by the principles of equitable interpleader with all of its technical limitations. These requirements are: (1) The same thing, debt, or duty must have been claimed by both or all the parties against whom the relief was

demanded. (2) All their adverse titles or claims must have been dependent on or be derived from a common source. (3) The person seeking relief - the plaintiff - must not have had or claimed any interest in the subject matter. (4) The plaintiff must have incurred no independent liability to either of the claimants. Pomeroy, *A Treatise on Equity Jurisprudence*, §§ 1320-1329 (1941). Ancillary to equitable interpleader, but available only to defendants in pending actions, is the statutory interpleader of present § 8-226. Additionally, *Burks* refers to §§ 8-227 et seq. as a "statutory petition of interpleader"; these provisions are in part a substitute for replevin whose object is to test the ownership of distrained or levied on property. *Burks Pleading & Practice*, § 410; 792-793 (4th Ed., 1952).

However, the Virginia Code does contain one plaintiff interpleader statute more in keeping with the American trend away from the traditional and cumbersome remedy in equity. Present § 8.7-603, a provision of the Uniform Commercial Code, allows a bailee of goods subject to adverse claims to bring an action interpleading all claimants. For the most part, proposed § 8.01-364 simply expands the principle of § 8.7-603 to make the interpleader remedy available to any person holding property which is the subject of multiple adverse claims.

The proposed section, like the modern interpleader statutes of most states, is patterned after the federal interpleader provisions found in 28 U.S.C. § 1335 and in FRCP 22. Subsection A. is very similar to FRCP 22; the first sentence has been re-ordered to more clearly indicate when the interpleader remedy is available. Also the reference to a defendant's cross-claim or counterclaim has been deleted in that they are encompassed by the term "pleading" in the first sentence.

Subsection A. of the proposed section enables any person, either as plaintiff or as defendant, to interplead two or more persons when their claims are such that he is, or may be, exposed to multiple liability that could result from adverse findings in different cases. Thus, the requirements that the person interpleading be a defendant in a pending action and that he submit an affidavit that there is no collusion between him and any of the claimants are no longer required.

Additionally, as in the FRCP 22, subsection A. expressly abolishes two of the four historical requirements of equitable interpleader, supra, i.e. those of common origin and of disinterest. (See 3A Wright & Miller, Civil § 1701, 3A Moore's *Federal Practice* § 22.11). However, unlike the Federal Rule, the requirement of identity of claims is retained; thus, while claims need not have a common origin and can be founded on different theories of recovery (i.e., one in contract, another in tort), such claims must relate to or affect the same property or fund.

The status of the fourth of the requirements, that of independent liability, is less clear.

Addressing that requirement, a 1955 article in the Yale Law Journal states:

> Whatever doubts may exist as to whether the independent liability rule survived enactment of the Interpleader Act should be resolved in favor of its abrogation. For the reasons which prompted development of the rule no longer exist.... Today, liberal joinder provisions have removed conceptual obstacles to the trial of logically distinct matters in the same proceeding. 65 Yale L.J. 715, 720 (1955).

In short, the reasons underlying the interpleader remedy - i.e., avoidance of the vexation of multiple claims to disputed property and of possible multiple liability arising from those claims, and the substitution of one comprehensive litigation for an extended series of individual actions - continue to have merit even when the person interpleading may be liable to one of the claimants on an independent basis.

This idea has won judicial recognition by courts interpreting the federal statute and rule. See, *D. Oliver* v. *Humble Oil & Refining Company*, 225 F. Supp. 536 (E.D. La. 1963) and *Knoll* v. *Socony Mobil Oil Co.*, 369 F. 2d 425, 429 (10th Cir. 1966); certs. denied, 87 S. Ct. 1173 (1967).

Thus, it is the revisers' belief that the problem of independent liability is best left to the wisdom and discretion of the trial court. Upon review of the facts and the pleadings, the court may choose to (1) dismiss the claim, (2) order severance or separate trials, or (3) require that the independent claim to the disputed property be tried in the interpleader action.

The final sentence of the subsection A. is inserted to make clear that the interpleader remedy provided by this section does not limit the joinder of parties provisions of proposed § 8.01-5.

Proposed § 8.01-364 B. stipulates that the interpleader remedy herein is supplementary to and does not supersede or limit the remedy provided elsewhere in the Virginia Code. (See § 8.01-365 et seq. and § 8.7-603) However, the proposed statute does abrogate and displace the equitable remedy of interpleader; this differs from the Virginia Supreme Court's interpretation of the role of statutory interpleader under present § 8-226 [See, *Runkle* v. *Runkle*, 112 Va. 788, 72 S.E. 69 (1911)] .

Subsection C., patterned after the federal interpleader provisions found in 28 U.S.C. § 1335, makes explicit that the ability to settle all claims in one proceeding and to enjoin the claimants from bringing separate suits is one of the purposes and major advantages of the interpleader remedy. Beckman, *Interpleader*, 16. U. Cin. L. Rev. 117 (1942). Under proposed § 8.01-364 C., the granting or denying of an injunction is discretionary; the discretionary power of the court to discharge parties, etc. and thereby tailor the course of the interpleader proceeding is recognized in the second paragraph of proposed § 8.01-364 C.

Subsection D. affords the interpleader the right to deposit the property into the court. This option is available under existing equitable procedures and by 28 U.S.C. § 1135. Under proposed § 8.01-364 D. the person interpleading may voluntarily deposit the

disputed property into the court, or the court may order it as a means of safeguarding the property and of facilitating the execution of its judgment. Although deposit may not be required, it may be to the person's advantage to do so and to be discharged from the action if possible. Similiarly, deposit is necessary to terminate a previously existing obligation to pay interest. See Frumer, *On Revising the New York Interpleader Statutes*, 25 N.Y.U.L. Rev. 737, 768-770 (1950).

Article 2.

Claims of Third Parties to Property Distrained or Levied on.

Note: The provisions of this proposed article represent present §§ 8-227 through 8-235; although §§ 8-227 and 8-230 have been redrafted and minor word changes have been made in the other sections, the proposed sections do not alter the substance of present §§ 8-227 through 8-235. As pointed out by the Virginia Supreme Court, these provide an orderly remedy where one would otherwise be lacking. *United States* v. *Lawler*, 210 Va. 686, 112 S.E. 2d 921 (1960); *Kiser* v. *Hensley*, 123 Va. 536, 96 S.E. 777 (1916).

§ 8.01-365. How claim of third party tried to property, distrained, or levied on.—When a writ of fieri facias issued from a circuit court, or a warrant of distress, is levied on property, or when a lien is acquired on money or other personal estate by virtue of § 8.01-501, and when some other person than the one against whom the process issued claims the property, money, other personal estate, or some part or the proceeds thereof, then either (i) the claimant, if such suspending bond as is hereinafter mentioned has been given, (ii) the officer having such process, if no indemnifying bond has been given, or (iii) the party who had the process issued, may apply to try the claim, by motion to the adverse party, to the circuit court of the county or city wherein the property, money, or other personal estate is located.

Reviser's Note:

The wording and ordering of present § 8-227 has been altered to conform more closely with that of § 16.1-119. (Proceedings to try title to property levied on under distress or execution) except for the added reference to § 8.01-501, the substance of present § 8-227 remains unaltered. However, its application has been restricted to circuit courts, leaving to Title 16.1 the appropriate provisions for the district courts. Other small language changes have been made that do not affect the statute's substance.

§ 8.01-366. Sale of property when no forthcoming bond is given.—In such case as is mentioned in the preceding section, when no bond is given for the forthcoming of the property, the court may, before a decision of the rights of the parties, make an order for the sale of the property, or any part thereof, on such terms as the court may deem advisable, and for the proper application of the proceeds. The court may make such orders and enter such judgment as to costs and all other matters as may be just and proper.

Reviser's Note:

This is present § 8-228 with minor language changes and the deletion in the last sentence of the words, inter alia, "in any case before mentioned in this chapter". Proposed § 8.01-364 C. renders such reference unnecessary.

§ 8.01-367. Indemnifying bond to officer.—If any officer levies or is required to levy a fieri facias, an attachment, or a warrant of distress on property, and the officer doubts whether such property is liable to such levy, he may give the plaintiff, his agent or attorney at law, notice that an indemnifying bond is required in the case; bond may thereupon be given by any person, with good security, payable to the officer in a penalty equal to the value of the property in the case of a fieri facias or a warrant of distress on property and equal to double the value of the property in case of an attachment, with condition to indemnify him against all damage which he may sustain in consequence of the seizure or sale of such property and to pay to any claimant of such property all damage which he may sustain in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold.

Provided, however, that when the property claimed to be liable by virtue of the process aforesaid is in the possession of any of the parties against whom such process was issued but is claimed by any other person or is claimed to belong to any other person, the officer having such process in his hands to be executed shall proceed to execute the same notwithstanding such claim unless the claimant of the property or some one for him shall give a suspending bond as provided by § 8.01-370 and shall within thirty days after such bond is given proceed to have the title to the property settled in accordance with the provisions of this chapter. And in case such claimant or someone for him fails to give such suspending bond, or having given such bond fails to have such proceedings instituted to settle the title thereto, the claimant shall be barred from asserting such claim to the property and the officer shall proceed to execute the process, and the officer who executes such process shall not be liable to any such claimant for any damages resulting from the proper execution of such process as is required by this section. If an indemnifying bond be not given within a reasonable time after such notice, the officer may refuse to levy on such property, or may restore it to the person from whose possession it was taken. If such bond be given, the officer shall proceed to levy (i) if he has not already done so, or (ii) if necessary to restore a levy previously released.

Reviser's Note:

This is present § 8-229. In the second sentence of the second paragraph of the present section, the phrase "the property shall be conclusively presumed to be the property of the party in possession" was revised. Similiarly, the final sentence was altered for the sake of clarity. See Burks, § 411, p. 794; see also, note at beginning of this article.

§ 8.01-368. Return of such bond to clerk's office.—Any indemnifying bond taken by an officer under the preceding section shall be returned by him within twenty-one days to the clerk's office of the circuit court of the county or city wherein the property levied on, or to be levied on, is located.

Reviser's Note:

The proposed section alters the wording of present § 8-230 to conform to present practice of the officer's return of an indemnifying bond. Also, the previous twenty days allowed for return of the bond has been increased to twenty-one; this is the Virginia practice generally with respect to other time requirements.

§ 8.01-369. Effect of such bond.—The claimant or purchaser of such property shall, after such bond is so returned, be barred from any action against the officer levying thereon, provided the security therein be good at the time of taking it.

Reviser's Note:

This is present § 8-231 without substantive change.

§ 8.01-370. Claimant may give suspending bond; required to have title settled.—The sale of any property levied on under a fieri facias or distress warrant shall be suspended at the instance of any claimant thereof who will deliver to the officer a suspending bond, with good security, in a penalty equal to double the value thereof, payable to such officer, with condition to pay to all persons who may be injured by suspending the sale thereof, until the claim thereto is adjudicated or otherwise adjusted, such damage as they may sustain by such suspension. If the property claimed to be liable by virture of such process is in the possession of any of the parties against whom such process was issued, but is claimed by any other person, or is claimed to belong to any other person, the officer having such process in his hands to be executed shall, whether an indemnifying bond has been given or not, after notice to the claimant, or his agent, proceed to execute the same notwithstanding such claim, unless the claimant of such property or someone for him shall give the suspending bond aforesaid, and shall within thirty days after such bond is given proceed to have the title to such property settled in accordance with the provisions of this chapter. And in case such claimant or someone for him fails to give a suspending bond, or having given such bond fails to have such proceedings instituted to settle the title thereto, the claimant shall be barred from asserting such claim to the property and the sale of the property shall proceed. For the purpose of this section, a person making a claim of ownership of property on behalf of another shall be deemed to be the latter's agent, and the notice required by this section may be verbal or in writing. Upon any such indemnifying or suspending bond as is mentioned in this or the preceding section an action may be prosecuted in the name of the officer for the benefit of the claimant, creditor, purchaser, or other person injured, and such damages recovered in such action as a jury may assess. The action may be prosecuted and a writ of fieri facias had in the name of such officer when he is dead in like manner as if he were alive.

Reviser's Note:

This is present § 8-232. The same change has been made to the sentence beginning "And in case such claimant. . ." as was made in proposed § 8.01-367. See that Reviser's Note. Also the word "suspending" has been inserted before "bond" in several places to remove any confusion as to the type of bond addressed by this section. Also, see note at beginning of this article.

§ 8.01-371. How forthcoming bond taken of claimant of property the sale whereof has been suspended.—The sheriff or other officer levying a writ of fieri facias or distress warrant on property, the sale of which is suspended under this chapter at the instance of a

claimant thereof, may, if such claimant desires the property to remain in such possession as it was immediately before the levy, and if the case be one in which a bond for the forthcoming of the property is not prohibited from being taken from the debtor by § 8.01-580, take from the claimant a bond, with sufficient surety, in a penalty equal to double the value of the property, payable to the creditor, with such recital as is required in a forthcoming bond taken from the debtor, and with condition that the property shall be forthcoming at such day and place of sale as may be thereafter lawfully appointed. Such property may then be permitted to remain, at the risk of such claimant, in such possession as it was immediately before the levy; and §§ 8.01-527, 8.01-528, 8.01-530, 8.01-531 and 55-232 shall apply to such forthcoming bond in like manner as to a forthcoming bond taken from the debtor.

Reviser's Note:

This is present § 8-233 without substantive change.

§ 8.01-372. Sale despite bond when property perishable, etc.—In such case as is mentioned in the preceding section, and whether a forthcoming bond is given or not, if the property be expensive to keep or perishable, the court in which proceedings in the case under § 8.01-365 are pending or may be had, may, before a decision of the rights of the parties under such proceedings, on the application of such claimant or of the surety in such suspending or forthcoming bond, after reasonable notice of the intended application has been given by such claimant or the surety to the other parties in the case, order a sale of the property, or any part thereof, on such terms as the court may deem advisable. The court shall apply the proceeds according to the rights of the parties when determined.

Reviser's Note:

This is present § 8-234 without substantive change.

§ 8.01-373. When property sells for more than claim, how surplus paid.—When property, the sale of which is indemnified, sells for more than enough to satisfy the execution, attachment, or distress warrant under which it is taken, the surplus shall be paid by the officer into the court where the indemnifying bond is required to be returned, or as such court may direct. The court wherein the surplus is held may make such order for the disposition thereof, either temporarily until the question as to the title of the property sold is determined, or absolutely, as in respect to the rights of those interested may seem to it proper.

Reviser's Note:

This is present § 8-235 without substantive change. For clarity the phrase "such court" has been replaced with "the court wherein the surplus is held."

Chapter 13.

Certain Incidents of Trial.

§ 8.01-374. Procedure when original papers in cause are lost.—If in any case the original papers therein, or any of them, or the record for or in an appellate court, or any paper filed or connected with such record, be lost or destroyed, any party to such case may present to the court wherein the case is, or in which it would or ought to be, but for such loss or destruction, a petition verified by affidavit stating such loss or destruction, and praying that such case be heard and determined or tried on the reproduction of such record or papers, or satisfactory proof of their contents. Upon such petition and an authenticated copy of what is lost or destroyed, the court may hear and determine the case, or proceed to a trial thereof, if before a jury. The court may also hear and determine the case, or proceed to the trial thereof, if before a jury, upon proof, after reasonable notice to the parties interested, of the contents of such record or papers, or so much thereof, as may be necessary for a decision by the court, or by a jury, and may make such order or decree as if the papers or any of them had not been lost or destroyed.

The court may in its discretion, require new pleadings to be made up in whole or in part.

A plaintiff instead of proceeding under this section may commence and prosecute a new suit for the same matter; and no certified copy of any deed, will, account, or other original paper required by law to be recorded shall be used by any party as evidence for him, in any case when the original deed, will, account, or other original paper or record thereof has been destroyed, until such copy has been properly admitted to record, according to law. This section shall not apply to criminal cases.

Reviser's Note:

Minor language changes are made in the proposal without material change to present § 8-209.

Present § 8-210.2. Physical or mental examination of party. To be deleted.

Reviser's Note:

Rule of Court 4:10, effective May 1, 1975, comports with the statute, and this procedural matter is better located in that Rule.

§ 8.01-375. Exclusion of witnesses in civil cases.—In the trial of every case the court, whether a circuit court, a general district court, or a juvenile and domestic relations district court, may upon its own motion and shall upon the motion of any party, require the exclusion of every witness; provided, that each named party who is an individual and one officer or agent of each party which is a corporation or association shall be exempt from the rule of this section as a matter of right.

Reviser's Note:

The proposal alters present § 8-211.1 by (1) making certain conforming changes and (2) removing criminal cases from its application. A parallel section will be added in Title 19.2.

Note: The provisions of present §§ 8-211, 8-212, 8-213, and 8-

214 have been amended and incorporated into § 8.01-336 as proposed. The provisions of present § 8-215 have been incoporated in proposed § 8.01-358.

§ 8.01-376. Views by juries.—The jury may, in any civil case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided that the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs.

Reviser's Note:

This is present § 8-216 from which the language that made it applicable to criminal cases has been removed, and a parallel section is to be added to Title 19.2.

§ 8.01-377. Remedy when variance appears between evidence and allegations.—If, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.

Reviser's Note:

Except for the deletion of the obsolete reference to "motion" in the first sentence, no change is made to present § 8-217.

§ 8.01-378. Trial judge not to direct verdicts.—In no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render unless the trial judge shall have granted a motion to strike the evidence of the plaintiff or defendant, in which case the judge may direct a verdict in conformity with his ruling on the motion to strike.

Reviser's Note:

No change is made to present § 8-218.

§ 8.01-379. Argument before jury.—Counsels' right to argument before a jury is preserved.

Reviser's Note:

The control of counsels' argument to a jury lies in the court's

discretion. While the proposal has altered present § 8-219 to reflect this right to argument, no inference of unlimited right should be drawn.

§ 8.01-380. Dismissal of an action by nonsuit.—A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. After a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause be shown for proceeding in another court.

B. Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorney's fees against the nonsuiting party.

C. A party shall not be allowed to nonsuit a cause of action, without the consent of the adverse party who has filed a counterclaim, cross-claim or third-party claim which arises out of the same transaction or occurrence as the claim of the party desiring to nonsuit unless the counterclaim, cross claim, or third-party claim can remain pending for independent adjudication by the court.

Reviser's Note:

Proposed § 8.01-380 is the successor to present §§ 8-220 (When nonsuit not allowed; no new proceeding after nonsuit) and 8-244 (When action deemed brought on counterclaim or cross-claim; statute of limitations; defendant's consent required for dismissal). Basically, this proposal (1) adopts the provisions of present § 8-220 but (2) restricts the number of nonsuits which may be taken in an action by a party as a matter of right and (3) expands the final sentence of present § 8-244.

Subsection A. adds to the present language of § 8-220 the phrase "as to any cause of action or any other party to the proceeding" in order to give a nonsuit broad application.

The provisions of present § 8-220 relating to the new proceedings on the same cause of action are incorporated in subsection A. of this proposal. An important related provision is proposed § 8.01-229 E.3. (Suspension or tolling of statute of limitations;...nonsuit...). If the new proceeding is instituted within six months of the nonsuit, the time between the commenced nonsuited action and this new proceeding will not be computed as part of the period within which such action must be brought. Thus, if the action is recommenced within six months, the filing of the nonsuited action tolls the statute of limitations for this later action.

Note: This proposal does not alter the time when a party may nonsuit. This aspect of the present statute has been criticized as having prejudicial consequences. See "The Voluntary Nonsuit in Virginia", 7 Wm. & Mary L. Rev. 357 (1966), and "Nonsuit in

Virginia", 52 Va. L. Rev. 751 (1966). These articles cite the case of *Berryman* v. *Moody* , 205 Va. 516 (1964). There, the plaintiff had presented his evidence, and the defendant made a motion to strike the evidence. From the court's comments before ruling on the motion, the plaintiff's counsel inferred that the motion would be sustained. Thus, just prior to the actual ruling, plaintiff moved to nonsuit. This action was upheld by the Supreme Court of Virginia. This proposal does not change *Berryman*.

Subsection B. of the proposal adds several provisions to the present statute. First, a party is restricted to one nonsuit as a matter of right. After taking the first nonsuit, a party can, with leave of court, or upon stipulation of the other party, be allowed additional nonsuits. The court, in permitting the additional nonsuit, may impose costs and reasonable attorney's fees upon the nonsuiting party. Similarly, a party agreeing to an additional nonsuit may stipulate upon what conditions he will permit the nonsuit.

Whether the nonsuit is (1) taken as a matter of right, (2) is permitted by the court, or (3) is stipulated to by a party, the court will enter an appropriate order. This order is subject to Rule of Court 1:13 (Endorsements). This rule requires either that all counsel of record endorse the order or, in this instance, that the nonsuiting party give proper notice.

Subsection C. is present § 8-244 expanded to also cover cross-claims and third-party claims. Additionally, even if the adverse party who has filed such a claim does not consent to the nonsuit, a nonsuit may be taken if such claim can remain pending for independent adjudication by the court.

Note: The provisions of § 8-244 relating to counterclaims etc. and to the statute of limitations for such claims are located in proposed § 8.01-233.

§ 8.01-381. What jury may carry out.—No pleadings may be carried from the bar by the jury. Exhibits may, by leave of court, be so carried by the jury.

Reviser's Note:

Present § 8-221 has been altered to provide that no pleadings may be carried out by the jury. However, with the courts' approval, exhibits may be taken to the jury room.

§ 8.01-382. Verdict to fix period at which interest begins; judgment or decree for interest.— Except as otherwise provided in § 8.3-122, in any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence. The judgment or decree entered shall provide for such interest until such principal sum be paid. If a judgment or decree be rendered which does not provide for interest, the judgment or decree awarded shall bear interest from its date of entry, at the rate as provided in § 6.1-330.10, and judgment or decree entered accordingly.

Reviser's Note:

Present § 8-223 has been rewritten to place the court and the jury on the same footing when it comes to providing for interest on the principal sum awarded in the judgment or decree. Also, the proposed section applies to all actions and suits, and thereby expands the present section's application which is limited to actions on contract, tort, and suits in equity. Finally, the proposed section provides that the interest awarded shall become part of the judgment or decree.

As for application of partial payments of judgments, see *Burks Pleading and Practice*, § 227; *Fultz* v. *Davis*, 67 Va. 903 (1875); and *Ohio Savings Bank & Trust Co.* v. *Willys Corporation*, 8 F. 2d 463 (2nd Cir. 1925) citing *Fultz*

§ 8.01-383. Power to grant new trial; how often.—In any civil case or proceeding, the court before which a trial by jury is had, may grant a new trial, unless it be otherwise specially provided. A new trial may be granted as well where the damages awarded are too small as where they are excessive. Not more than two new trials shall be granted to the same party in the same cause on the ground that the verdict is contrary to the evidence, either by the trial court or the appellate court, or both.

Reviser's Note:

No change is made to present § 8-224.

§ 8.01-383.1. Allowing appeal when verdict reduced and accepted under protest.—In any action at law in which the trial court shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court upon an appeal awarded the plaintiff as in other actions at law; and in any such case in which an appeal is awarded the defendant, the judgment of the court in requiring such remittitur may be the subject of review by the Supreme Court, regardless of the amount.

Reviser's Note:

This is present § 8-350 without substantive change.

§ 8.01-384. Formal exceptions to rulings or orders of court unnecessary; motion for a new trial unnecessary in certain cases.—A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal.

B. The failure to make a motion for a new trail in any case in which an appeal, writ

of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.

Reviser's Note:

No change is made to present §§ 8-225 and 8-225.1. However, they have been combined into one section, proposed § 8.01-384. Present § 8-225.1 is subsection A. and present § 8-225 is subsection B.

CHAPTER 14.

EVIDENCE.

NOTE: THE STATUTORY PROVISIONS IN THE EVIDENCE CHAPTER OF TITLE 8 RELATING TO DISCOVERY HAVE BEEN OMITTED FROM TITLE 8.01. THIS HAS BEEN DONE WITH AN EYE TOWARD A REVISED PART 4 OF THE RULES OF COURT. THE SECTIONS INVOLVED ARE: 8-111.1, 8-301 THROUGH 8-315, 8-316, 8-317 THROUGH 8-327.2.

Article 1.

Judicial Notice.

§ 8.01-385. Definitions.—As used in this Chapter:

1. The term "United States" shall be deemed to refer to the United State of America and to include any of its territories, commonwealths, insular possessions, the District of Columbia, and any of its other political subdivisions other than states.

2. The term "court" shall be deemed to include the courts of this Commonwealth, any other person or body appointed by it or acting under its process or authority in a judicial or quasi-judicial capacity, and any other judicial, quasi-judicial, or fact-finding body acting pursuant to the laws of the Commonwealth, including without limitation, the State Corporation Commission and the Industrial Commission.

3. The term "political subdivision" shall: (i) as applied to the United States, include any other political subdivision other than states and including without limitation the District of Columbia and the Commonwealth of Puerto Rico; (ii) as applied to other countries, include without limitation states, counties, cities, towns, boroughs, and any division thereof recognized and vested with the authority to enact or promulgate ordinances, rules, and regulations having the force or effect of law; (iii) as applied to this Commonwealth and other states of the United States, include without limitation counties, cities, towns, boroughs, and any other division thereof recognized and vested with the authority to enact or promulgate ordinances, rules, and regulations having the force or effect of law.

4. The term "agency" shall be deemd to include without limitation any department, division, commission, association, board, or other administrative body established pursuant to the laws of a jurisdiction.

§ 8.01-386. Judical Notice of Laws.—A. Whenever, in any civil action it becomes necessary to ascertain what the law, statutory or otherwise, of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same is, or was, at any time, the court shall take judicial notice thereof whether specially pleaded or not.

B. The court, in taking such notice, may consult any book, record, register, journal, or other official document or publication purporting to contain, state, or explain such law, and may consider any evidence or other information or argument that is offered on the subject.

§ 8.01-387. Notice by courts and officers of signatures of judges and Governor.—All courts and officers shall take notice of the signature of any of the judges, or of the Governor of this Commonwealth, to any judicial or official document.

§ 8.01-388. Judicial notice of official publications.—The court shall take judicial notice of the contents of all official publications of this Commonwealth and its political subdivisions and agencies required to be published pursuant to the laws thereof, and of all such official publications of other states, of the United States, of other countries, and of the political subdivisions and agencies of each published within those jurisdictions pursuant to the laws thereof.

Article 2.

Laws, Public Records, and Copies of Original Records as Evidence.

§ 8.01-389. Judicial records as evidence; full faith and credit; recitals in deeds, deeds of trust, and mortgages.—A. The records of any judicial proceeding and any other official record of any court of this Commonwealth, of another state or country, or of the United States, shall be received as prima facie evidence provided that such records are authenticated by the clerk of the court where preserved to be a true record, and similarly certified by a judge of that court.

"Record", as used in this article, shall be deemed to include any memorandum, report, paper, data compilation, or other record in any form, or any combination thereof.

B. Every court of this Commonwealth shall give such records of courts not of this Commonwealth the full faith and credit given to them in the courts of the jurisdiction from whence they come.

C. Specifically, recitals of any fact in a deed or deed of trust of record conveying any interest in real property shall be prima facie evidence of that fact.

§ 8.01-390. Non-judicial records as evidence.—Copies of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, shall be received as prima facie evidence provided that such copies are authenticated to be true copies both by the custodian thereof and by the person to whom the custodian reports.

§ 8.01-391. Copies of originals as evidence.—A. Whenever the original of any official publication or other record has been filed in an action or introduced as evidence, the court

may order the original to be returned to its custodian, retaining in its stead a copy thereof. The Court may make any order to prevent the improper use of the original.

B. If any department, division, institution, agency, board, commission, court, or clerk's office of a court of this Commonwealth, of another state or country, or of the United States, or of any political subdivision or agency of the same, acting pursuant to the law of the respective jurisdiction or other proper authority, has copied any record made in the performance of its official duties, such copy shall be as admissible into evidence as the original, whether the original is in existence or not, provided that such copy is authenticated as a true copy both by the custodian of said record and by the person to whom said custodian reports and is accompanied by a certificate that such officer does in fact have the custody.

C. If any business or member of a profession or calling in the regular course of business or activity has made any record, and again in the regular course of business has caused any or all of such record to be copied, the copy shall be as admissible in evidence as the original, whether the original exists or not, provided that such copy is satisfactorily identified and authenticated as a true copy both by the custodian of such record and by the person to whom said cutodian reports, if they be different, and is accompanied by a certificate that said person does in fact have the custody. Copies in the regular course of business shall be deemed to include reproduction at a later time, if done in good faith and without intent to defraud.

The original of which a copy has been made may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law, or its validity has been questioned.

D. The introduction in an action of a copy under this section neither precludes the introduction or admission of the original nor the introduction of a copy or the original in another action.

E. Copy, as used in this section, shall be deemed to include photographs, microphotographs, photostats, microfilm, microcard, printouts or other reproductions of electronically stored data, or any other reproduction of an original from a process which forms a durable medium for its recording, storing, and reproducing.

Articles 1 and 2.

Evidence.

Reviser's Notes:

The first three articles of the present Evidence chapter [Chapter 16, §§ 8-263 through 8-279.2] pertain generally to the evidentiary status of laws and records of this Commonwealth, the United State [U.S.] , other states, and other countries. A review of these twenty statutes reveals many out-dated provisions. Also noticed is the interesting anomaly that while a court of this Commonwealth may take judicial notice of the law of another state or courty, or of the U.S., such court must have the laws of the Commonwealth entered into evidence and proved. [See respectively §§ 8-273 (Proof of Laws) and 8-263 (This Code, the acts, etc., to be evidence)] .

Proposed §§ 8.01-386 through 8.01-391 address the same

substantive matters now covered in those three articles. While the proposals absorb the substance of the present provisions, they also recommend several substantive amendments.

Present §§ 8-263 [This Code, the acts, etc. to be evidence] . *To be deleted.*

Proposed § 8.01-386—Judicial Notice of Laws.

Initially, the proposal abolishes the anomaly mentioned above as to the laws of this Commonwealth. Under subsection A. all laws of the named jurisdictions are given equal status and courts of this Commonwealth shall take judicial notice thereof.

It is important to note that the proposed section reads "...what the law, statutory or otherwise...is, or was..." Thus, the word "law" encompasses inter alia, statutes, ordinances, resolutions, judicial decisions, and administrative rulings and regulations of the respective jurisdictions.

Additionally, subsection A. calls for the taking of judicial notice of the law of any political subdivision [as defined in § 8.01-385, subdivision 3] of this Commonwealth, the U.S., and of other states and countries. This provision pertaining to political subdivisions expands the present law (§ 8-270, 2nd paragraph) which makes ~~pies of ordinances etc. of municipal corporations prima facie dence. The inclusion of the term "agency" in the statute ombines with the broad definition of law discussed above to clearly indicate that regulations and rules issued and decisions rendered by such a body are also to receive judicial notice.

This recommended expansion of judicial notice is not intended to make work for the courts, but to end the practice of proving in evidence "law" as a formality which has outlived its time. For many years briefs and memoranda of law have cited statutes and case law not proved in evidence. In the event of a genuine dispute as to what the "law" is, subsection B. of this proposed statute provides protections against any abuse of this expanded judicial notice. That subsection adopts the provision found in present Code § 8-273 which recognizes the right of the court to research the law and to hear any evidence which will assist it in definitively stating the notice it is taking.

Proposed § 8.01-385—Definitions. This proposed statute defines the terms "United States", "court", "political subdivision", and "agency" as they are used in this chapter.

Proposed § 8.01-387—Notice by courts and officers of signatures of judges and Governor.

This proposal adopts present § 8-274 without substantive change.

Proposed § 8.01-388—Judicial Notice of official publications.

The concept of this section is derived from present § 8-272. It

addresses the evidentiary status of official publications. Such publications of this Commonwealth, of other states and countries, and of the United States published pursuant to the laws of the respective jurisdiction shall also be given judicial notice.

Proposed § 8.01-389—Judicial records as evidence; ...

Subsection A. of this proposed section makes records of judicial proceedings and records located in the office of the clerk of a court prima facie evidence. However, such records shall be given this evidentiary status only if they are authenticated to be a true record by both the clerk and a judge of the court.

Subsections B. and C. adopt present statutory provisions pertaining to court records. They are § 8-271 (Authentication of records of courts of United States or other states) and §§ 8-275 to 8-276.1 pertaining to deeds and recitals therein.

Proposed § 8.01-390—Non-Judicial records as evidence.

This section addresses those official records of a public entity that are neither published nor maintained in a clerk's (of a court) office. Such official records are to be received as prima facie evidence provided they are doubly authenticated.

Proposed § 8.01-391—Copies of originals as evidence.

This proposed statute addresses the evidentiary status of copies of official publications and records. Subsection A. recognizes the authority of the court to exchange the original for a copy. Subsections B. and C. respectively place copies of official records covered by §§ 8.01-388 and 8.01-389 and business records on the same evidentiary footing as the original provided such copy is twice authenticated.

Article 3.

Establishing Lost Records, etc.

§ 8.01-392. When court order book or equivalent is lost or illegible, what matters may be re-entered.—When any book, microfilm record, or record in other form containing judgments, decrees, orders or proceedings of a court is lost, destroyed, or illegible, and there can be again entered correctly, by means of any writing, any matters which were in such book, such court may cause its clerk to have such matters re-entered, and such re-entries shall have the same effect as the original entries.

Reviser's Note:

Because of storage problems, it is foreseeable that in the near future court order books will be retained in some form other than the present hard bound volumes - e.g. microfilm. This proposal amends present § 8-280 accordingly in anticipation of this change.

The final sentence of present § 8-280 pertaining to the clerk's compensation for such re-recording will be transferred to Title 14.1.

§ 8.01-393. When book or paper or equivalent in clerk's office lost, destroyed, or illegible to be again recorded.—When any such book, or any book, microfilm record, or record in other form containing the record of wills, deeds, or other papers, or any other paper filed in a clerk's office, is lost, destroyed, or is illegible, the clerk in whose office such book or paper was, upon the production to him of any original paper which was recorded in such book, or of an attested copy of the record thereof, or of anything else in such book, or of any paper so filed, shall, on application, record the same anew. The record shall show whether it is made from an original or a copy, and how the paper from which it was made was authenticated or attested. Such record shall have, as far as may be, the same effect that the record or paper for which it is substituted would have had.

Reviser's Note:

As with present § 8-281, proposed § 8.01-393 has been amended to include records maintained in forms other than hard bound volumes.

§ 8.01-394. How contents of any such lost record, etc., proved.—A. Any person desirous of proving the contents of any such book, record, or other paper as is mentioned in either § 8.01-392 or § 8.01-393, may file before the circuit court of the county or city in which such record, book, or other paper was a petition in writing, stating the nature of the r[illegible]d, book, or paper, the contents of which he desires to prove, and what persons may [illegible]ected by such proof. Thereupon the court shall appoint a time and place for p[illegible]eeding on such petition, of which reasonable notice shall be given by him to all parties named in such petition, or interested in the proceedings, and to any others who shall be known to the court, or who shall claim to be so interested. If any party interested other than the petitioner, or who may be affected by the proof, be a person under a disability, the court shall appoint a guardian ad litem to represent his interest in the proceeding.

B. The evidence upon said petition shall be in writing and filed, and the court shall make such order in respect to such record, book, or other paper, or anything therein, as may be necessary to secure the benefits thereof to the parties interested, or such other order as may be proper in the case.

Before such court shall make such order, the petitioner shall cause to be served on the persons interested a notice in writing that he will apply for such order, in the manner provided by § 8.01-296, at least ten days before such order is to be made; but if such persons, or any of them, do not reside in this Commonwealth, or after due diligence cannot be found therein, an order of publication may be issued as provided by §§ 8.01-316 and 8.01-317.

Reviser's Note:

Present §§ 8-282 and 8-283 are combined in this proposal. The only major change is the abolishment of the practice of referring such matter to a commissioner; the procedure can be more expeditiously handled by the court itself. Other minor language changes - e.g. use of person under a disability - are made to comport with changes made throughout this Title.

§ 8.01-395. Validating certain proceedings under two preceding section.—All proceedings had in any case, under the provisions of § 8.01-394, wherein a final judgment or decree has stood unimpeached for more than twenty years are declared to be valid and binding in all respects.

Reviser's Note:

Present § 8-284 has been changed to a general validating statute.

Article 4.

Witnesses Generally.

§ 8.01-396. No person incompetent to testify by reason of interest, or because a party.—No person shall be incompetent to testify because of interest, or because of his being a party to any civil action; but he shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence in his own behalf and be competent and compellable to attend and give evidence on behalf of any other party to such action; but, in any case, the court, for good cause shown, may require any such person to attend and testify ore tenus and, upon his failure to so attend and testify, may exclude his deposition.

Reviser's Note:

This is present § 8-285 without substantive change.

§ 8.01-397. Corroboration required and evidence receivable when one party incapable of testifying.—In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party.

Reviser's Note:

Present § 8-286 has been amended to clearly indicate that it applies to proceedings in which a person under a disability is a party. Also, the receiving as evidence of the entries, etc., of the person incapable of testifying shall no longer be contingent on the adverse party's testifying.

§ 8.01-398. Competency of husband and wife to testify; privileged communications and exceptions thereto.—A. Husband and wife shall be competent witnesses to testify for or against each other in all civil actions; provided that neither husband nor wife shall

without the consent of the other, be examined in any action as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted.

B. The proviso in subsection A. of this section shall not apply in those instances where the law of this Commonwealth confers upon a spouse a right of action against the other spouse.

Reviser's Note:

Subsection A. of this section is a combination of present §§ 8-287 and 8-289.

At common law neither husband nor wife could sue the other; this incapacity arose out of the legal unity of the two. However, both by statute and case law this rule has largely been eroded away. [See e.g., Married Women's Act (1876), §§ 55-35 through 55-37) which rendered the wife sui juris and gave her full ownership and control of her property.] The last remaining vestige of the common law rule, but for one exception noted below, is the prohibition against actions for purely personal torts.

Today, a spouse may sue or be sued by the other spouse (1) in a contract action [See *Alexander* v. *Alexander*, 85 Va. 353 (1888)], (2) in a tort action for damage to his or her property [See *Vigilant Ins. Co.* v. *Bennett*, 197 Va. 216 (1955)], and (3) in a tort action for personal injury arising out of an automobile accident [See *Surratt* v. *Thompson*, 212 Va. 191 (1971)].

However, a change in the evidentiary law has not accompanied this expansion of the spouse's right of action. Under present § 8-289 even in these instances when one spouse may sue the other, communications between the two made while married are privileged.

As Mr. McCormick states:

"...husband and wife, while they would desire that their confidences be shielded from the outside world, would ordinarily anticipate that if a controversy between themselves should arise in which their mutual conversations would shed light on the merits, the interests of both would be served by full disclosures." [See *McCormick on Evidence*, § 84, p. 171 (2nd Ed. 1971)]

Subsection B. of proposed § 8.01-398 adopts this idea. If by the laws of this Commonwealth one spouse is permitted to sue the other, the privileged status of communications between the two made while married is abrogated.

Present § 8-22. Testimony of husband and wife in criminal cases. To be transferred to Title 19.2.

§ 8.01-399. Communications between physicians and patients.—Except at the request

of, or with the consent of, the patient, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, respecting any information which he may have acquired in attending, examining or treating the patient in a professional capacity if such information was necessary to enable him to furnish professional care to the patient; provided, however, that when the physical or mental condition of the patient is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be privileged and disclosure may be required. This section shall not be construed to repeal or otherwise affect the provisions of § 65.1-91 relating to privileged communications between physicians and surgeons and employees under the Workmen's Compensation Act. The provisions of this section shall not apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug. A clinical psychologist duly licensed under the provisions of § 54-309.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

Reviser's Note:

Only minor language changes have been made to present § 8-289.1. The only change in substance is making this section applicable to all courts and not just circuit courts.

§ 8.01-400. Communications between ministers of religion and persons they counsel or advise.—No regular minister of religion, over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required in giving testimony as a witness in any civil action to disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

Reviser's Note:

No change has been made in present § 8-289.2 except to change the age to eighteen.

§ 8.01-401. How adverse party may be examined; effect of refusal to testify.—A. A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross examination.

B. If any party, required by another to testify on his behalf, refuses to testify, the court, officer, or person before whom the proceeding is pending, may, in addition to punishing said party as for contempt, dismiss the action, or other proceeding of the party so refusing, as to the whole or any part thereof, or may strike out and disregard the plea, answer, or other defense of such party, or any part thereof, as justice may require.

Reviser's Note:

This proposal combines present §§ 8-290 and 8-291, with § 8-291 being subsection A. and § 8-290, subsection B.

§ 8-290 has been altered to clearly indicate that the sanctions listed are cumulative; the court may still hold the refusing party in contempt.

§ 8.01-402. Members of State Crash Investigation Team not to be required to give evidence in certain cases.—No member of the State Highway Safety Division's Crash Investigation Team shall be required to give evidence concerning any statements made to him in the course of such investigation before any court or grand jury in any case involving a motor vehicle crash on the highways of the Commonwealth in which any member or members of such Crash Investigation Team made or took part in any investigation pursuant to a directive from the Director of the State Highway Safety Division for purposes of research and evaluation of the State's highway safety program.

Reviser's Note:

No substantive change has been made to present § 8-296.1.

§ 8.01-403. Witness proving adverse; contradiction; prior inconsistent statement.—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court prove ~~e~~*rse, by leave of the court, prove that he has made at other times a statement* ~~o~~*nsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. In every such case the court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness.*

Reviser's Note:

§ 8.01-403 is present § 8-292 unchanged.

§ 8.01-404. Contradiction by prior inconsistent writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject matter of the civil action, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to the particular occasion on which the writing is supposed to have been made, and he may be asked if he did not make a writing of the purport of the one to be offered to contradict him, and if he denies making it, or does not admit its execution, it shall then be shown to him, and if he admits its genuineness, he shall be allowed to make his own explanation of it; but it shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may thereupon make such use of it for the purpose of the trial as it may think best. This section is subject to the qualification, that in an action to recover for a personal injury or death by wrongful act or neglect, no ex parte affidavit or statement in writing other than a deposition, after due notice, of a witness and no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof, as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict him as a witness in the case. Nothing in this section shall be

construed to prohibit the use of any such ex parte affidavit or statement in an action on an insurance policy based upon a judgment recovered in a personal injury or death by wrongful act case.

Reviser's Note:

The sentence in present § 8-293 applying its provisions to criminal cases has been deleted. Also, the phrase "civil action" has been inserted in the frist sentence to clearly indicate that this section applies to all civil proceedings.

§ 8.01-405. Who may administer oath to witness.—Any person before whom a witness is to be examined may administer an oath to such witness.

Reviser's Note:

No change is made in present § 8-294.

§ 8.01-406. Interpreters.—Interpreters shall be sworn truly so to do.

Reviser's Note:

Present § 8-295 has been re-written. However, no change in substance is intended.

Article 5.

Compelling Attendance of Witnesses, etc.

§ 8.01-407. How summons for witness issued, and to whom directed; prior permission of court to summon certain officials and judges; attendance before commissioner of other state.—A. A summons may be issued, directed as prescribed in § 8.01-292, commanding the officer to summon any person to attend on the day and at the place that such attendance is desired, to give evidence before a court, grand jury, arbitrators, magistrate, notary, or any commissioner or other person appointed by a court or acting under its process or authority in a judicial or quasi-judicial capacity. The summons may be issued, if the attendance be desired at a court or in a proceeding pending in a court, by the clerk thereof; if before a commissioner in chancery or other commissioner of a court, by the clerk of the court in which the matter is pending, or by such commissioner in chancery or other commissioner; if before a notary or other officer taking a deposition, by such notary or other officer at the instance of the attorney desiring the attendance of the person sought; if before a grand jury, by the Attorney for the Commonwealth, or the clerk of the court, at the instance of the Attorney for the Commonwealth; and in other cases, by the clerk of the circuit court of the county or city in which the attendance is desired. It shall express on whose behalf, and in what case or about what matter, the witness is to attend. Failure to respond to any such summons shall be punishable by the court in which the proceeding is pending as for contempt.

B. No subpoena shall, without permission of the court first obtained, issue for the attendance of the Governor, Lieutenant Governor, or Attorney General of this Commonwealth, or a judge of any court thereof; the President or Vice President of the United States; any member of the President's Cabinet; any Ambassador or Consul; or any Military Officer on active duty holding the rank of Admiral or General.

C. This section shall be deemed to authorize a summons to compel attendance of a citizen of the Commonwealth before commissioners or other persons appointed by authority of another state when the summons requires the attendance of such witness at a place not out of his county or city.

Reviser's Note:

The scope of present § 8-296 is extended to include persons acting in a judicial or quasi-judicial capacity, and altered to delete umpires, justice, coroner, and surveyor. The court's power to punish as for contempt (See § 18.2-456(5)) is expressly included so as to permit such punishment for disobedience of any summons authorized. Subsection B., requiring prior court order to summon certain officials and judges, is new. Present § 8-297 has been made subsection C. of this section, without substantive change.

§ 8.01-408. Recognizance taken upon continuance of case.—Upon the continuance of any civil case in a court, the court shall at the request of any party litigant require such par witnesses then present to enter into recognizance in such penalty as the court may de oper, either with or without security, for their appearance to give evidence in such case on such day as may then be fixed for the trial thereof, such recognizance to be taken, conditioned, and entered of record in the same manner provided in §§ 19.2-135 to 19.2-137, for taking recognizance.

Reviser's Note:

The application of present § 8-298 to criminal cases has been deleted in this proposal and the provisions of this statute have been made applicable to all courts.

§ 8.01-409. When court may have process for witness executed by its own officer in another county or city.—Whenever on the calling or during the trial of a civil case in any court it appears to the court that it is necessary to have a witness from a county or city other than that of trial, the summons, rule, or attachment issued for such witness from the trial court may, when the court so orders, be executed by its officers in any county or city of the Commonwealth, for which services the officer shall be allowed a reasonable compensation by the court.

Reviser's Note:

As in proposed § 8.01-408, the application of present § 8-299 to criminal cases has been deleted. Also the provisions of this statute have been made applicable to all courts.

§ 8.01-410. Convicts as witnesses in civil actions.—Whenever any party in a civil action in any circuit court in this Commonwealth shall require as a witness in his behalf, a convict or prisoner in a correctional or penal institution as defined in § 53-19.18, the court, on the application of such party or his attorney may, in his discretion and upon consideration of the importance of the personal appearance of the witness and the nature of the offense for which he is imprisoned, issue an order to the Director of the Department of Corrections to deliver such witness to the sheriff of the county or the city, as the case may be, who shall go where such witness may then be. Under such conditions as shall be prescribed by the superintendent of the institution, such officer shall carry the convict to the court to testify as such witness, and after he shall have so testified and been released as such witness, carry him back to the place whence he came.

If necessary the sheriff may confine the convict for the night in any convenient city or county correctional institution.

Under such rules and regulations as the superintendent of such an institution may prescribe, any party to a civil action in any circuit court in this Commonwealth may take the deposition of a convict or prisoner in the institution, which deposition, when taken, may be admissible in evidence as other depositions in civil actions.

The party seeking the testimony of such prisoner shall advance a sum sufficient to defray the expenses and compensation of the officers, which the court, in its discretion, may tax as other costs.

Reviser's Note:

Several minor language changes have been made in present § 8-300.1 without changing its substance - e.g. the adoption by reference of the definition of correctional and penal institutions in § 53-19.18. Also the final phrase in the first paragraph of the present section pertaining to expenses of the sheriff will be relocated in Title 14.1.

Present § 8-300. Convicts as witnesses in criminal cases. To be transferred to Title 19.2.

Article 6.

Uniform Foreign Depositions Act.

§ 8.01-411. Compelling attendance of witnesses for taking depositions to be used in foreign jurisdiction.—Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this Commonwealth, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this Commonwealth.

§ 8.01-412. Uniformity of interpretation; reciprocal privileges.—This article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it. The privilege extended to persons in other states by § 8.01-411 shall only apply to those states which extended the same privilege to persons in this

Commonwealth.

§ 8.01-413. Short title.—This article may be cited as the Uniform Foreign Depositions Act.

Reviser's Note:

The Uniform Foreign Depositions Act of present §§ 8-316 through 8-316.3, has been adopted without substantive change.

Article 7.

Medical Evidence.

§ 8.01-413. Certain copies of hospital records or papers of patient.—A. In any case where the original hospital records or papers of any patient in a hospital or institution for the treatment of physical or mental sickness or ills are admissible or would be admissible as evidence, any typewritten copy, photograph, photostatic copy, or microphotograph thereof shall be admissible as evidence in any court of this Commonwealth in like manner as the original, provided said typewritten copy, photograph, photostatic copy or microphotograph is properly authenticated by such hospital employees as would have authority to release or produce in court the original records.

B. Copies of hospital records or papers shall be furnished to the patient or his attorney upon such patient's or attorney's written request; provided, however, that copies of a patient's mental records shall not be furnished to such patient where the patient's treating physician has made a part of the patient's records a written statement that in his opinion the furnishing to or review by the patient of such records would be injurious to the patient's mental health or well-being, but in any such case such records shall be furnished to the patient's attorney. A reasonable charge may be made for such copies.

Reviser's Note:

Present § 8-277.1 was amended in the 1976 General Assembly by the addition of subsection B. This proposal makes no changes in the amended statute except to remove the requirement that a charge be made for such services.

Present § 8-329.1. Admission of results of blood tests in divorce or support proceedings where question of paternity arises.—

Reviser's Note:

Present § 8-329.1 is to be transferred without any change, to Title 20.

Article 8.

Certain Affidavits.

§ 8.01-414. Affidavit prima facie evidence of nonresidence.—In any action, an affidavit that a witness or party resides out of this Commonwealth, or is out of it, shall be prima facie evidence of the fact, although such affidavit be made by a party, and without previous notice.

§ 8.01-415. Affidavit evidence of publication.—When anything is authorized or required by law to be published in a newspaper, the certificate of the editor, publisher, business manager or assistant business manager, or the affidavit of any other person, shall be admitted as evidence of what is stated herein as to the publication.

§ 8.01-416. Affidavit re damages of five hundred dollars or less to motor vehicle.—In a civil action in any court to recover for damages of five hundred dollars or less to a motor vehicle, evidence as to such damages may be presented by an itemized estimate sworn to by a person who also makes oath (i) that he is a motor vehicle repairman or estimator qualified to determine the amount of such damage; (ii) as to the approximate length of time that he has engaged in such work; and (iii) as to the trade name and address of his business and employer.

Reviser's Note:

Article 8 of this proposed Evidence Chapter adopts §§ 8-328 and 8-329 without substantial change. The admission into evidence of an ex parte estimate of the damages to a motor vehicle, now applicable pursuant to § 16.1-88.1 only to general district courts, is made applicable by § 8.01-416 to all courts.

Article 9.

Miscellaneous Provisions.

§ 8.01-417. Copies of written statements or transcriptions of verbal statements by injured person to be delivered to him.—Any person who takes from a person who has sustained a personal injury a signed written statement or voice recording of any statement relative to such injury shall deliver to such injured person a copy of such written statement forthwith or a verified typed transcription of such recording within thirty days from the date such statement was given or recording made, when and if the statement or recording is transcribed or in all cases when requested by the injured person or his attorney.

Reviser's Note:

Present § 8-628.2 has been adopted without change.

§ 8.01-418. When plea of guilty or nolo contendere or forfeiture in criminal prosecution admissible in civil action; proof of such plea.—Whenever, in any civil action, it is contended that any party thereto pled guilty or nolo contendere or suffered a forfeiture in a criminal prosecution which arose out of the same occurrence upon which the civil

action is based, evidence of said plea or forfeiture as shown by the records of the criminal court shall be admissible; and where the records of the court in which such prosecution was had are silent or ambiguous as to whether or not such plea was made or forfeiture occurred the court hearing the civil case shall admit such evidence on the question of such plea or forfeiture as may be relevant, and the question of whether such plea was made or forfeiture suffered shall be a question for the court to determine.

Reviser's Note:

Present § 8-267.1, is broadened to include the party's having pled nolo contendere or suffered a forfeiture. It has been changed to provide that in the event of a dispute about such plea or forfeiture, the question is to be decided by the court.

§ 8.01-419. Table of life expectancy.—Whenever, in any case not otherwise specifically provided for, it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the following table shall be received in all courts and by all persons having power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the following columns:

AGE	BOTH SEXES	MALE	FEMALE
0	71.3	67.6	75.3
1	71.6	67.9	75.5
2	70.7	67.0	74.5
3	69.8	66.1	73.6
4	68.8	65.1	72.6
5	67.8	64.2	71.7
6	66.9	63.2	70.7
7	65.9	62.3	69.7
8	64.9	61.3	68.7
9	64.0	60.3	67.8
10	63.0	59.3	66.8
11	62.0	58.3	65.8
12	61.0	57.3	64.8
13	60.0	56.4	63.8
14	59.1	55.4	62.8
15	58.1	54.5	61.9
16	57.1	53.5	60.9
17	56.2	52.6	59.9
18	55.3	51.7	59.0
19	54.3	50.8	58.0
20	53.4	49.9	57.1
21	52.5	49.0	56.1
22	51.6	48.1	55.1
23	50.6	47.2	54.2
24	49.7	46.3	53.2
25	48.8	45.4	52.3
26	47.9	44.5	51.3
27	46.9	43.6	50.3
28	46.0	42.7	49.4
29	45.1	41.8	48.4
30	44.1	40.9	47.5
31	43.2	39.9	46.5
32	42.3	39.0	45.5

33	41.3	38.1	44.6
34	40.4	37.2	43.6
35	39.5	36.3	42.7
36	38.5	35.4	41.8
37	37.6	34.5	40.8
38	36.7	33.6	39.9
39	35.8	32.7	39.0
40	34.9	31.8	38.0
41	34.0	30.9	37.1
42	33.1	30.0	36.2
43	32.2	29.2	35.3
44	31.3	28.3	34.4
45	30.5	27.5	33.5
46	29.6	26.6	32.6
47	28.8	25.8	31.7
48	27.9	25.0	30.9
49	27.1	24.2	30.0
50	26.3	23.4	29.1
51	25.5	22.6	28.3
52	24.6	21.8	27.4
53	23.8	21.1	26.6
54	23.1	20.3	25.7
55	22.3	19.6	24.9
56	21.5	18.9	24.1
57	20.8	18.2	23.3
58	20.0	17.5	22.5
59	19.3	16.8	21.7
60	18.6	16.2	20.9
61	17.9	15.5	20.2
62	17.2	14.9	19.4
63	16.6	14.3	18.6
64	15.9	13.7	17.9
65	15.3	13.1	17.2
66	14.6	12.6	16.4
67	14.0	12.0	15.7
68	13.4	11.5	15.0
69	12.8	10.9	14.3
70	12.2	10.4	13.6
71	11.6	9.9	12.9
72	11.0	9.5	12.3
73	10.5	9.0	11.7
74	10.0	8.6	11.1
75	9.5	8.2	10.5
76	9.0	7.8	9.9
77	8.6	7.4	9.4
78	8.1	7.0	8.9
79	7.7	6.7	8.4
80	7.3	6.4	7.9
81	6.9	6.1	7.5
82	6.6	5.8	7.1
83	6.2	5.5	6.6
84	5.8	5.1	6.2
85	5.4	4.8	5.8

Reviser's Note:

The statistics in the present section § 8-263.1 were derived from *Vital Statistics of the United States, 1963, Volume II*, published by the United States Department of Health, Education and Welfare. The figures in the proposed section represent that Department's 1973 update of these statistics. representing U.S. inhabitants.

§ 8.01-420. Depositions as basis for motion for summary judgment or to strike evidence.—No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. To the extent that it conflicts with the provisions of this section, Rule 4:7 of the Rules of the Supreme Court of Virginia is hereby superseded.

Reviser's Note:

No change is made in present § 8-315.1. This provision is also found in Rule of Court 4:7(e). Its retention here is an exception to the general procedure of repealing those statutes adequately covered by the Rules. However, the Code Commission strongly endorses the substance of this statute and therefore desires its retention in Title 8.

§ 8.01-420.1. Abolition of common law perpetuation of testimony.—The common law proceeding to perpetuate testimony is abolished.

Reviser's Note:

This is a new section. See the note at the beginning of this chapter. This section contemplates an amendment to Rule 4:2 which will adequately provide for the perpetuation of testimony.

Chapter 15.

Payment and Set-Off.

§ 8.01-421. Payment may be pleaded; payment into court of part of claim; procedure upon such payment.—A. In any action for recovery of a debt the defendant may plead payment of the debt or any part thereof prior to the commencement of the action.

B. In any personal action, the defendant may pay into court a sum of money on account of what is claimed, or way of compensation or amends, and plead that he is not indebted to the plaintiff, or that the plaintiff has not sustained damages, to a greater amount than such sum. The plaintiff may accept such sum either in full satifaction, and then have judgment for his costs, or in part satisfaction, and reply to the allegations of the

defendant's pleadings, and, if issue thereon be found for the defendant, judgment shall be given for the defendant, and he shall recover his costs.

Reviser's Note:

Present § 8-236 has been rewritten to clarify the statute and inserted as subsection A. of this proposed statute. Subsection A. is limited to debts.

Present §§ 8-237 and 8-238 will become proposed subsection B. and minor language changes have been made. This statute pertains to "any personal action" and for example, the defendant could come in and make compensation to stop the interest on damages from continuing to run pending the outcome of the action. Present § 8-238 is the second sentence of proposed subsection B. without change.

Present § 8-239. Right of set-off recognized; counterclaims and crossclaims in courts of record. To be deleted.

Reviser's Note:

This statute was placed in the Code in 1954 after some consideration when the rules were relatively new and the counterclaim statutes had not been extensively used. The rules are adequate and the statute no longer has any usefulness.

Present § 8-239.1. Counterclaims in proceedings before trial justices.

Present § 8-239.2. Cross-claims in proceedings before trial justices.

Reviser's Note:

Sections 8-239.1 and 8-239.2 are being transferred to Title 16.1. in which they will be more appropriately located. The terms "any general district court" and "court" have been substituted for the term "trial justice" throughout these sections.

Present § 8-240. When in action on contract surety may counterclaim on claim of principal against plaintiff.

Reviser's Note:

This section is being deleted. In its present form it is declaratory merely of the existing case law of suretyship as it existed prior to courterclaim rules of court. Rule 3:8 now permits a defendant to assert any claim he has against the plaintiff which, it is believed, is broad enough to make available to the counterclaiming surety both a claim in favor of his principal and a claim which the surety has

against the plaintiff creditor. Although the rule changes the law of suretyship, many of the courts and commentators have sharply critized the case law and tended to favor the principle embodied in the rule of court. The rule of court governs.

Present § 8-240.1. When plaintiff allowed courter set-off; trial of issue.

Reviser's Note:

This section is being deleted. It is believed that the rules of court are adequate.

§ 8.01-422. Pleading equitable defenses.—In any action on a contract, the defendant may file a pleading, alleging any matter which would entitle him to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the pleading. If the amount claimed by the defendant exceed the amount of the plaintiff's claim the court may, in a proper case, give judgment in favor of the defendant for such excess.

Reviser's Note:

This is present § 8-241. Rule 3:8 covers nearly any defense to an action or claim, but upon close examination, the rule in its present form does not appear to include equitable defenses to a contract such as estoppel or unconscionability. Therefore, the Code Commission's decision is to retain this section with no changes.

Present § 8-244. When action deemed brought on counterclaim or crossclaim; statute of limitations; defendant's consent required for dismissal

Reviser's Note:

The provisions of this section have been incorporated in other sections. Insofar as the treatment of a counterclaim or crossclaim is deemed to be the bringing a new action, it is believed that the Rules of Court together with the language in proposed § 8.01-233 cover this subject. Proposed § 8.01-233 incorporates the first provision of present § 8-244 with respect to commencement of the action and also includes the provision relating to tolling of the statute of limitations. The last sentence of present § 8-244 has been amended and it is now incorporated in the proposed nonsuit statute (see proposed § 8.01-380).

Present § 8-245. Procedure on defendant's claim; excess.

Reviser's Note:

This section is being deleted since it has little utility and is perhaps obsolete.

§ 8.01-423. When plaintiff claims as assignee or transferee.—If the plaintiff claims as assignee or transferee under a person with whom the contract sued on was originally made, and the defendant's claim exceeds the plaintiff's demand, the defendant:

1. In his counterclaim, may waive the benefit of his claim as to any excess beyond the plaintiff's claim, whereupon, the further proceedings shall be upon the plaintiff's claim and the defendant's counterclaim as a defense thereto; or

2. Instead of such waiver such defendant may, by rule issued by the court, to which rule shall be attached a copy of the counterclaim and served on the person, under whom plaintiff claims as aforesaid, make such person a party to the action; and, on the trial of the case, the jury shall ascertain and apply, the amount and interest to which the defendant is entitled; and, for any excess beyond the plaintiff's demand for which such person under whom the plaintiff claims as aforesaid is liable, with such interest as the court or jury allows, judgment shall be rendered for the defendant against such person.

Reviser's Note:

This is present § 8-246 from which the phrase "or, on his application, issued by the clerk of the court in vacation" has been deleted from subdivision 2. Also, the phrase "as provided in the preceding section" has been deleted from such subdivision.

Present § 8-247. Effect of chapter on voluntary bonds.

Reviser's Note:

This section is obsolete and is therefore being deleted.

CHAPTER 16.

Compromises.

§ 8.01-424. Approval of compromises on behalf of persons under a disability in suits or actions to which they are parties.—A. In any action or suit wherein a person under a disability is a party, the court in which the same is pending shall have the power to approve and confirm a compromise of the matters in controversy on behalf of such party, including claims under the provisions of any liability insurance policy, if such compromise shall be deemed to be to the interest of the party; and any order or decree approving and confirming any such compromise shall be binding upon such party, except that the same may be set aside for fraud.

B. In case of damage to the person or property of a person under a disability, caused by the wrongful act, neglect or default of any person, when death did not ensue therefrom, any person interested in compromise of any claim for such damages, including any claim under the provisions of any liability insurance policy, may upon motion to the court in which the action is pending for the recovery of damages on account of such injury, or if no

such action is pending, then to any circuit court, move the court to approve the compromise. The movant shall give reasonable notice of such motion to all parties who may be interested in the compromise. Whether or not the movant is person under a disability, the court shall appoint a guardian ad litem, who may be the attorney of record for such person, to represent the interest of the person under a disability.

C. The compromise action shall be in accordance with the applicable provisions of § 8.01-55, provided that nothing in this section shall be construed to affect the provisions of § 8.01-76, except that in such action the court may in its discretion direct the payment of the proceeds of the compromise agreement, when approved, as follows: (1) payment of the sum into court as provided by § 8.01-600; or (2) to a duly qualified fiduciary of the person under a disability, after due inquiry as to the adequacy of the bond of such fiduciary; or (3) as provided in § 8.01-606.

Reviser's Note:

This is a combination of present §§ 8-169 and 8-170. (§ 8-169 appears as subsection A. followed by subsections B. and C. from present § 8-170).

In the revision to Title 8, the new phrase "person under a disability" has been adopted in most instances in lieu of such present terms as "incompetent," "incapacitated," "insane" or "ant"; this term, as defined, includes all persons unable to protect r property or legal rights regardless of the particular impairment or malady. This term is used in this section.

A substantive change in the proposal is the elimination of the right of an infant to attack an order of compromise within six months after his majority. The present statute does not accord similar protection to an "idiot or lunatic" even though such a person could be restored to full competency. Moreover, subsection B., which sets forth the procedure for compromise of claims for persons under disabilities, has been changed to insure that an infant's interests are protected by a guardian ad litem. Thus, it is submitted that an infant does not need the additional leeway of present § 8-169.

Present § 8-170 has been completely rewritten to simplify the procedure for compromising personal injury and property claims of persons under a disability. In all instances a guardian ad litem must be appointed to represent the interests of the person under the disability. This additional protection is an extension of similar protection provided by the present section where a fiduciary or a relative of the person under the disability is the movant. Thus all parties under disability are treated alike irrespective of the relationship of the nominal party to the real party in interest. The court may appoint as the guardian ad litem the attorney of record of the person under a disability - a discretion also granted in proposed subsection B. of § 8.01-9 (when guardian ad litem need not be appointed for person under a disability).

Similarly, there is added protection provided by the deletion of the provision in the present section whereby it is unnecessary to

make a party to such proceedings any person whose whereabouts is unknown. This may be exactly the type of party whose interest should be represented by a guardian ad litem.

The provisions pertaining to the court wherein such motion for compromise should be made have also been altered. If an action to recover damages for injury to a person under a disability or his property has been filed, the motion seeking approval of the compromise must be presented to the court in which that action is pending. However, if no such action has been brought, the motion may be made to any circuit court within the Commonwealth. This change to the present law is in conformity with the broadened venue provisions of proposed Chapter 5. Moreover, if the parties have been able to agree to a compromise, it is likely that they also can agree upon a mutually convenient circuit court to approve that compromise.

Finally, the present provisions dealing with procedures set forth in other sections of the Code which are incorporated in the present § 8-170 have been retained. See §§ 8.01-55 (Wrongful death compromise), 8.01-76 (Disposition of proceeds from sales of lands of persons under disabilities), 8.01-600 (Deposit of money under court's control), 8.01-606 (Payment of small amounts to infants, etc).

Note: (1) The reference in present § 8-170 to "person or corporation" was shortened in the proposal to "person" since person is defined in § 1-13.19 to include corporations.

§ 8.01-425. How fiduciaries may compromise liabilities due to or from them.—Any fiduciary may compromise any liability due to or from him, provided that such compromise be ratified and approved by a court of competent jurisdiction, all parties in interest being before such court by proper process. When such compromise shall have been so ratified and approved, it shall be binding on all parties in interest before such court. Nothing contained in this section shall affect the right of indemnity or of contribution among the parties.

Reviser's Note:

No substantive change has been made in present § 8-171. Since the term "compound" means compromise, it has been deleted as being redundant. With the deletion of present § 8-172 recommended, present § 8-173 has been incorporated in proposed § 8.01-171 as the last sentence thereto.

Present § 8-172. Compromises in suits administering assets of joint stock companies. To be deleted.

Reviser's Note:

Joint stock companies are an enigma under current Virginia law. This section is the only one in the Code referring to such

organizations which have apparently fallen into disuse.

CHAPTER 17.

Judgments and Decrees Generally.

Article 1.

In General.

§ 8.01-426. "Judgment" includes decree.—A decree for land or specific personal property, and a decree or order requiring the payment of money, shall have the effect of a judgment for such land, property, or money, and be embraced by the word "judgment", where used in this chapter or in Chapters 18, 19 or 20 of this title or in Title 43; but a party may proceed to carry into execution a decree or order in chancery other than for the payment of money, as he might have done if this and the following section had not been enacted.

Reviser's Note:

The Revisers recommend no change to present

-343.

§ 8.01-427. Persons entitled under decree deemed judgment creditors; execution on decree.—The persons entitled to the benefit of any decree or order requiring the payment of money shall be deemed judgment creditors, although the money be required to be paid into a court, or a bank, or other place of deposit. In such case, an execution on the decree or order shall make such recital thereof, and of the parties to it, as may be necessary to identify the case; and if a time be specified in the decree or order within which the payment is to be made, the execution shall not issue until the expiration of that time.

Reviser's Note:

This is present § 8-344 without substantive change.

Present § 8-347. When judgment by default on scire facias to become final.—To be deleted.

Reviser's Note:

It is believed that this section is unnecessary in view of the present method for extending the life of a judgment. (See present § 8-396, proposed § 8.01-251)

Proposed § 8.01-428. Setting aside default judgments, clerical mistakes, independent actions to relieve a party from a judgment, or proceedings; grounds and time limitations.

A. Default judgements and decrees pro confesso; summary procedure.—Upon motion of the judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.

B. Clerical mistakes.—Clerical mistakes in all judgements or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court.

C. Other judgments or proceedings.—This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in § 8.01-322, or to set aside a judgment or decree for fraud upon the court.

Reviser's Note:

The Supreme Court has stated that "the full intent and meaning of present § 8-348 is not clear." (*Federal Realty* v. *Litterio & Co.*, 213 Va. 3 (1972)) In a more recent case, *Highway Commissioner* v. *Easley*, 215 Va. 197 (1974), involving condemnation, the Supreme Court ruled that a final order could be amended pursuant to § 8-348. The amended order corrected a clerical as well as a procedural error. The clerical error was an incorrect statement that there were no exceptions to the commissioner's report; the procedural error was the lack of endorsement of the order by the landowner's counsel. An analysis of the court's opinion and the dissent indicates that the Supreme Court has had difficulty in determining the applicability of this section. See also *Federal Realty, supra.*

The Consultants recommend that the proposed section be adopted and that present § 8-348 be repealed. The proposal is an adaptation of FRCP 55 and 60 and is designed to be more definitive and practical than present § 8-348. The time limitation for setting aside a default judgment or decree pro confesso on the ground of fraud on the court has been reduced from three to two years. No limitation period is provided when the ground is a void judgment or an accord and satisfaction. (See § 8.01-428 A.) In addition, no time limitation is proposed for the grounds set forth in § 8.01-428 B. Clerical Mistakes and § 8.01-428 C. Other judgments, decrees, orders or proceedings.

A court's inherent equity power to entertain an independent action to relieve a party from any judgment has been preserved.

§ 8.01-429. Action of appellate court when there might be redress under § 8.01-428.—No appeal shall be allowed by the Supreme Court or any justice thereof for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion be made and overruled

in whole or in part. And when the Supreme Court hears a case wherein an appeal has been allowed, if it appears that, either before or since the same was allowed, the judgment or decree has been so amended, the Supreme Court shall affirm the judgment or decree, unless there be other error; and if it appear that the amendment ought to be, and has not been made, the Supreme Court may make such amendment, and affirm in like manner the judgment or decree, unless there be other error.

Reviser's Note:

This is present § 8-349 without substantive change.

§ 8.01-430. When final judgment to be entered after verdict set aside.—When the verdict of a jury in a civil action is set aside by a trial court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. If necessary to assess damages which have not been assessed, the court may empanel a jury at its bar to make such assessment, and then enter such final judgment.

Nothing in this section contained shall be construed to give to trial courts any greater power over verdicts then they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after discovered evidence.

Reviser's Note:

This is present § 8-352 without change.

Present § 8-353. How judgment entered on bond for payment of money.—To be deleted.

Reviser's Note:

This section is merely declaratory of long standing and clear principles of substantive law.

Present § 8-354. Right of infant to show cause against decree.—To be deleted.

Reviser's Note:

The infant is protected by the tolling statute found in proposed § 8.01-229 and his right to attack an order of compromise within six months of his majority was eliminated by proposed § 8.01-424. Moreover, case law has decisively held that an infant is not entitled to upset decrees on grounds that would not be available to an adult.

Article 2.

§ 8.01-431. Judgment or decree by confession in pending suit.—In any suit a defendant may, whether the suit be on the court docket or not, confess a judgment in the clerk's office for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for. The same shall be entered of record by the clerk in the order book and be as final and as valid as if entered in court on the day of such confession. And the clerk shall enter upon the margin of such book opposite where such judgment or decree is entered, the date and time of the day at which the same was confessed, and the lien of such judgment or decree shall run from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city in which land of the defendant lies.

Reviser's Note:

The language "whether the court be in vacation or not and..." has been deleted from present § 8-355 as unnecessary for modern practice. The Revisers have deleted the requirement that the clerk enter a confessed judgment into a minute book and have retained recording the same in an order book.

§ 8.01-432. Confession of judgment irrespective of suit pending.—Any person being indebted to another person, or any attorney in fact pursuant to a power of attorney, may at any time confess judgment in the clerk's office of any circuit court in this Commonwealth, whether a suit, motion or action be pending therefor or not, for only such principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court. Such judgment shall be as final and as binding as though confessed in open court or rendered by the court, subject to the control of the court in the clerk's office of which the same shall have been confessed.

Revisers's Note:

The language ", or any attorney in fact pursuant to a power of attorney," has been inserted after the present language "Any person being indebted to another person..." in present § 8-356. The proposed language will cover the import of associated sections, for example §§ 8.01-434 and 8.01-435, which indicate that one other than the debtor may confess judgment. (See § 8.01-433 and Reviser's Note thereto.)

§ 8.01-433. Setting aside such judgments by confession.—Any judgment confessed under the provisions of § 8.01-432 may be set aside or reduced upon motion of the judgment debtor made within twenty-one days following notice to him that such judgment has been entered against him, and after twenty-one days notice to the judgment creditor or creditors for whom the judgment was confessed, on any ground which would have been an adequate defense or set-off in an action at law instituted upon the judgment creditor's note, bond or other evidence of debt upon which such judgment was confessed. Whenever any such judgment is set aside or modified the case shall be placed on the trial docket of the court, and the proceedings thereon shall thereafter be the same as if an action at law had been instituted upon the bond, note or other evidence of debt upon which judgment

was confessed. After such case is so docketed the court shall make such order as to the pleadings, future proceedings and costs as to the court may seem just.

Reviser's Note:

The language "creditor or creditors for whom the judgment was confessed" has been inserted in the present § 8-357 for clarification. The Revisers recommend the judgment debtor give the judgment creditors 21 days notice that he will file a motion to set aside or reduce the confessed judgment.

§ 8.01-434. Lien of such judgments.—The clerk shall enter on the margin of the record of any judgment confessed under the provisions of § 8.01-432, the day and hour when the same was confessed and the lien thereof shall attach and be binding from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city in which land of the defendant lies. Unless otherwise provided in the power of attorney to confess judgment, or the note or the bond or other evidence of debt authorizing the confessed judgment, the judgment shall not be a lien against the principal residence of the maker until the expiration of the twenty-one-day period allowed the judgment debtor as set forth in § 8.01-433. In the event the judgement debtor files a motion or other pleading within such twenty-one-day period, the judgment shall not be a lien upon such principal residence until an order to that effect is entered by the court.

Reviser's Note:

The language "allowed the judgment debtor as..." has been inserted before the words "...set forth in § 8.01-433" in present § 8-358. The language "...or other evidence of debt..." has been inserted in the second sentence following the word "bond" in order for this statute to conform with present language in § 8-357.

§ 8.01-435. Who may confess judgment.—Confession of judgment under the provisions of § 8.01-432 may be made either by the debtor himself or by his duly constituted attorney in fact, acting under and by virtue of a power of attorney duly executed and acknowledged by him as deeds are required to be acknowledged, before any officer or person authorized to take acknowledgments of writings to be recorded in this Commonwealth, provided, however, that any power of attorney incorporated in, and made part of, any note or bond authorizing the confession of judgment thereon against the makers and endorsers in the event of default in the payment thereof at maturity need not be acknowledged, but shall specifically name therein the attorney or attorneys or other person or persons authorized to confess such judgment and the clerk's office in which the judgment is to be confessed.

Reviser's Note:

The phrase "power of attorney" has been substituted for the word "warrant" in present § 8-359 in order to eliminate any confusion as to the meaning of the word "warrant".

§ 8.01-436. Form of confession of judgment.—On the presentation of any such power

of attorney as is mentioned in § 8.01-435 by any of the persons therein named as attorney in fact, or on the personal appearance of the debtor and the expression by him of his desire to confess such judgment, the clerk of the court mentioned in such power of attorney, or before whom such debtor shall so appear, shall draw and require the attorney in fact so appearing, or the debtor, as the case may be, to sign a confession of judgment, which shall be in form substantially as follows:

"Virginia: In the clerk's office of the ..... court of the ..... of ....., I, (or we) A.B., (or A.B. and C.D., etc.) hereby acknowledged myself (or ourselves) to be justly indebted to, and do hereby confess judgment in favor of (name of creditor) in the sum of ..... dollars ($.....) with interest thereon from the ..... day of ....., nineteen hundred ....., until paid, and the cost of this proceeding (including the attorney's fees and collection fees provided for in the instrument on which the proceeding is based) hereby waiving the benefit of my (or our) homestead exemptions as to the same, provided the instrument on which the proceeding is based carries such homestead waiver.

Given under my (or our) hand, this ..... day of ....., nineteen hundred and .....

(Signatures)

or, if by an attorney in fact, signatures and seals of debtors,

By .....
his (or their) attorney in fact".

Reviser's Note:

The word "warrant" has been replaced with the phrase "power of attorney" in present § 8-360.

§ 8.01-437. Endorsement of clerk thereon.—When a judgment is so confessed, the clerk shall endorse upon such confession, or attach thereto, his certificate in manner and form substantially as follows:

"Virginia: In the clerk's office of the ..... court of the ..... of .....

The foregoing (or attached) judgment was duly confessed before me in my said office on the ..... day of ....., nineteen hundred and ....., at ..... o'clock ..... a.m., p.m. and has been duly entered of record in common law order book number ....., page .....

Teste:
..... clerk".

Reviser's Note:

No material change has been made to present § 8-361.

§ 8.01-438. When judgment confessed by attorney-in-fact copy to be served on judgment debtor.—If a judgment is confessed by an attorney-in-fact, it shall be the duty of the clerk within ten days from the entry thereof to cause to be served upon the judgment

debtor a certified copy of the order so entered in the common-law order book, to which order shall be appended a notice setting forth the provisions of § 8.01-433. The officer who serves the same shall make return thereof within ten days after such service to the clerk who shall promptly file the same with the papers in the case, and note in the judgment lien docket when the judgment is docketed the date of such service and return, and if the same be not returned "executed" within sixty days after the date of entry of such judgment he shall note such fact at the appropriate place in the judgment lien docket. The failure to serve a copy of such order within sixty days from the date of entry thereof shall render such judgment void as to any debtor not so served. Service of a copy of such order on a nonresident judgment debtor by an officer of the county or city of his residence, authorized by law to serve processes therein, or by the clerk of the court sending a copy of such order by registered or certified mail to such nonresident judgment debtor at his last known post-office address and the filing of a certificate with the papers in the case showing that such has been done or of a receipt showing the receipt of such letter by such nonresident judgment debtor, shall be deemed sufficient service thereof for the purposes of this section.

Reviser's Note:

The phrase "registered mail" has been changed to "certified mail" with respect to service on the non-resident judgment debtor.

§ 8.01-439. Filing of records by clerk.—Such confession and clerk's certificate, ...er with the power of attorney if the confession be by an attorney in fact, and the bond or other obligation, if there be such, on which the judgment is based, shall be securely attached together by the clerk and filed by him among the records in his office.

Reviser's Note:

This is present § 8-363 without substantive change.

§ 8.01-440. Docketing and execution.—The clerk shall forthwith docket such judgment in the current judgment lien docket in his office and shall issue execution thereon as he may be directed by the creditor therein named, or his assigns, in the manner prescribed by law.

Reviser's Note:

This is present § 8-364. The Revisers recommend a cross reference to § 8.01-438 in the annotation to this section as it will appear in the Code of Virginia.

Present § 8-365. Fees and costs.—To be transferred to Title 14.1.

Reviser's Note:

The cost of registered and certified mail has been added to this section. Also, the fee for the sheriff's service has been raised from ...0 to $1.25.

§ 8.01-441. Judgments otherwise confessed invalid.—No judgment confessed in the office of the clerk of any circuit court in this Commonwealth, by virtue of a power of attorney, shall be valid, unless such power of attorney be in conformity with the provisions of this article.

Reviser's Note:

This is present § 8-366 without material change.

Article 3.

When There Are Several Defendants.

§ 8.01-442. In joint actions on contract plaintiff, though barred as to some, may have judgment against others.—In an action or motion, founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against whom he is not so barred.

Reviser's Note:

This is present § 8-367 A cross reference in the annotation to proposed § 8.01-30, Procedure in actions on contracts made by several persons to this section is recommended.

This section is not intended to impair the right of collateral estoppel by judgment.

§ 8.01-443. Joint wrongdoers; effect of judgment against one.—A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each, or, if sued jointly, he may proceed to judgment against them successively until judgment has been rendered against, or the cause has been otherwise disposed of as to, all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied. If there be a judgment against one or more joint wrongdoers, the full satisfaction of such judgment accepted as such by the plaintiff shall be a discharge of all joint wrongdoers, except as to the costs.

Reviser's Note:

The last sentence of present § 8-368 presents a problem in terms of the plaintiff making an irrevocable election when one of multiple judgments can only be partially satisfied. The proposal changes the present law such that discharge of all joint tortfeasors, except as to costs, occurs only when one of multiple judgments has been fully satisfied and has been accepted as such by the plaintiff. "Satisfaction" is determined by case law and in an appropriate

situation would include, besides full payment, an accord and satisfaction or a convenant not to sue supported by consideration. (See *Shortt* v. *Hudson Supply Co.* 191 Va. 306 (1950). See also *Dickenson* v. *Tabb* 208 Va. 184 (1967) and *Harris* v. *City of Roanoke* 179 Va. 1 (1942)). The result of this proposal is deemed to be a more equitable one than the result under the present law.

§ 8.01-444. Where new parties added; if some not liable, how judgment entered.—If it shall appear at the trial that all the original defendants are liable, but that one or more of the other persons added under the provisions of § 8.01-5 are not liable, the plaintiff shall be entitled to judgment, or to verdict and judgment, as the case may be, against the defendants who appear liable, and such as are not liable shall have judgment and recover costs as against the plaintiff, who shall be allowed the same as costs against the defendants who cause them to be made parties.

Reviser's Note:

This is present § 8-369 without change.

Article 4.

Distinction Between Term and Vacation Abolished.

§ 8.01-445. Distinction between term and vacation abolished; effect of time.—The distinction of what a court may do in term as opposed to vacation is hereby abolished. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Reviser's Note:

This section rewrites present §§ 8-370 through 8-372 to empower a court to operate in vacation as it does in term. The distinction in modern practice is at most negligible and therefore the Revisers recommend the abolition of the distinction in Virginia.

Article 5.

Keeping of Docket Books; Execution Thereon.

§ 8.01-446. In what courts judgment dockets to be kept.—The clerk of each court of every circuit, and each clerk of the two divisions of the Circuit Court of the city of Richmond, shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket, without delay, any judgment for money rendered in his court, and shall likewise docket without delay any judgment for money rendered in this Commonwealth by any other court of this Commonwealth or federal court, when he shall be required so to do by any person interested, on such person delivering to him an authenticated abstract of it

and also upon the request of any person interested therein, any such judgment rendered by a district court judge whose book has been filed in his office under the provisions of Title 16.1 or of which an abstract is delivered to him certified by the district court judge who rendered it; provided, that judgments docketed in the clerk's office of the Circuit Court of the city of Williamsburg and the county of James City shall be docketed and indexed in one book; and provided further that the clerk of the circuit court of any county using card files on July one, nineteen hundred seventy-five in lieu of a book may continue to use the card file system.

Reviser's Note:

This is present § 8-373 without substantive change.

Present § 8-374. Certification of judgment by clerks of other courts.—To be deleted.

Reviser's Note:

It is believed that this statute is obsolete and is therefore unnecessary

§ 8.01-447. Docketing of judgments and decrees of United States courts.—Judgments and decrees rendered in the circuit court of appeals or a district court of the United States within this Commonwealth may be docketed and indexed in the clerks' offices of courts of this Commonwealth in the same manner and under the same rules and requirements of law as judgments and decrees of courts in this Commonwealth.

Reviser's Note:

This is present § 8-375 with no substantive change.

§ 8.01-448. Attorney General, etc., to have judgments in favor of Commonwealth docketed.—Whenever a judgment is recovered in favor of the Commonwealth, it shall be the duty of the Attorney General or other attorney representing the Commonwealth, to cause such judgment to be docketed in all counties and cities wherein there is any real estate owned by any person against whom the judgment is recovered.

Reviser's Note:

This is present § 8-376 with no substantive change.

§ 8.01-449. How judgments are docketed; executions issued thereon.—In the judgment docket there shall be stated in separate columns the date and amount of the judgment, the time from which it bears interest, the costs, the names of all the parties thereto, the alternative value of any specific property recovered by it, the date and the time of docketing it, the amount and date of any credits thereon, the court by which it was rendered, and when paid off or discharged in whole or in part, the time thereof, and by whom such payment or discharge was made, when there is more than one defendant. And in case of a judgment or decree by confession, the clerk shall also enter in such docket the

time of day at which the same was confessed, or at which the same was received in his office to be entered of record. There shall also be shown on such book the name of plaintiff's attorney, if any, the date of each execution in the order made, the nature thereof, when returnable, and the officer's return thereon.

Reviser's Note:

No substantive change has been made to present § 8-377.

§ 8.01-450. How indexed.—Every judgment shall, as soon as it is docketed, be indexed by the clerk in the name of each defendant, as required by § 17-79, and shall not be regarded as docketed as to any defendant in whose name it is not so indexed.

Reviser's Note:

This is present § 8-378 without change.

§ 8.01-451. Judgments to be docketed and indexed in new names of judgment debtors; how execution may thereafter issue.—Whenever there be a judgment docketed and indexed, as required by § 17-79 of the Code of Virginia, and thereafter a judgment debtor whose name is so recorded change his name, whether by marriage, court order, by a voluntary assumption of a new name or otherwise, it shall be the duty of the clerk of the court in which the judgment was obtained upon satisfactory proof that the judgment debtor has acquired a new name, to docket and index the judgment in the new name. Execution may thereafter issue against the judgment debtor in the prior name, the new name, or both. Affidavit by any party interested in the judgment or by his duly authorized attorney or agent that the judgment debtor has acquired a new name, stating the new name, shall constitute satisfactory proof of the new name. This section shall apply to all judgments obtained prior or subsequent to the enactment hereof.

Reviser's Note:

This is present § 8-378.1. The sentence that provides a clerk's fee of fifty cents for the service rendered by the clerk pursuant to this section will be transferred to Title 14.1.

§ 8.01-452. Entry of assignment of judgment on judgment lien docket.—Whenever there shall be an assignment of a judgment, there may be a notation of the assignment made upon the judgment docket, where the same is recorded, by the clerk. An assignment, in order to be so noted, must be in writing, showing the date thereof, the name of the assignor and assignee, the amount of the judgment, and when and by what court granted, and either acknowledged as are deeds for recordation in the clerks' offices of circuit courts in this Commonwealth, or signed by the assignor, attested by two witnesses; or such judgment may be assigned by notation on the margin of the judgment lien docket on the page of the book where same is docketed, by the judgment creditor or his attorney of record, and attested by the clerk. The assignment, after the same is noted upon the judgment docket as is herein provided, shall be filed by the clerk with the other papers in the case in his office. When such assignment is made and noted as herein provided further executions shall be issued in the name of the assignee as the plaintiff in the case.

Reviser's Note:

This is present § 8-379. The sentence concerning the clerk's fee will be transferred to Title 14.1.

Article 6.

Satisfaction.

§ 8.01-453. When and how payment thereof entered on judgment docket.—The fact of payment or discharge, either in whole or in part, of any judgment so docketed, and if there be more than one defendant, by which defendant it was paid or discharged, shall be entered by the clerk in whose office the same is so docketed whenever it shall appear from the return of an execution issued from his office, or from a certificate of the clerk from whose office such execution is issued, that the same has been satisfied, in whole or in part, or upon the direction of the judgment creditor, his duly authorized attorney or other agent.

Reviser's Note:

This is present § 8-380. The phrase "..., his duly authorized attorney or other agent..." has been inserted following the words "judgement creditor" at the end of the last sentence of the section. Often an agent of a judgment creditor will release a judgment. The clerk of court may require the agent to exhibit such authorization to release the judgment as the clerk deems appropriate.

Present § 8-381. When clerk to certify satisfaction of judgment.—To be deleted.

Reviser's Note:

The Consultants recommend the repeal of present § 8-381. Present §§ 8.01-453, 8.01-454 and 8.01-455 are adequate to cover the import of this statute.

§ 8.01-454. Judgment, when paid, to be so noted by creditor.—In all cases in which payment or satisfaction of any judgment so docketed is made which does not appear by the return of any execution to the office of the clerk in which the judgment is docketed or which is not required to be certified to him under § 8.01-455, it shall be the duty of the judgment creditor, himself, or by his agent or attorney, to cause such payment, or satisfaction, by the defendant, whether in whole or in part, and if there be more than one defendant, by which defendant it was paid or discharged, to be entered within thirty days after the same is made, on such judgment docket, or, if the judgment has not been docketed, then on the execution book in the office of the clerk from which the execution issued. And for any failure to do so, after ten days' notice so to do by the judgment debtor, his agent or attorney, such judgment creditor shall be liable to a fine of up to fifty dollars. Such entry of payment or satisfaction shall be signed by the creditor, his duly authorized attorney or other agent, and be attested by the clerk in whose office the judgment is docketed, or, when not docketed, by the clerk from whose office the execution issued. But the cost of such release shall be paid by the judgment debtor.

Reviser's Note:

This is present § 8-382. The present 90 day period in which the judgment creditor has to note satisfaction on the judgment docket has been reduced to 30 days. The fine for failure to do so has been increased from $20 to a maximum of $50. Other minor changes have been made.

§ 8.01-455. Court, on motion of defendant, etc., may have payment of judgment entered.—A. A defendant in any judgment, his heirs or personal representatives, may, on motion, after ten days' notice thereof to the plaintiff in such judgment, or his assignee, or if he be dead, to his personal representative, or if he be a nonresident, to his attorney, if he have one, apply to the court in which the judgment was rendered, to have the same marked satisfied, and upon proof that the judgment has been paid off or discharged, such court shall order such satisfaction to be entered on the margin of the page in the book wherein such judgment was entered, and a certificate of such order to be made to the clerk of the court in which such judgment is required by § 8.01-446 to be docketed, and the clerk of such court shall immediately, upon the receipt of such certificate, enter the same in the proper column of the judgment docket opposite the place where such judgment is docketed. If the plaintiff be a nonresident and have no attorney of record residing in this Commonwealth, the notice may be published and posted as an order of publication is required to be published and posted under §§ 8.01-316 and 8.01-317. Upon a like motion and similar proceeding, the court may order to be marked "discharged in bankruptcy", any judgment which may be shown to have been so discharged.

B. The cost of such proceedings, including reasonable attorney's fees, may be ordered to be paid by the plaintiff.

Reviser's Note:

This is present § 8-383. The word "resident" has been deleted and the language "of record residing in this Commonwealth" has been added after the word "attorney". Subsection B. providing that the cost of such a proceeding be borne by the plaintiff is new.

§ 8.01-456. Satisfaction of judgment when judgment creditor cannot be located.—Whenever a judgment debtor or any one for him or any party liable on the judgment wishes to pay off and discharge a judgment, of record in any clerk's office in this Commonwealth, when the judgment creditor cannot be located, he may do so by paying into the court having jurisdiction over such judgment an amount sufficient to pay the principal, interest, and all costs due thereupon, together with the cost of entering necessary orders, and other service attendant upon the proceeding herein provided for, and satisfaction upon such judgment. Upon such payment, the court, by an order entered of record shall direct the clerk to deposit the same at interest in any bank which is a member of the Federal Deposit Insurance Corporation and is designated in such order; to file evidence of such deposit in the office of the clerk in an appropriate file and shall be payable to the court entering the order for the benefit of the judgment creditor; and to enter upon the judgment docket, where the judgment is docketed, the date of such deposit, the date of the entry of the order of the court receiving same, referring to the number and page of the order book in which it is entered.

The judgment creditor or his attorney may have the money, so paid, to which he is entitled, upon application to the court therefor whenever it may appear to the court that it

should be paid to him.

From and after the time of such payment, into the court, as aforesaid, the property of the defendant shall be free and clear of any lien created by any such judgment, or any execution issued thereupon.

Reviser's Note:

This is present § 8-384. The language "a judgment debtor or any one for him or any party liable on the judgment who" has been substituted for "any interested party..." before the word "wishes". The language "any bank which is a member of the Federal Deposit Insurance Corporation..." has been inserted in place of the present language "some solvent bank...". The words "at interest" have been inserted after the language "deposit the same". This substituted language is to clarify the application of the statute and is not designed to change the principles found therein. The language "to take a interest bearing certificate therefor which shall be filed..." has been replaced with "to file evidence of such deposit...".

§ 8.01-457. Marking satisfied judgments for Commonwealth; releasing recognizances.—It shall be the duty of the clerks of the several courts of record of this Commonwealth, upon the payment of any judgment in favor of the Commonwealth or upon the release of any recognizance by court order, to mark the same satisfied upon the judgment lien docket at every place such judgment or recognizance, as the case may be, shall have been recorded upon such lien docket; and in marking such recognizance satisfied it shall be the duty of such clerk to refer by marginal reference to the court order, if any, releasing or discharging such recognizance.

Reviser's Note:

This is present § 8-385 without change.

Article 7.

Lien and Enforcement Thereof.

§ 8.01-458. From what time judgment to be a lien on real estate; docketing revived judgment.—Every judgment for money rendered in this Commonwealth by any state or federal court or by confession of judgment, as provided by law, shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city where such land is situated; provided, however, when a judgment is revived under the provisions of § 8.01-251, that such revived judgment shall not be a lien as prescribed in this section unless and until such judgment is again docketed as provided herein. In such event the lien shall be effective from the date of the original docketing. Any judgment or decree properly docketed under the provisions of this section shall, if the real estate subject to the lien of such judgment has been annexed to or merged with an adjoining city subsequent to such docketing, be deemed to have been docketed in the proper clerk's office of such city.

Reviser's Note:

No substantive change has been made to present § 8-386.

§ 8.01-459. Priority of judgments.—Judgments against the same person shall, as among themselves, attach to his real estate, and be payable thereout in the order of the priority of the lien of such judgments, respectively.

Reviser's Note:

This is present § 8-387. For clarification, the language "the lien of" has been inserted before the words "such judgments."

§ 8.01-460. Decree for support and maintenance of a spouse or infant children of parties as a lien on real estate.—A decree, order or judgment for support and maintenance of a spouse or of infant children of the parties payable in future installments shall be a lien upon such real estate of the obligor as the court shall, from time to time, designate by order or decree. An order after reasonable notice to the obligor adjudicating that the obligor is delinquent, shall be a lien on the obligor's real estate. Liens under this section shall arise when duly docketed in the manner prescribed for the docketing of other judgments for money. On petition by any interested person and after reasonable notice to the obligee, the court in which the obligor was adjudicated delinquent may order the release or other modification of such lien.

Reviser's Note:

This is present § 8-388. A major change in this section has been made so that the lien for maintenance and support of a spouse or infant children would rise only after the order adjudicating the obligor delinquent and creating the lien has been docketed as other money judgments are docketed. The lien shall attach to such real estate of the obligor as the court shall designate and shall be subject to modification by the court upon petition. Other minor language changes have been made for the sake of clarification. [NB. There should be a cross-reference to this section in the annotation under § 20-109.]

§ 8.01-461. Extracts from judgments.—An extract from any judgment shall, upon request to the clerk of the court wherein the judgment is rendered, be granted to any person interested immediately upon its rendition, subject to the future action of the court rendering the same.

Reviser's Note:

This is present § 8-389. For simplication, the word "motion" has been deleted and the language "request to the clerk of the court wherein the judgment is rendered" has been inserted in its place. It is believed that this change merely comports with modern practice.

§ 8.01-462. Jurisdiction of equity to enforce lien of judgment; when it may decree a sale.—Jurisdiction to enforce the lien of a judgment shall be in equity. If it appear to the court that the rents and profits of all real estate subject to the lien will not satisfy the judgment in five years, the court may decree such real estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment.

Reviser's Note:

This is present § 8-392 without change.

§ 8.01-463. Enforcement of lien when judgment does not exceed twenty dollars.—If the amount of the judgment does not exceed twenty dollars, exclusive of interest and costs, no bill to enforce the lien thereof shall be entertained, unless it appear that thirty days before the institution of the suit, the judgment debtor or his personal representative, and the owner of the real estate on which the judgment is a lien, or, in case of a nonresident, his agent or attorney, if he had one in this Commonwealth, had notice that the suit would be instituted, if the judgment was not paid within that time.

Reviser's Note:

This is present § 8-392 without change.

§ 8.01-464. Order of liability between alienees of different parts of estate.—When the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it, or any part of it, has been aliened, as among the alienees for value, that which was aliened last, shall, in equity, be first liable, and so on with other successive alienations, until the whole judgment is satisfied. And as among alienees who are volunteers under such judgment debtor, the same rule as to the order of liability shall prevail; but as among alienees for value and volunteers, the lands aliened to the latter shall be subjected before the lands aliened to the former are resorted to; and, in either case, any part of such real estate retained by the debtor shall be first liable to the satisfaction of the judgment. An alienee for value, however, from a volunteer shall occupy the same position that he would have occupied had he purchased from the debtor at the time he purchased from the voluntary donee.

Reviser's Note:

This is present § 8-395 without change.

§ 8.01-465. Chapter embraces recognizances and bonds having force of a judgment.—The foregoing sections of this chapter, so far as they relate to the docketing of judgments, the entering of satisfaction thereof, and the liens of judgments and enforcement of such liens, shall be construed as embracing recognizances, and bonds having the force of a judgment.

Reviser's Note:

This is present § 8-398 without change.

CHAPTER 18.

Executions and Other Means of Recovery.

Article 1.

Issue and Form; Motion to Quash.

§ 8.01-466. Clerk to issue fieri facias on judgment for money.—On a judgment for money, it shall be the duty of the clerk of the court in which such judgment was rendered, upon request of the judgment creditor, his assignee or his attorney, to issue a writ of fieri facias at the expiration of twenty-one days from the date of the entry of the judgment and place the same in the hands of the proper officer of such court to be executed and take his receipt therefor. For good cause the court may order an execution to issue on judgments and decrees at an earlier period.

Reviser's Note:

This is present § 8-399. The Revisers have replaced to language "...only if so requested by a party in interest..." which was added during the 1976 Session of the General Assembly and substituted therefor the language "...upon request of the judgment creditor, his assignee or his attorney". The 1976 language is believed to be overly broad and would allow anyone with an interest in the debtor's assets, other than a judgment creditor, to request issuance of a writ of fieri facias on a judgment for money. In any event, either amendment would impose no duty on the clerk to issue a writ of fi fa until requested to do so. Therefore, the language "...unless he is otherwise directed by writing by the beneficiary of such judgment, his agent or attorney..." is surplusage, and the Revisers have deleted it. Also the distinction made in the present section between district courts and circuit courts as to procedure for issuance of execution has been deleted.

This proposal has been approved by many judges and clerks who were consulted. Conforming changes to § 16.1-98 will be made.

§ 8.01-467. What writs may not issue.—No writ of levari facias, writ of elegit, writ of capias ad satisfaciendum, or writ of distringas shall be issued hereafter.

Reviser's Note:

This is present § 8-400 without change.

§ 8.01-418. Executions against corporations; how issued on joint judgments.—Such executions as may issue against a natural person may issue against a corporation.

Reviser's Note:

This is present § 8-401. The last sentence of this section has been made a separate section, § 8.01-469.

§ 8.01-469. Execution.—When a judgment is against several persons jointly, executions thereon may be joint against all of them.

Reviser's Note:

This is the last sentence of present § 8-401. The word "shall" has been replaced by "may" Other minor language changes have been made.

§ 8,01-470. Writs on judgments for specific property.—On a judgment for the recovery of specific property, real or personal, a writ of possession may issue for the specific property, which shall conform to the judgment as to the description of the property and the estate, title and interest recovered, and there may also be issued a writ of fieri facias for the damages or profits and costs. In cases of unlawful entry and detainer and of ejectment, whenever the officer to whom a writ of possession has been delivered to be executed finds the premises locked, he may, after declaring at the door the cause of his coming and demanding to have the door opened, employ reasonable and necessary force to break and enter the door and put the plaintiff in possession. And an officer having a writ of possession for specific personal property, if he find locked or fastened the building or place wherein he has reasonable cause to believe the property specified in the writ is located, may in the day time, after notice to the defendant, his agent or bailee, break and enter such building or place for the purpose of executing such writ.

Reviser's Note:

This is present § 8-402 without change.

§ 8.01-471. When writs of possession in cities, etc., returnable.—Writs of possession, in case of unlawful entry and detainer, shall be made returnable within thirty days from the date of issuing the writ.

Reviser's Note:

This is present § 8-403. The Revisers have made 30 days uniform for returns of writs of possession irrespective of the location of the property

§ 8.01-472. Writs on judgments for personal property.—When the judgment is for personal property, the plaintiff may, at his option, have a fieri facias for the alternative value, instead of a writ of possession, and the damages and costs.

Reviser's Note:

This is present § 8-404 without change.

§ 8.01-473. Judgment for benefit of other person than plaintiff; remedies of such person.—When an execution issues on a judgment, for the benefit, in whole or in part, of any person other than the plaintiff, if the fact appears by the record, the clerk shall, in the execution, or by an endorsement thereon, state the extent of the interest therein of such person; and such person, either in his own name or that of the plaintiff, may, as a party injured, prosecute a suit or motion against the officer.

Reviser's Note:

This is present § 8-405 without change.

§ 8.01-474. What writ to command.—By a writ of fieri facias, the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is.

Reviser's Note:

This is present § 8-406 without change.

§ 8.01-475. After an execution has issued, provision for others.—Subject to the limitations prescribed by Chapter 17 (§ 8.01-426 et seq.) of this title, a party obtaining an execution may sue out other executions at his own costs, though the return day of a former execution has not arrived; and may sue out other executions at the defendant's costs, when on a former execution there is a return by which it appears that the writ has not been executed, or that it or any part of the amount thereof is not levied, or that property levied on has been discharged by legal process which does not prevent a new execution on the judgment. In no case shall there be more than one satisfaction for the same money or thing.

And the fact that a judgment creditor may have availed himself of the benefit of any other remedies under this chapter, shall not prevent him from issuing, from time to time, without impairing his lien under it, other executions upon his judgment until the same is satisfied.

Reviser's Note:

This is present § 8-407 without change.

§ 8.01-476. New execution after loss of property sold under indemnifying bond.—When property sold under an execution, or its value, is recovered from an obligor on an indemnifying bond given before such sale, or from a purchaser having a right of action on such bond, the person having such execution, or his personal representative, may, by motion, after reasonable notice to the person, or the personal representative of the person, against whom the execution was, obtain a new execution against him, without credit for the amount for which the property was sold under the former execution. Such motion shall be made within the period of time prescribed by § 8.01-255.2.

Reviser's Note:

This is present § 8-408 without material change. The statute of limitations provision of this section has been transferred to proposed Chapter 4, Limitations of Actions.

§ 8.01-477. When executions may be quashed; how proceedings thereon stayed.—A motion to quash an execution may, after reasonable notice to the adverse party, be heard and decided by the court which issued the execution. Such court, on the application of the plaintiff in the motion, may make an order staying the proceedings on the execution until the motion be heard and determined, the order not to be effectual until bond be given in such penalty and with such condition, and either with or without surety, as the court may prescribe. The clerk from whose office the execution issued, shall take the bond and make as many copies of the order as may be necessary and endorse thereon that the bond required has been given; and a copy shall be served on the plaintiff in the execution and on the officer in whose hands the execution is placed.

Reviser's Note:

This section, present § 8-410, has been simplified without material change.

Article 2.

Lien in General.

§ 8.01-478. On what writ levied; when lien commences.—The writ of fieri facias may be levied as well on the current money and bank notes, as on the goods and chattels of the judgment debtor, except such as are exempt from levy under Title 34, and shall bind what is capable of being levied on only from the time it is actually levied by the officer to whom it has been delivered to be executed.

Reviser's Note:

This is present § 8-411. The Revisers have changed the time of binding tangible personal property to be levied on from the time of delivery of the writ of fi fa to the officer to the time "...it is actually levied by the officer to whom it has been delivered to be executed." This change in the common law has been made to allow Virginia to join the overwhelming number of jurisdictions that have so modified the common law. (This change has received encouragement from Virginia judges.) This change will prevent the injustice which results when a BFP takes the property and later discovers an officer with a writ in his pocket which he failed to execute.

§ 8.01-479. When lien ceases; enforcement of lien.—The lien of a writ of fieri facias, on what is capable of being levied on but is not levied on under the writ on or before the return day thereof, shall cease on that day. Property levied on, on or before the return day, may be advertised and sold within a reasonable time thereafter, and the lien given by this section may also be enforced after the return day of the writ by proceedings under § 8.01-506 and following of this chapter, if such proceedings be commenced before that day.

Reviser's Note:

This is present § 8-412 without change.

§ 8.01-480. Prior lien on property levied on.—Tangible personal property subject to a prior lien, or in which the execution debtor has only an equitable interest, may nevertheless be levied on for the satisfaction of a fieri facias. If such prior lien be due and payable, the officer levying the fieri facias shall sell the property free of such lien, and apply the proceeds first to the payment of such lien, and the residue, so far as necessary, to the satisfaction of the fieri facias. If such prior lien be not due and payable at the time of sale, such officer shall sell the property levied on subject to such lien.

Reviser's Note:

This is present § 8-413 without change.

§ 8.01-481. Territorial extent of the lien of an execution.—The lien given by this chapter on personal property by levy shall, as to property capable of being levied on, be restricted to the bailiwick of the officer into whose hands the execution is placed to be executed, but as to property not capable of being levied on the lien shall extend throughout the limits of the Commonwealth.

Reviser's Note:

This is present § 8-414. The language "...placing an execution in the hands of an officer to be executed shall..." has been deleted and the words "levy shall" have been inserted in its place. This change comports with the recommendation in proposed § 8.01-478.

§ 8.01-482. If levy be on coin or currency, how accounted for.—If the levy be on coin or currency (including notes) made a legal tender for the payment of debts, the same shall be accounted for at its par value as so much money made under the execution. If it be upon coin or currency (including notes) not a legal tender for the payment of debts, and the creditor will not take them at their nominal value, they shall be sold and accounted for as any other property taken under execution.

Reviser's Note:

This is present § 8-415 without change.

Article 3.

Return and Venditioni Exponas.

§ 8.01-483. Return of officer on fieri facias; statement filed therewith.—Upon a writ of fieri facias, the officer shall return whether the money therein mentioned has been or cannot be made; or if there be only part thereof which is or cannot be made, he shall

return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received, including his fees and other charges, and such amount, except such fees and charges, he shall pay to the person entitled. In his return upon every execution, the officer shall also state whether or not he made a levy of the same, the date and time of such levy, and the date when he received such payment or obtained such satisfaction upon such execution; and if there be more than one defendant from which defendant he received the same.

Reviser's Note:

This is present § 8-416. The language "...date and time..." has been inserted before the words "of such levy". This recommended language comports with the changes made in §§ 8.01-478 and 8.01-487.

§ 8.01-484. Entry of return by clerk; when writ may be destroyed.—Upon the return of such writ of fieri facias by the officer to the clerk's office or to the court to which it is returnable, it shall be the duty of the clerk thereof to enter the return of such officer on the execution book or judgment docket wherein such execution is entered, as the case may be, giving the date thereof. Any such writ, returned by the officer with a notation that the money cannot be made may, when duly entered by the clerk on the execution book or judgment docket, be destroyed after two years from the date of the return.

Reviser's Note:

This is present § 8-417 without change.

§ 8.01-485. When venditioni exponas may issue; proceedings thereon.—When it appears by the return on an execution that property taken to satisfy it remains unsold, a writ of venditioni exponas may issue, whereupon the like proceedings shall be had as might have been had on the first execution; except, that if it issue upon a return of no sale for want of bidders, or of a sufficient bid, the advertisement shall state the fact, and that the sale will be made peremptorily.

Reviser's Note:

This is present § 8-418 without change.

§ 8.01-486. Procedure when officer taking property under execution dies before sale.—If an officer taking property under execution die before the sale thereof, and there be no deputies of such officer acting in the case, upon a suggestion of the fact a writ of venditioni exponas may be directed to the sheriff or other officer of the county or city wherein the property was taken. Whereupon the officer to whom the writ is directed shall take possession of the property previously levied upon, whether the same be in possession of the representatives of the deceased officer or the execution debtor, and proceed to advertise and sell it and account for the proceeds thereof in like manner as if the levy had been made by himself.

Reviser's Note:

This is present § 8-419 without material change.

Article 4.

Enforcement Generally.

§ 8.01-487. Officer to endorse on fieri facias time of receiving it.—Every officer shall endorse on each writ of fieri facias the date and time he receives the same and also when he levies upon tangible personal property of the debtor. If he fail to do so, the judgment creditor may, by motion, recover against him and his sureties, jointly and severally, in the court in which the judgment was rendered, a sum not exceeding fifteen per cent upon the amount of the execution.

Reviser's Note:

This is presnt § 8-420 rewritten to require every officer to endorse on each writ of fi fa the "date and time" when he receives the writ and also when he levies. This comports with proposed § 8.01-478.

§ 8.01-488. When several writs of fieri facias, how satisfied.—Of writs of fieri facias, that which was first delivered to the officer, though two or more be delivered on the same day, shall be first levied and satisfied, and when several such executions are delivered to the officer at the same time they shall be satisfied ratably. But if an indemnifying bond be required by the officer as a prerequisite to a sale, and the same to be given by some of the creditors and not by others, and the officer sells under the protection of such bond, the proceeds of the sale shall be paid to the creditors giving the bond in the order in which their liens attached.

Reviser's Note:

This is present § 8-421 without change.

§ 8.01-489. Growing crops not liable to distress or levy except, etc.—No growing crop of any kind, not severed, shall be liable to distress or levy.

Reviser's Note:

The outdated exceptions in present § 8-421.1 of crops that may be taken by a writ of fi fa have been deleted.

§ 8.01-490. No unreasonable distress or levy; sustenance provided for livestock.—Officers shall in no case make an unreasonable distress or levy. For horses, or any livestock distrained or levied on, the officer shall provide sufficient sustenance while they remain in his possession. Nothing distrained or levied on shall be removed by him out of his county or city, unless when it is otherwise specially provided.

Reviser's Note:

This is present § 8-421.2 without change.

§ 8.01-491. Officer may break open dwelling house and levy on property in personal possession of debtor.—An officer into whose hands an execution is placed to be levied, may, if need be, break open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant, in order to make a levy, and may also levy on property in the personal possession of the debtor if the same be open to observation.

Reviser's Note:

This is present § 8-422 without change. The demand provision of this statute parallels proposed § 8.01-470.

§ 8.01-492. Sale of property.—In any case of goods and chattels which an officer shall distrain or levy on, otherwise than under an attachment, or which he may be directed to sell by an order of a court, unless such order prescribe a different course, the officer shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city. If the goods and chattels be expensive to keep or perishable, the court from whose clerk's office the writ of fieri facias or the distress warrant was issued under which the seizure is made, or if the distress warrant was issued by a clerk, the court of which he is a clerk, may order a sale of the property seized under fieri facias or distress warrant to be made upon such notice less than ten days as to such court may seem proper. At the time and place so appointed, such officer shall sell to the highest bidder, for cash, such goods and chattels, or so much thereof as may be necessary.

Reviser's Note:

This is present § 8-422.1 without material change.

§ 8.01-493. Adjournment of sale.—When there is not time, on the day appointed for any such sale, to complete the same, the sale may be adjourned from day to day until completed.

Reviser's Note:

This is present § 8-422.2 without change.

§ 8.01-494. Resale of property if purchaser fails to comply; remedy against such purchaser.—If, at any sale by an officer, the purchaser does not comply with the terms of sale, the officer may sell the property, either forthwith or under a new advertisement, or return that the property was not sold for want of bidders. If, on a resale, the property be sold for less than it sold for before, the first purchaser shall be liable for the difference to the creditor, so far as is required to satisfy him, and to the debtor for the balance. This section shall not prevent the creditor from proceeding as he might have done if it had not

been enacted.

Reviser's Note:

This is present § 8-423 without change.

§ 8.01-495. When money received by officer under execution to be repaid to debtor.—When an officer has received money under execution, if any surplus remain in his hands after satisfying the execution, such surplus shall be repaid to the debtor; and if the debtor, or his personal representative, obtain an injunction or supersedeas to an execution, in whole or in part, before money received under it, or any part of it, is paid over to the creditor, the officer shall repay such debtor the money so received and not so paid over, or so much thereof as the injunction or supersedeas may extend to, unless such process otherwise direct.

Reviser's Note:

This is present § 8-424 without change.

§ 8.01-496. Officer not required to go out of his jurisdiction to pay over money.—No officer receiving money under execution, when the person to whom it is payable resides in a different county or city from that in which the officer resides, shall be liable to have any judgment rendered against him or his sureties for the non-payment thereof, until a demand of payment be made of such officer in his county or city, by such creditor or his attorney-at-law, or some person having a written order from the creditor.

Reviser's Note:

This is present § 8-425 without material change.

§ 8.01-497. Suit by officer to recover estate on which fieri facias is a lien.—For the recovery of any estate on which a writ of fieri facias is a lien under this chapter, or on which the judgment on which such writ issues is a lien under Chapter 17 (§ 8.01-426 et seq.) of this title, or for the enforcement of any liability in respect to any such estate, a suit may be maintained, at law or in equity, as the case may require, in the name of the officer to whom such writ was delivered, or in the name of any other officer who may be designated for the purpose by an order of the court in which the judgment is entered. No officer shall be bound to bring such suit unless bond, with sufficient surety, be given him to indemnify him against all expenses and costs which he may incur or become liable for by reason thereof. But any person interested may bring such suit at his own costs in the officer's name.

Reviser's Note:

This section, present § 8-426, has been simplified without material change.

§ 8.01-498. Selling officers and employees not to bid or to purchase.—No officer of

any city, town or county or employee of any such city, town or county shall, directly or indirectly, bid on or purchase effects sold under a writ by such officer.

Reviser's Note:

The application of present § 8-427 has been changed. The proposed section applies to any officer or employee of any city, town or county

Present § 8-428. Selling officer not to act as auctioneer unless licensed. To be deleted.

Reviser's Note:

This statute is unnecessary

§ 8.01-499. Officer receiving money to make return thereof and pay net proceeds.—An officer receiving money under this chapter shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment is entered. For failing to do so, the officer shall be liable as if he had acted under an order of such court. After deducting from such money a commission of five per centum and his necessary expenses and costs, including reasonable fees to sheriff's counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under a writ of fieri facias on the judgment.

Reviser's Note:

Present § 8-429 has been rewritten to require the officer receiving money to return it "forthwith" instead of within thirty days. Antiquated language has been deleted to allow the statute to comport with modern practice.

§ 8.01-500. Officer receiving money to notify person entitled to receive it.—Every officer collecting or receiving money to be applied on any execution or other legal process, or on any claim, whether judgment has been rendered thereon or not, shall notify in writing by mail or otherwise, within thirty days after such money is received, the person entitled to receive such money, if known. Any officer failing without good cause to comply with this section within the time prescribed shall be fined not less than twenty dollars nor more than fifty dollars for each offense.

Reviser's Note:

This is present § 8-430. The dollar limits on the fine have been increased from five and twenty to twenty and fifty respectively.

Article 5.

Lien on Property Not Capable of Being Levied on.

§ 8.01-501. Lien of fieri facias on estate of debtor not capable of being levied on.—Every writ of fieri facias shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to a sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ become, possessed or entitled, in which, from its nature is not capable of being levied on under such sections, except such as is exempt under the provisions of Title 34, and except that, as against an assignee of any such estate for valuable consideration, the lien by virtue of this section shall not affect him unless he had notice thereof at the time of the assignment.

Reviser's Note:

This is present § 8-431 without change.

§ 8.01-502. Person paying debtor not affected by lien unless notice given.—As against a person making a payment to the judgment debtor, the lien referred to in § 8.01-501 shall not affect him, unless and until he be given written notice thereof setting forth (i) the name of the person against whom obtained, (ii) by whom obtained, (iii) the amount and costs of the judgment, (iv) the date recovered, (v) the date of the issuance or renewal of execution thereon, (vi) the return day of execution, and (vii) the date of placing of the execution in the hands of the officer, and unless such notice shall be personally signed by the plaintiff or his attorney and shall have been duly served upon the person making payment and the judgment debtor by an officer authorized to serve civil process.

Reviser's Note:

This is present § 8-432 with no material change.

§ 8.01-503. Withholding of wages or salary not required by preceding sections unless garnishment process served.—Nothing contained in §§ 8.01-501 and 8.01-502 shall have the effect of requiring any employer paying wages or salary to an employee to withhold any part of such wages or salary unless and until such employer is duly served with process in garnishment.

Reviser's Note:

This is present § 8-432.1 without material change.

§ 8.01-504. Penalty for service of such notice when no judgment exists.—Whoever causes to be served a notice of lien of a writ of fieri facias without there being a judgment against the defendant named therein, shall pay to him the sum of one hundred dollars, and whoever serves a notice of lien of a writ of fieri facias before the issuance of a writ of fieri facias, or after the return day thereof, or serves or in any way gives a notice of a lien of fieri facias by means other than by service by an officer authorized to serve civil process, shall pay to the named defendant the sum of one hundred dollars, to be recoverable as damages in an action at law, in addition to whatever damages may be alleged and proven.

Reviser's Note:

The last sentence of present § 8-433 has been deleted as unnecessary. The language "causes to be" has been inserted after the word "Whoever" to clarify the intent of the statute.

Also, the fine has been increased from $50 to $100.

§ 8.01-505. When lien acquired on intangibles under § 8.01-500 ceases.—The lien acquired under § 8.01-500 on intangibles shall cease whenever the right of the judgment creditor to enforce the judgment by execution or by action, or to extend the right by motion, ceases or is suspended by a forthcoming bond being given and forfeited or by other legal process. Furthermore, as to all such intangibles the lien shall cease upon the expiration of the following periods whichever is the longer: (i) one year from the return day of the execution pursuant to which the lien arose, or (ii) if the intangible is a debt due from, or a claim upon, a third person in favor of the judgment debtor or the estate of such third person, one year from the final determination of the amount owed to the judgment debtor.

Reviser's Note:

This is present § 8-434 which has been rewritten for clarity.—No change in substance is intended. The changes made in the section are in accordance with the case law interpreting its meaning and applicability. (See *Baer* v. *Ingram*, 99 Va. 200 and *Trevillian* v. *Guerrant*, 72 Va. 525.)

Article 6.

Interrogatories.

§ 8.01-506. Proceedings by interrogatories to ascertain estate of debtor; summons; proviso; objections by judgment debtor.—A. To ascertain the personal estate on which a writ of fieri facias is a lien, and to ascertain any real estate, in or out of this Commonwealth, to which the debtor named in a judgment and fieri facias is entitled, upon the application of the execution creditor, the clerk of the court from which such fieri facias issued shall issue a summons against the execution debtor, or any officer of the corporation if such execution debtor be a corporation having an office in this Commonwealth, or any debtor to, or bailee of, the execution debtor.

B. The summons shall require him to appear before the court or a commissioner at a time and place designated in such summons, to answer such interrogatories as shall be propounded to him by the execution creditor, the court, or the commissioner, as the case may be.

C. Provided, however, that as a condition precedent to proceeding under this section, the execution creditor has furnished to the court an affidavit setting forth that he has not proceeded against the execution debtor under this section within the six months last preceding the date of such affidavit. Except that for good cause shown, the court may, on motion of the execution creditor, issue an order allowing further proceedings before a commissioner by interrogatories during the six-month period.

D. The debtor or other person served with such summons shall appear at the time and place mentioned and make answer to such interrogatories. The commissioner shall

enter in his proceedings and report to the court mentioned in § 8.01-507, any and all objections taken by such debtor against answering such interrogatories, or any or either of them, and if the court afterwards sustains any one or more of such objections, the answers given to such interrogatories as to which objections are sustained shall be held for naught in that or any other case.

Reviser's Note:

This is present § 8-435 with minor language changes. The restriction against commissioners causing process to be served outside or contiguous to the county or city for which they were appointed has been deleted. This change is compatible with the proposed issuance (Statewide) of process found in proposed Chapter 8, Process. General District Courts are also authorized to employ similiar procedure to compel a judgment debtor to reveal his assets to the judgment creditor. See § 16.1-103.

§ 8.01-507. Conveyance or delivery of property disclosed by interrogatories.—Any real estate out of this Commonwealth to which it may appear by such answer that the debtor is entitled shall be forthwith conveyed by him to the officer to whom was delivered such fieri facias, and any money, bank notes, securities, evidences of debt, or other personal estate, tangible or intangible, which it may appear by such answers are in possession of or under the control of the debtor or his debtor or bailee, shall be delivered by him or them, as far as practicable, to such officer, or to some other, or in such manner as may be ordered by the commissioner or court.

Reviser's Note:

This is present § 8-436 with no material change.

§ 8.01-507.1. Interrogatories, answers, etc., to be returned to court.—The commissioner shall return the interrogatories and answers filed with him, and a report of the proceedings under §§ 8.01-506 and 8.01-507, to the court in which the judgment is rendered.

Reviser's Note:

This is present § 8-437 with no material change. The proviso which restricts the commissioner's duty to report to the court where only personal property is involved has been deleted.

§ 8.01-508. How debtor may be arrested and held to answer.—If any person summoned under § 8.01-506 shall fail to appear and answer, or shall make any answers which are deemed by the commissioner or court to be evasive, or if, having answered, shall fail to make such conveyance and delivery as is required by § 8.01-507, the commissioner or court shall issue a writ directed to any sheriff requiring such sheriff to take the person so in default and keep him safely until he shall make proper answers, or such conveyance or delivery, as the case may be, and upon making such answers, or such conveyance and delivery, he shall be discharged by such commissioner or the court. He may also be discharged by the court from whose clerk's office the fieri facias issued, in any case if the

court shall be of the opinion that he was improperly committed, or is improperly or unlawfully detained in custody.

Reviser's Note:

This present § 8-438 without material change.

§ 8.01-509. Order for sale and application of debtor's estate.—The court to which the commissioner returns his report, as required by § 8.01-507.1, may make any order it may deem right, as to the sale and proper application of the estate conveyed and delivered under §§ 8.01-506 and 8.01-507.

Reviser's Note:

This is present § 8-439 with no material change.

§ 8.01-510. Sale, collection and disposition of debtor's estate by officer.—Real estate, conveyed to an officer under this chapter, shall, unless the court otherwise direct, be sold as other property levied on is required to be sold under § 8.01-492 and be conveyed to the purchaser by the officer. An officer to whom there is delivery under this chapter, when the delivery is of money, bank notes, or any goods or chattels, shall dispose of the same as if levied on by him under a fieri facias; and when the delivery is of evidences of debts, other than such bank notes, may receive payment of such debts within sixty days after such delivery. Any evidence of debt or other security, remaining in his hands at the end of such sixty days, shall be returned by him to the clerk's office of such court, and collection thereof may be enforced as prescribed by § 8.01-497. For a failure to make such return, he may be proceeded against as if an express order of the court for such return had been disobeyed.

Reviser's Note:

This is present § 8-440 without material change.

Article 7.

Garnishment.

§ 8.01-511. Institution of garnishment proceedings.—On a suggestion by the judgment creditor that, by reason of the lien of his writ of fieri facias, there is a liability on any person other than the judgment debtor, or, that there is in the hands of some person in his capacity as personal representative of some decedent a sum of money to which a judgment debtor is or may be entitled as creditor or distributee of such decedent, upon which sum when determined such writ of fieri facias is a lien, a summons substantially in the form prescribed by § 8.01-512 may be sued out of the clerk's office of the court in which the judgment is rendered or sued out of the clerk's office to which an execution issued thereon has been returned as provided in § 16.1-99 against such person. The summons in garnishment shall be served on the garnishee. A copy of the summons shall be served on the judgment debtor as set forth in the Chapter 8 (Process); provided that if such service is

on a natural person pursuant to subitem b. of subdivision 2. of § 8.01-296, the required mailing shall be by the clerk; and provided further, that if such service on a natural person cannot be made pursuant to subdivision 1. or 2. of § 8.01-296, the clerk shall similarly mail a copy to the judgment debtor and such mailing shall constitute proper process. The clerk shall file a certificate of any such mailing. Postage shall be taxed as costs. There shall be no service by publication.

No summons under this section shall be issued at the suggestion of the judgment creditor or his assignee against the wages of a judgment debtor unless the judgment creditor, his agent or attorney shall allege in his suggestion that:

1. The summons is based upon a judgment upon which a prior summons has been issued but not fully satisfied; or

2. No summons has been issued upon his suggestion against the same judgment debtor within a period of eighteen months, other than under the provisions of subdivision paragraph 1 above; or

3. The summons is based upon a judgment granted against a debtor upon a debt due or made for necessary food, rent or shelter, public utilities including telephone service, drugs, or medical care supplied the debtor by the judgment creditor or to one of his lawful dependents, and that it was not for luxuries or nonessentials; or

4. The summons is based upon a judgment for a debt due the judgment creditor to refinance a lawful loan made by an authorized lending institution; or

5. The summons is based upon a judgment on an obligation incurred as an endorser or comaker upon a lawful note; or

6. The summons is based upon a judgment for a debt or debts reaffirmed after bankruptcy.

Any judgment creditor who knowingly gives false information upon any such suggestion made under this chapter shall be guilty of a Class 1 misdemeanor.

Reviser's Note:

This statute, present § 8-441, was amended in 1976. The section, as amended, suggests that the garnishee may be proceeded against by order of publication. However, personal service on the garnishee is necessary if a personal judgment is to be entered against him. The proposal satisfies that jurisdictional requirement.

The provision for service of a copy of the summons on the judgment debtor has also been revised, incorporating by reference the provisions of Chapter 8. If the judgment debtor is a natural person, the summons is to be served pursuant to subdivision 1. or 2. of § 8.01-296; service by publication under subdivision 3 of § 8.01-296 will not be good notice. If service on the natural person can not be so made, the clerk is to mail a copy of the summons to the judgment debtor.

§ 8.01-512. Form of garnishment summons.—Any garnishment summons issued pursuant to § 8.01-511 shall be substantially in the following form:

The Commonwealth of Virginia,

To the ....., of the ..... of ....., Greeting:

WHEREAS, on ....., an execution was duly issued and delivered to ..... upon a judgment rendered in the ..... Court of the ..... of ..... on, ..., in favor of ....., plaintiff, against ....., defendant, for the sum of $....., with legal interest thereon from ..... until payment, and $..... costs; and it being suggested by the plaintiff that by reason of the lien of such execution there is a liability upon the garnishee hereinafter named;

THEREFORE, WE COMMAND YOU, in the name of the Commonwealth of Virginia, to summon ....., garnishee, to appear before the ..... Court of the ..... of ....., at ....., on ....., at ..... o'clock .....M., to answer such suggestion, having then and there this writ; and the garnishee named above shall withhold from the defendant any sums of money to which the defendant is or may be entitled from the garnishee for the period between the date of service of this summons on the garnishee and the date for the garnishee's appearance in Court specified above, except such sums of money as may be exempt from garnishment pursuant to Virginia Code § 34-29, which reads as follows:

§ 34-29. Maximum portion of disposable earnings subject to garnishment.—(a) Except as provided in subsection (b), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed the lesser of the following amounts:

(1) Twenty-five per centum of his disposable earnings for that week, or

(2) The amount by which his disposable earnings for that week exceed thirty times the federal minimum hourly wage prescribed by § 206(a) (1) of Title 29 of the United States Code in effect at the time earnings are payable.

(b) The restrictions of subsection (a) do not apply in the case of

(1) Any order of any court for the support of any person.

(2) Any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

(3) Any debt due for any State or federal tax.

In the case of earnings for any pay period other than a week, the State Commissioner of Labor and Industry shall by regulation prescribe a multiple of the federal minimum hourly wage equivalent in effect to that set forth in this section.

(c) No court of the State may make, execute, or enforce any order or process in violation of this section.

The exemptions allowed herein shall be granted to any person so entitled without any further proceedings.

(d) For the purposes of this section

(1) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program,

(2) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld, and

(3) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

(e) Every assignment, sale, transfer, pledge or mortgage of the wages or salary of an individual which is exempted by this section, to the extent of the exemption provided by this section, shall be void and unenforceable by any process of law.

(f) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

Given under my hand on .....
....., Clerk

Reviser's Note:

This is present § 8-441.1 without change.

§ 8.01-513. Service upon corporation.—Notwithstanding the provisions of §§ 13.1-11, 13.1-111, 13.1-210 and 13.1-274, if the person upon whom there is a suggestion of liability as provided in § 8.01-511 is a corporation, the summons shall be served upon an officer or managing employee of the corporation other than an officer of the corporation, unless the judgment creditor shall file with the court a certificate that he has used due diligence and that no such officer or managing employee of the corporation other than an officer or other person authorized to accept such service can be found within the Commonwealth, in which case such summons shall be served on the registered agent of the corporation or upon the clerk of the State Corporation Commission as is otherwise provided by law.

Reviser's Note:

This statute, present § 8-441.2, was designed to make it easier for serving the garnishment summons upon a corporation. It is not inconsistent with present § 8-63. (Proposed § 8.01-302, Service of certain process on foreign or domestic corporations., found in Chapter 8, Process.) No material changes have been made to this section.

§ 8.01-514. When garnishment summons returnable.—The summons in garnishment shall be returnable to the general district court from which it issued not more than sixty days after the date thereof and to the circuit court from which it issued, not more than ninety days after the date thereof. When issued by a district court, such summons may be directed to a sheriff of any county or city wherein the garnishee resides and made returnable before the general district court, and shall be made returnable within sixty days at some certain place within such county or city named in such summons.

Reviser's Note:

This statute, present § 8-442, was amended by the 1976

Legislature. The Revisers have rewritten the first sentence so that summons in garnishment is returnable to the general district court not more than sixty days after the date thereof and to the circuit court not more than ninety days from the date thereof. This change comports with the return date of executions found in present § 16.1-99 and the return period for writs specified in Rule of Court 3:2.

§ 8.01-515. How garnishee examined; court's order on such examination; execution thereon.—A person so summoned shall appear in person and be examined on oath; or he may file a statement verified by affidavit; and a corporation so summoned shall appear by an authorized agent who shall be examined on oath; or it may file a statement, not under seal, verified by affidavit of such authorized agent. Such statement shall show the amount the garnishee is indebted to the judgment debtor, if any, or what property or effects, if any, the garnishee has or holds which belongs to the judgment debtor, or in which he has an interest. If the judgment debtor dispute the verity or accuracy of such statement and so desire, then summons shall issue requiring the appearance of such person or authorized agent for examination on oath, and requiring him to produce such books and papers as may be necessary to determine the fact.

In determining the exemption to which the employee is entitled, the employer may until otherwise ordered by the court rely upon the information contained in the employee's withholding exemption certificate filed by the employee for federal income tax purposes, and any person showing more than one exemption thereon shall be considered by him to be a householder or head of a family.

Reviser's Note:

This is present § 8-443 without change.

§ 8.01-516. Judgment against garnishee pursuant to § 8.01-504.—If it appear from a verified statement or examination that there is any liability on the garnishee, the court may give judgment against him for any amount found due the execution debtor, in excess of any amounts exempted by § 34-29 and paid to the execution debtor before such exemptions shall have been specifically disallowed by the court, and order him to deliver any estate for which there is such liability, or pay the value of such estate into court or to any officer whom it may designate; and the levy of an execution on such order shall be valid, although levied by such officer.

Reviser's Note:

This is present § 8-444 without material change.

§ 8.01-517. Exemption of wages.—Notwithstanding the provisions of §§ 8.01-515 and 8.01-516, any employer against whom any garnishment is served in connection with an action or judgment against an employee may pay to such employee when due wages or salary not exceeding the amount exempted by § 34-29 unless such exemptions shall have been specifically disallowed by the court and shall answer such garnishment summons by a written statement verified by affidavit, showing the amount of wages or salary due on the return date of the garnishment summons and the amount of wages or salary so exempted, and if there shall be an excess of wages or salary so due over the amount of the exemptions, the employer may pay the amount of such excess into the court where the garnishment summons is returnable, which payment when determined by the court to be

correct will constitute a discharge of any liability of the employer to the employee for the wages or salary so withheld.

Reviser's Note:

The language that states the affidavit need not be under seal has been deleted. No substantive changes have been made to this section, present § 8-445.

§ 8.01-518. When garnishee is personal representative of a decedent.—If the person so summoned be the personal representative of a decedent, he shall answer in writing whether or not there is in his hands in his fiduciary capacity, any sum of money owing to the judgment debtor, and if so, the amount thereof, if the same has been definitely determined, and when it will be payable by him; and if such amount has not been definitely ascertained, the court shall continue the case, with direction to him to thereafter, and as soon as such amount has been definitely determined, report the same to the court, and say when it will be payable by him. In either event, and when the amount so owing to the judgment debtor has been definitely fixed and determined, the court shall direct the disposition of such fund to the creditor of such other person or persons according as their rights may be determined.

Reviser's Note:

This is present § 8-446 without change.

§ 8.01-519. The proceedings, if garnishee fail to appear or answer, or to disclose his liability.—If the garnishee, after being served with the summons, fail to appear or answer personally, or if it be suggested that he has not fully disclosed his liability, the proceedings shall be according to §§ 8.01-564 and 8.01-565, mutatis mutandis, except that when the summons is before a general district court, the court shall proceed without a jury.

Reviser's Note:

This present § 8-447. The language "or answer personally" has been inserted after "appear".

§ 8.01-520. Payment, etc., by garnishee to officer before return of summons.—Any person, summoned under § 8.01-511, may, before the return day of the summons, deliver and pay to the officer serving it, what he is liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered.

Reviser's Note:

This is present § 8-448 without change.

§ 8.01-521. Judgments as to costs.—Unless the garnishee appear to be liable for more than is so delivered and paid, there shall be no judgment against him for costs. In other cases, judgment under §§ 8.01-516 and 8.01-519 may be for such costs, and against such

party, as the court may deem just.

Reviser's Note:

This is present § 8-449 without material change.

§ 8.01-522. Wages and salaries of State employees.—Unless otherwise exempted, the wages and salaries of all employees of this Commonwealth, other than State officers, shall be subject to garnishment or execution upon any judgment rendered against them. Whenever the salary or wages of such employees as above mentioned shall be garnished under this section, the process shall be such as is usual in other cases of garnishment and shall be served on the judgment debtor and on the officer or supervisor who is head of the department, agency, or institution where the employee is employed, or other officer through whom the judgment debtor's salary or wages is paid, provided that process shall not be served upon the State Treasurer or the State Comptroller except as to employees of their respective departments, and upon such service the officer or supervisor shall, on or before the return day of process, transmit to the clerk of the court issuing the process a certificate showing the amount due from the Commonwealth to such judgment debtor, up to the return day of the process, which amount the officer or supervisor shall hold subject to order of the court issuing the process. Such certificate shall be evidence of all facts therein stated, unless the court direct that the deposition of the officer or supervisor, or such other officer through whom the judgment debtor's salary or wages be paid, be taken, in which event the deposition of the officer or supervisor shall be taken in his office and returned to the clerk of the court in which the garnishment is, just as other depositions are returned, and in no such case shall the officer or supervisor be required to leave his office to testify. In all proceedings under this section, if the judgment be for the plaintiff, the amount found to be due the judgment debtor by the Commonwealth shall be paid as directed by the court.

Reviser's Note:

This is present § 8-449.1 with no material change.

§ 8.01-523. Service upon the federal government.—A. If the suggestion of liability as provided in § 8.01-511 is the United States of America, the summons shall be served upon the managing employer of the agency of the federal government which is alleged to be liable, or, if the judgment debtor is a member of the armed forces of the United States, upon the chief fiscal officer of the military post to which the judgment debtor was last assigned.

B. If service on the agents identified in subsection A. for service of process on the United States cannot be made, then service may be made on a United States attorney or other agent in the manner set forth in Rule 4(d)(4) of the Federal Rules of Civil Procedure, as from time to time amended.

Reviser's Note:

This statute, present § 8-441.3, is a 1976 legislative enactment which pertains to garnishment for maintenance and support of a spouse or child pursuant to the provisions of 42 *U.S.C.A.* §§ 652(b),

659 and 660. (See also FRCP 4(d).) A cross reference in the annotation under to § 20-78.1 to this section is also recommended.

Subsection B. has been added to provide a method of service of a garnishment summons on the federal government where the agents set forth in subsection A. cannot be served in Virginia; e.g., where garnishment is sought against military retirement pay and the paying agency is outside Virginia.

§ 8.01-524. Wages and salaries of all city, town and county officials, clerks and employees.—Unless otherwise exempt, the wages and salaries of all officials, clerks and employees of any city, town or county shall be subject to garnishment or execution upon any judgment rendered against them.

Reviser's Note:

This is present § 8-449.2 without change.

§ 8.01-525. Who are officers and employees of cities, towns and counties.—All officers, clerks and employees who hold their office by virtue of authority from the General Assembly or by virtue of city, town or county authority whether by election or appointment and who receive compensation for their services from the moneys of such city, town or county shall, for the purposes of garnishment, be deemed to be, and are, officers, clerks or employees of such city, town or county.

Reviser's Note:

This is present § 8-449.3 without change.

CHAPTER 19.

Forthcoming Bonds.

§ 8.01-526. When forthcoming bond taken; property then remains in debtor's possession.—The sheriff or other officer levying a writ of fieri facias, or distress warrant, may take from the debtor a bond, with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon, including the officer's fee for taking the bond, commissions, and other lawful charges, if any, with condition that the property shall be forthcoming at the day and place of sale; whereupon, such property may be permitted to remain in the possession and at the risk of the debtor.

Reviser's Note:

This is present § 8-450 without change. A cross reference is recommended to § 55-230 et seq. (particularly § 55-232.2 as amended in 1974) which deal with distress warrants and outlines the procedure thereon.

§ 8.01-527. If bond forfeited, where returned; its effect; clerk to endorse time of return.—If the condition of such forthcoming bond be not performed, the officer, unless payment be made of the amount due on the execution or warrant, including his fee, commission, and charges as aforesaid, shall, after the bond is forfeited, return it forthwith, with the execution or warrant, to such court, or the clerk's office of such court as is prescribed by § 15.1-80. The clerk shall endorse on the bond the date of its return; and against such of the obligors therein as may be alive when it is forfeited and so returned, it shall have the force of a judgment. But no execution shall issue thereon under this section.

Reviser's Note:

This is present § 8-451. The provision that requires the officer to return the bond within 30 days after forfeiture, has been deleted. As rewritten the section requires the officer to return the bond "forthwith". A corresponding change will be made to § 15.1-80.

§ 8.01-528. Liability of obligors; how recovery on the bond is had.—The obligors in such forfeited bond shall be liable for the money therein mentioned, with interest thereon from the date of the bond till paid, and the costs. The obligee or his personal representative shall be entitled to recover the same by action or motion.

Reviser's Note:

This is present § 8-452 without change.

§ 8.01-529. When bond returned, how endorsed and recorded by clerk; lien and fee.—Upon the return of a forthcoming bond to the clerk's office in the manner prescribed by § 8.01-527, it shall be the duty of the clerk to endorse thereon the date of such return, and his fee as provided by law for recordation of items specified herein, and to record in a book to be kept by him for the purpose, the date of such bond and of the return endorsed thereon, the amount of the penalty thereof, the amount, the payment whereof will discharge such penalty, and the names of the obligee and obligor to such bond. Such bond, when so returned to the clerk's office aforesaid, shall constitute a lien on the real estate of the obligor.

Reviser's Note:

This is present § 8-458. The requirement of recording the clerk's fee on the bond will be transferred from present § 8-459 to Title 14.1. The language "...and his fee as provided by law for recordation of items specified herein..." has been inserted after "...date of such return..." to implement this recommendation. The actual clerk's fee for his service will be transferred to Title 14.1. The fee has been increased to one dollar.

Present § 8-454. When taken under distress warrant, what defense may be made. To be transferred to Title 55.

Reviser's Note:

This is present § 8-453 which will be transferred to § 55-232 which deals explicitly with distress warrants and only incidentally with forthcoming bonds.

The words "a forthcoming" have been substituted for "such" preceding the word "bond".

§ 8.01-530. Remedy of creditor if bond quashed.—If any forthcoming bond be at any time quashed, the obligee, besides his remedy against the officer, may have such execution on his judgment, or issue such distress warrant, as would have been lawful if such bond had not been taken.

Reviser's Note:

No material change has been made to this section which is present § 8-454.

§ 8.01-531. In what cases forthcoming bond not to be taken.—No bond for the forthcoming of property shall be taken:

1. On an execution on a forthcoming bond;

2. On an execution on a judgment against (i) a treasurer, sheriff, or a deputy of either of them, or a surety or personal representative of either such officer or deputy, for money received by any such officer or deputy, by virtue of his office, (ii) any such officer or his personal representative, in favor of a surety of such officer for money paid or a judgment rendered for a default in office, or (iii) a deputy of any such officer, or his surety or personal representative, in favor of his principal or the personal representative of such principal, for money paid or a judgment rendered for a default in office; or

3. On any other execution on which the clerk is required by law or by order of court to endorse that "no security is to be taken".

Reviser's Note:

This is present § 8-455. References to sergeant, constable and coroner have been deleted. The latter term has been abolished and the former two will be embraced by the term "sheriff" in the proposed definitions section. (See § 8.01-2, Definitions.) The language "or by order of court" has been inserted after the language "is required by law" in order to allow the statute to comport with modern practice.

Present § 8-456. Endorsement on execution in such cases. To be deleted.

Reviser's Note:

This statute is repetitious of subdivision 3. of § 8.01-531.

Present § 8-457. When a general district court may give judgment on forthcoming

bond; removal of case. To be transferred to Title 16.1.

Reviser's Note:

Much of the unnecessary language of this statute has been deleted and a cross reference to § 16.1-92 has been made so that removal of the case conforms with the requirements and procedures of § 16.1-92. The removal amount required has been changed from twenty dollars to five hundred dollars and "constable" has been deleted. This section as amended will be transferred to, and incorporation in, § 16.1-77.

Related Amended Section:

§ 16.1-92. Removal of action involving more than $500.—When the amount in controversy in any action at law except cases of unlawful entry and detainer in a ~~court not of record~~ *general district court* exceeds the sum of five ~~hundred dollars~~, exclusive of interest, attorney's fees contracted for in the instrument, and costs, the judge shall, at any time on or before the return day of the process, or within ten days after such return day, if trial of the case has not commenced or if judgment has not been rendered, upon the application of any defendant, the filing by him of an affidavit of himself, his agent or attorney, that he has a substantial defense to the action, which affidavit shall state the grounds of such defense, and the payment by him of the costs accrued to the time of removal, the writ tax as fixed by law, and the costs in the court to which it is removed as fixed by subsection (17) of § 14.1-112, remove the action and all the papers thereof to a court having jurisdiction of appeals from the court wherein the action was brought; and the clerk if there be one, or the judge if there be no clerk of the court, shall promptly transmit the papers in the case and the writ tax and costs to the clerk of the court to which the action is removed. If the defendant fails to pay the accrued costs, writ tax, and the costs in the court to which the case is removed at the time the application for removal is filed, the judge shall proceed to try the case.

On the trial of the case in the circuit court the proceedings shall conform as nearly as may be to proceedings prescribed by the Rules of Court for other actions at law, but the court may permit all necessary amendments, enter such orders, and direct such proceedings as may be necessary or proper to correct any defects, irregularities and omissions in the pleadings and bring about a trial of the merits of the controversy.

In no event shall an objection to venue be considered by the circuit court unless raised by a defendant in his affidavit of substantial defense filed in the general district court.

Reviser's Note:

The proposed chapter on Venue requires that objection to

improper venue be timely raised; if not, the objection is waived. The proposed amendment to this section comports with that policy by requiring an objection to venue be raised in the affidavit of substantial defense.

§ 8.01-532. How bond withdrawn from clerk's office.—The obligee in a forthcoming bond, or his agent, may, at any time after the record of such bond is made by the clerk, required by § 8.01-529, withdraw the same from the clerk's office, leaving a copy thereof attested by the clerk.

Reviser's Note:

This is present § 8-459 with minor language changes. The requirement that the clerk endorse on the bond his fee has been incorporated in § 8.01-529. Minor language changes have been made.

Present § 8-460. Costs to be included by judge of a general district court. To be transferred to Title 16.1.

Present § 8-461. Judge of a general district court to keep record of judgment; how to endorse execution. To be transferred to Title 16.1.

CHAPTER 20.

ATTACHMENTS AND BAIL IN CIVIL CASES.

Article 1.

Attachments Generally.

§ 8.01-533. Who may sue out an attachment.—If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, including rent, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exclusive of interest, he may sue out an attachment therefor on any one or more of the grounds stated in § 8.01-534, except that if the claim be for a debt not due and payable no attachment shall be sued out when the only ground for the attachment is that the defendant, or one of the defendants against whom the claim is, is a foreign corporation, or is not a resident of this Commonwealth, and has estate, or has debts owing to such defendant, within this Commonwealth.

Reviser's Note:

This is present § 8-519. The language "including rent" has been inserted after the present language "claim to any debt". This change comports with the recommended revocation of Article 5 of present Chapter 24 (§§ 8-566 through 8-568) which presently deals separately with attachments for rent. Other minor changes have been made.

§ 8.01-534. Grounds of attachment. It shall be sufficient ground for an attachment that the principal defendant or one of the principal defendants:

1. Is a foreign corporation, or is not a resident of this Commonwealth, and has estate or has debts owing to such defendant within the county or city in which the attachment is, or that such defendant being a nonresident of this Commonwealth, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word "estate", as herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity;

2. Is removing or is about to remove out of this Commonwealth with intent to change his domicile;

3. Intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this Commonwealth so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor should only the ordinary process of law be used to obtain the judgment;

4. Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay, or defraud his creditors;

5. Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors;

6. Has absconded or is about to abscond from the Commonwealth or has concealed himself to the injury of his creditors, or is a fugitive from justice.

The intent mentioned in subdivisions 4. and 5. above may be stated either in the alternative or conjunctive.

Reviser's Note:

This is present § 8-520 without material change.

§ 8.01-535. Jurisdiction of attachments; trial or hearing of issues.—Except as provided in § 16.1-77 the jurisdiction of attachments under this chapter shall be in the circuit courts. The trial or hearing of the issues, except as otherwise provided, shall be the same, as near as may be, as in actions in personam.

Reviser's Note:

The language "Except as provided in § 16.1-77" has been inserted at the beginning of the statute for proper cross reference. Otherwise, no material changes have been made to present § 8-521.

§ 8.01-536. Pleadings in attachment.—No pleading on behalf of the plaintiff shall be necessary except the petition mentioned in § 8.01-537. The principal defendant, and any other defendant who seeks to defeat the petitioner's attachment, may demur to the petition, issue on which demurrer shall be deemed to be joined; but if such demurrer be

overruled, such defendant shall answer the petition in writing. No replication shall be necessary to such answer. The answer shall be sworn to by such defendant, or his agent. Any other defendant may answer the petition, under oath, and the cause shall be deemed at issue as to him, if he denies any of the allegations of the petition, without any replication. Answers under this section shall not have the effect of evidence for the defendant.

Reviser's Note:

This is present § 8-523 without material change.

§ 8.01-537. Petition for attachment; writ tax.—A. Every attachment, except an attachment for rent, shall be commenced by a petition filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by subdivision 11. of § 8.01-261. If it is sought to recover specific personal property the petition shall state the nature and estimated value thereof, the character of estate therein claimed by the plaintiff, and what sum, if any, the plaintiff claims he is entitled to recover for its detention. If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least, the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a petition for attachment shall be the same as required for a motion for judgment under Rules of Court 1:4(d) and 3:16(b). The petition shall also set forth the existence of one or more of the grounds of attachment mentioned in § 8.01-534, and shall ask for an attachment against the specific personal property mentioned in the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of such defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some other person cognizant of the facts therein stated.

B. The plaintiff praying for an attachment shall, at the time that he files his petition, if he files with the clerk, or if he files his petition with the magistrate, then within ten days thereafter, pay to the clerk of the court to which the return is made the proper writ tax as fixed by law, if not already paid, and in the event of his failure to do so the clerk shall refuse to issue the attachment or the attachment issued by the magistrate shall stand dismissed ipso facto at the cost of the plaintiff and no further proceedings shall be had thereon.

Reviser's Note:

This is present § 8-524. For clarification the language "petition for attachment shall be the same as required for a..." has been inserted in subsection A. after the language "The certainty required of a...". Correct cross references have been inserted and present § 8-528 has been added as subsection B. of this section.

§ 8.01-538. Attachment of ships, boats and other vessels of more than twenty tons.—No attachment against any ship, boat, or other vessel of more than twenty tons, shall issue unless the plaintiff or someone in his behalf, shall first establish, to the satisfaction of the court in which he files his petition for attachment that he has a reasonable expectation of

recovering an amount exclusive of all costs, equal to at least one-half the damages demanded in the petition for attachment. Reasonable notice of appearance before the court shall be given the owner, agent or master of said vessel, and at the time of the appearance the court shall determine the amount of such reasonable expectation of recovery and the amount of bond necessary to secure the release of the vessel if and when a writ be levied in accordance with this section.

No attachment issued in violation of the provisions of this section shall create a valid lien upon the property sought to be attached, and no levy made under authority thereof shall be of any effect.

Reviser's Note:

This is present § 8-524.1 with no material change.

§ 8.01-539. Who made defendants.—A person against whom the plaintiff is asserting the claim shall be made a defendant to the petition, and shall be known as a principal defendant. There shall also be made a defendant any person indebted to or having in his possession property, real or personal, belonging to a principal defendant, which is sought to be attached. There may also be made a defendant any person claiming title to, and interest in, or a lien upon the property sought to be attached. A defendant, other than a principal defendant, shall be known as a codefendant.

Reviser's Note:

This is present § 8-525 with no material change.

§ 8.01-540. Issuance of attachment; against what attachment to issue.—Upon the filing of the petition mentioned in § 8.01-537, the clerk or the magistrate before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of § 8.01-538. If the plaintiff seeks the recovery of specific personal property, the attachment may be against such property and against the principal defendant's estate for so much as is sufficient to satisfy the probable damages for its detention; or, at the option of the plaintiff, against the principal defendant's estate for the value of such specific property and the damages for its detention. If the plaintiff seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

If the attachment be issued by a magistrate, it shall be returnable as prescribed by § 8.01-541. The magistrate shall promptly return to the clerk's office of the court to which the attachment is returnable the petition and the bond, if any, filed before him. The proceedings thereafter shall be the same as if the attachment had been issued by the clerk.

Reviser's Note:

This is present § 8-526 with no material change.

§ 8.01-541. To whom attachments directed; when and where returned.—Any

attachment issued under this chapter may be directed to the sheriff of any county or city. Except when otherwise provided, it shall be returnable to the office of the clerk of court wherein the petition has been filed not more than thirty days from its date of issuance nor less than ten days from the date of service.

Reviser's Note:

This is present § 8-527. The language "the office of the clerk of court wherein the petition has been filed" has been inserted after the word "returnable". The unnecessary language pertaining to terms of court has been deleted in order for the statute to comport with modern practice.

§ 8.01-542. Issue and execution of attachment on any day.—Such attachment may be issued or executed on any day, including a Sunday or holiday.

Reviser's Note:

This section, present § 8-529, has been rewritten to provide that a writ of attachment may be issued on any day including a Sunday or holiday. Unnecessary language has been deleted.

§ 8.01-543. Issue of other attachments on the original petition.—Upon the written application of the plaintiff, his agency or attorney, other attachments founded on the original petition may be issued from time to time by the clerk of the court in which the original attachment is pending, and the same may be directed, executed, and returned in like manner as an original attachment. The court shall adjudge the costs of such attachments as to it may seem right and just.

The following, or its equivalent, shall be a sufficient form of application for an additional attachment:

To A.B., clerk of the ..... court of ..... county (or city): In the case of ..... v. ....., on an attachment, you are requested to issue an attachment and summons against .....

X.Y. (or X.Y. by H., attorney or agent, as the case may be).

If new or additional grounds of attachment are relied on, the plaintiff may amend his petition in accordance with Rules of Court 1:8 according to the facts and swear to the same, and thereupon an attachment may issue, and the cause shall proceed, under the provisions of this chapter, upon the petition as amended.

Reviser's Note:

This is present § 8-530. The language "in accordance with Rules of Court 1:8..." has been inserted after the words "his petition". Also, the term "petitioner" has been changed to "plaintiff".

§ 8.01-544. When attachment not served other attachments may issue; order of

publication.—When an attachment is returned not served on a principal defendant, whether levied on property or not, further attachments and summonses may be issued until service is obtained on him, if he be a resident of the Commonwealth. If for any cause service cannot be had in the Commonwealth, upon affidavit of that fact, an order of publication shall be made against him.

Reviser's Note:

This is present § 8-531 with no material change.

§ 8.01-545. Amendments; formal defects.—Such amendments shall be allowed of the petition, answer and of any of the other proceedings in the attachment as shall be conducive to the attainment of the ends of substantial justice, and upon such terms as to continuance and costs as may seem proper. An amendment when made shall as against the principal defendant and as to claims against him existing at the time the attachment was issued relate back to the time of the levy of the attachment, unless otherwise directed. No attachment shall be quashed or dismissed for mere formal defects.

Reviser's Note:

This is present § 8-532 with no material change.

Article 2.

Summons; Levy; Lien; Bonds, etc.

§ 8.01-546. What attachment to command; summons.—Every attachment sued out against specific personal property shall command the sheriff or other officer to whom it may be directed to attach the specific property claimed in the petition, and so much more of the real and personal property of the principal defendant as shall be necessary to cover the damages for the detention of the specific property sued for and the costs of the attachment. Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution as will be sufficient to satisfy the plaintiff's demand, and, in case of tangible personal property, taken possession of under § 8.01-551, to keep the same safely in his possession to satisfy any judgment that may be recovered by the plaintiff in such attachment.

Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for the attachment.

Reviser's Note:

This is present § 8-533 without change.

§ 8.01-547. Attachment against remainders.—If the attachment be against a principal defendant who is a nonresident or an absconding debtor, the attachment may also direct the sheriff or other officer to levy the same on any remainder, vested or contingent, of the principal defendant, or so much thereof as may be sufficient to pay the amount for which it issues. But no such remainder shall be sold until it becomes vested. A judgment, however, ascertaining the amount due the plaintiff may be docketed as other judgments are docketed, but unless it be a personal judgment, it shall be a lien only on the property levied on.

Reviser's Note:

This is present § 8-534 with no material change.

§ 8.01-548. Who may levy attachment and on what.—An attachment may be levied upon any estate of the defendant, whether the same be in the county or city in which the attachment issued, or in any other, either by the officer of the county or city wherein the attachment issued, or by the officer of the county or city where the estate is.

Reviser's Note:

This is present § 8-535 without change.

§ 8.01-549. Restraining order or receiver.—The court may interpose by a restraining order, or the appointment of a receiver, or otherwise, to secure the forthcoming of the specific property sued for, and so much other estate as will probably be required to satisfy any further order that may be made in the proceedings.

Reviser's Note:

This is present § 8-536 without substantive change.

§ 8.01-550. How attachment levied.—An attachment may be levied as follows:

On tangible personal property in possession of a principal defendant, whether such possession be actual or constructive, it may be levied as at common law or by delivering a copy of the attachment to such principal defendant if the bond required by § 8.01-552 has not been given; but if such bond has been given, then by taking possession of such personal property;

On choses in action or on tangible personal property in possession of any defendant other than the principal defendant, it may be levied by delivering a copy of the attachment to the person indebted to the principal defendant or having possession of the property belonging to him; and

On real estate, it may be levied by such estate being mentioned and described in a endorsement on the attachment by the officer to whom it is delivered for service to th following effect:

"Levied on the following real estate of the defendant A. (or defendants A. and B.), t wit: (here describe the real estate) this the ..... day of ..... at ..... o'cloc

E.F., sheriff (or other officer)", and by service of the attachment on the person, if any, in possession of such real estate.

Wherever a copy of an attachment is required or allowed to be served on any person, natural or artificial, it may be served as a notice is served under §§ 8.01-296, 8.01-299, 8.01-300 or 8.01-301, as the case may be.

Reviser's Note:

This is present § 8-537 without change.

§ 8.01-551. When bond given officer to take possession of property.—If the plaintiff shall, at the time of suing out an attachment, or afterwards, give bond with surety, approved by the clerk issuing the attachment, in a penalty of at least double the fair value of the property on which the attachment is levied, with condition to pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the attachment, the officer to whom the attachment is directed shall take possession of the property specified in the attachment, or when no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim. When such bond is given, the fact shall be endorsed on the attachment, or certified by the clerk to the officer, who shall return the certificate with the attachment. But the officer levying the attachment shall, before taking possession of any property as aforesaid, make his certificate of the fair value of the property on which the attachment is levied, and he shall not take possession of the same unless and until bond as aforesaid shall be given in a penalty of at least double the fair value of the property as so stated in his certificate. Such certificate shall be filed in the clerk's office of the court to which the attachment is returnable and the value so certified shall be subject to review by the court to which the attachment is returnable.

Reviser's Note:

This is present § 8-538 with no material change.

§ 8.01-552. Bond required of plaintiff when defendant makes affidavit of substantial defense.—If a principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that fact, and the attachment shall stand dismissed ipso facto unless within ten days from the service of such notice the plaintiff, or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment. But this section shall not apply in any case in which the plaintiff has, prior to the filing of such affidavit, given the bond designated in § 8.01-551, or the defendant has given the bond designated in § 8.01-553.

Reviser's Note:

This is present § 8-539 without change.

§ 8.01-553. Bonds for retention of property or release of attachment; revising bonds mentioned in this and two preceding sections.—Any property levied on or seized as aforesaid, under any attachment, may be retained by or returned to the defendant or other person in whose possession it was on his giving bond, with condition to have the same forthcoming at such time and place as the court may require; or the principal defendant may, by giving bond with condition to perform the judgment of the court, release from any attachment the whole of any estate attached. The bond in either case shall be taken by the officer serving the attachment, with surety, payable to the plaintiff, and in a penalty in the latter case either double the amount or value for which the attachment issued or double the value of the property on which the attachment was levied, at the option of the person giving it, and in the former, either double the amount of value for which the attachment issued or double the value of the property retained or returned, at the option of the person giving it; provided, however, that in the event the court shall consider that the amount of any bond required by this section, § 8.01-551 or § 8.01-552 is excessive or inadequate, such court may, upon motion of any party in interest after reasonable notice to the opposite party if he can be found in the jurisdiction of the court or to his attorney of record, if any, fix the amount of such bond to conform to the equities of the case.

Reviser's Note:

This is present § 8-540 without material change.

§ 8.01-554. Where bond returned and filed; exceptions to bond.—Every such bond shall be returned by the officer to and filed by the clerk of the court in which the attachment is pending, or to which the attachment is returnable, and the plaintiff may, within thirty days after the return thereof, file exceptions to the same, or to the sufficiency of the surety therein. If such exception be sustained, the court shall order the officer to file a good bond, with sufficient surety, to be approved by it, on or before a certain day to be fixed by the court. If he fail to do so, he and his sureties in his official bond shall be liable to the plaintiff as for a breach of such bond; but the officer shall have the same rights and remedies against the parties to any bonds so adjudged bad as if he were a surety for them.

Reviser's Note:

This is present § 8-541 without material change.

§ 8.01-555. When appeal bond given property to be delivered to owner.—When judgment in favor of the plaintiff is rendered by a general district court in any case in which an attachment is issued and on appeal therefrom to a circuit court an appeal bond is given, with condition to prosecute the appeal with effect or pay the debt, interest, costs and damages, as well as the costs of the appeal, the officer, in whose custody any attached property is, shall deliver the same to the owner thereof. When an appeal is from a circuit court to the Supreme Court and an appeal bond is given pursuant to § 8.01-465, the officer having custody shall proceed in like manner.

Reviser's Note:

This is present § 8-543. The language "...by a general district

court..." has been inserted after the word "rendered", and "...to a circuit court..." after the word "therefrom". A sentence as to how the officer in custody shall proceed when an appeal is taken from a circuit court to the Supreme Court has been added. (See also § 8.01-676.)

§ 8.01-556. Bonds may be given by any person.—Any bond authorized or required by any section of this chapter may be given either by the party himself or by any other person.

Reviser's Note:

This is present § 8-544 without change.

§ 8.01-557. Lien of attachment; priority of holder in due course.—The plaintiff shall have a lien from the time of the levying of such attachment, or serving a copy thereof as aforesaid, upon the personal property of the principal defendant, when the same is in his possession, actual or constructive, and upon the personal property, choses in action, and other securities of such defendant in the hands of, or owing by a co-defendant on whom it is so served; and on any real estate mentioned in such an endorsement by the officer on the attachment or summons as is prescribed by § 8.01-550, from the time of levy and service pursuant to such section. But a holder in due course of negotiable paper shall have priority over an attachment levied thereon.

Reviser's Note:

This is present § 8-545. The language "...the suing out of the same" has been deleted and the language "...from the time of levy and service pursuant to such section" has been substituted therefor. This change is for clarification and so there is no distinction between real and personal property regarding the time when the lien arises. A cross reference from this section to § 8.01-268, which relates to the necessity of a lis pendens to bind a purchaser, etc..., of attached real or personal property, is recommended.

§ 8.01-558. Attachment lien on effects already in hands of officer.—When an officer has in his possession or custody money or effects of the defendant held under an attachment executed, or other legal process, a delivery to such officer of an attachment under this chapter shall be deemed a levy thereof as to such money or effects, and constitute a lien thereon from the time of such delivery.

Reviser's Note:

This is present § 8-546 without change.

§ 8.01-559. Return by officer.—The officer levying the attachment shall show in his return the time, date and manner of the service, or execution thereof, on each person and parcel of property, and also give a list and description of the property, if any, levied on under the attachment.

Reviser's Note:

This is present § 8-547 without change.

Article 3.

Subsequent Proceedings Generally.

§ 8.01-560. How interest and profits of property applied in certain cases.—When any attachment is sued out, although the property or estate attached be not seized, the interest and profits thereof pending the attachment and before judgment may be paid to the defendant, if the court deem it proper.

Reviser's Note:

This is present § 8-548 without material change.

§ 8.01-561. How property to be kept; how sold, when expensive to keep or perishable.—Any property seized under any attachment and not sold before judgment shall be kept in the same manner as similar property taken under execution. But such as is expensive to keep or perishable may be sold by order of the court upon such terms as the court may direct. If the court directs that the sale may be made on credit, the court may order the sheriff to take a bond with sufficient surety, payable to the sheriff, for the benefit of the party entitled. Such bond shall be returned forthwith by the officer to the court.

Reviser's Note:

So as to simplify the statutory procedure, all of the language of present § 8-549 following the phrase "...by order of the court" has been rewritten. The words "replevied or" have been deleted. However, no material change is made to the present section.

§ 8.01-562. Examination on oath of co-defendant; order and bond.—A defendant who at the time of service of the attachment was alleged to be indebted to a principal defendant, or had in his possession personal property belonging to such principal defendant, shall appear in person and submit to an examination on oath touching such debt or personal property, or he may, with the consent of the court, after reasonable notice to the plaintiff, file an answer in writing under oath, stating whether or not he was so indebted, and if so, the amount thereof and the time of maturity, or whether he had in his possession any personal property belonging to such principal defendant and, if so, the nature and value thereof. If it appear on such examination or by his answer that at the time of the service of the attachment, he was indebted to the principal defendant, or had in his possession or control any goods, chattels, money, securities or other effects belonging to such defendant, the court may order him to pay the amount so owing by him, or to deliver such effects to the sheriff, or other person designated by the court to receive the same; or such defendant may, with the leave of the court, give bond with sufficient security, payable to such person and in such penalty as the court shall prescribe, with condition to pay the amount owing by him, and have such effects forthcoming, at such

time and place as the court may thereafter require. An answer under oath under this section shall be deemed prima facie to be true.

Reviser's Note:

This is present § 8-550. The language "after reasonable notice to the plaintiff" has been inserted after the present language "consent of the court"

§ 8.01-563. Principal defendant may claim exemption.—The principal defendant, if a householder or head of a family, may claim that the amount so found owing from his codefendant, or the personal property in his possession, shall be exempt from liability for the plaintiff's claim; and if it shall appear that the principal defendant is entitled to such exemption, then the court shall render a judgment against the defendant only for the excess, if any, beyond the exemption to which the principal defendant is entitled.

Reviser's Note:

This is present § 8-551 without material change.

§ 8.01-564. Procedure when codefendant fails to appear.—If the attachment be served on a defendant who the petition alleges is indebted to, or has in his possession effects of, the principal defendant, and he fail to appear, the court may either compel him to appear, or hear proof of any debt owing by him, or of effects in his hands belonging to a principal defendant in such attachment, and make such orders in relation thereto as if what is so proved had appeared on his examination.

Reviser's Note:

This is present § 8-552 without material change.

§ 8.01-565. Suggestion that codefendant has not made full disclosure.—When it is suggested by the plaintiff in any attachment that a codefendant has not fully disclosed the debts owing by him, or effects in his hands belonging to the principal defendant in such attachment, the court, without any formal pleading, shall inquire as to such debts and effects, or, if either party demand, it shall cause a jury to be impaneled for that purpose, and proceed in respect to any such debts or effects found by the court or the jury in the same manner as if they had been confessed by such codefendant. If the judgment of the court or verdict of the jury be in favor of such codefendant, he shall have judgment for his costs against the plaintiff.

Reviser's Note:

This is present § 8-553 without material change.

§ 8.01-566. Who may make defense to attachment.—Any of the defendants in any such attachment, or any party to any forthcoming bond given as aforesaid, or the officer who may be liable to the plaintiff by reason of such bond being adjudged bad, or any

person authorized by § 8.01-573 to file a petition, may make defense to such attachment, but the attachment shall not thereby be discharged, or the property levied on released.

Reviser's Note:

This is present § 8-554 without change.

§ 8.01-567. What defense may be made to attachments.—Any party in interest may show that the court is without jurisdiction to hear and determine the controversy.

The principal defendant, if not served with process, may appear specially and show that the attachment was issued on false suggestion or without sufficient cause, in which event the attachment shall be quashed.

Any person claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after being admitted as a party defendant, if not already a defendant, and the principal defendant, may contest the liability of the principal defendant for the plaintiff's claim, in whole or in part, by proof of any manner which would constitute a good defense by the principal defendant to an action at law on such claim, and may also show that the attachment was not issued on any of the grounds set forth in § 8.01-534, or that the plaintiff is not likely to succeed on the merits of his underlying claim. The principal defendant may also file counterclaims or defenses available under § 8.01-422 as in an action at law.

Other defendants shall be limited to defenses personal to themselves, or which may prevent a liability upon them or their property.

Reviser's Note:

This is present § 8-555. The word "defendant" in the first sentence has been replaced by the phrase "...party in interest...". The language "...on false suggestion or without sufficient cause" has been replaced with the language "...on any of the grounds set forth in § 8.01-534, or that the plaintiff is not likely to succeed on the merits of the underlying claim." These changes are merely for clarification. In place of the word "set-offs", the Revisers have substituted the modern language "...counterclaims or defenses available under § 8.01-422...".

§ 8.01-568. Quashing attachment or rendering judgment for defendant.—The court in which an attachment is pending, may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the plaintiff, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or that none of the grounds for attachment in § 8.01-534 exist, or that the plaintiff is not likely to succeed on the merits of his underlying claim. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and damages for loss of the use of his property, and there shall be an order for the restoration of the attached effects. The plaintiff shall have the burden of proof in proceedings pursuant to this section.

Reviser's Note:

This is present § 8-556. The language "...was issued on false suggestion, or without sufficient cause" has been replaced with the language "...that none of the grounds for attachment in § 8.01-534 exist, or that the plaintiff is not likely to succeed on the merits of his underlying claim" This change is for clarification. Also the words "attaching creditor" have been replaced with the word "plaintiff". Following the word "costs", the language "...and damages for loss of the use of his property,..." has been added. Also, a final sentence has been added specifying that the plaintiff is to have the burden of proof in proceedings under this section. This codifies current case law on present § 8-556. (See *Wright* v *Rambo*, 21 Gratt. (62 Va.) 158); see also *Burruss* v *Trant*, 88 Va. 980).

§ 8.01-569. When petition dismissed; when retained and cause tried.—If the principal defendant has not appeared generally, nor been served with process, and the sole ground of jurisdiction of the court is the right to sue out the attachment, and this right be decided against the plaintiff, the petition shall be dismissed at the cost of the plaintiff; but if the plaintiff's claim be due at the hearing, and the court would otherwise have jurisdiction of an action against such defendant for the cause set forth in the petition, and such defendant has appeared generally, or been served with process, it shall retain the cause and proceed to final judgment as in other actions at law.

Reviser's Note:

This is present § 8-557 without material change.

§ 8.01-570. Judgment, etc., of court when claim of plaintiff established.—If the claim of the plaintiff be established, judgment shall be rendered for him, and the court shall dispose of the specific property levied on, as may be right, and order the sale of any other effects or real estate which shall not have been previously released or sold under this chapter, and direct the proceeds of sale, and whatever else is subject to the attachment, including what is embraced by such forthcoming bond, to be applied in satisfaction of the judgment.

Reviser's Note:

This is present § 8-558 without material change.

§ 8.01-571. When defendant not served fails to appear plaintiff required to give bond.—If the principal defendant has not appeared or been served with a copy of the attachment ten days before the judgment therein mentioned, the plaintiff shall not have the benefit of § 8.01-570 unless and until he shall have given bond with sufficient surety in such penalty as the court shall approve, with condition to perform such future order as may be made upon the appearance of such defendant and his making defense. If the plaintiff fail to give such bond in a reasonable time, the court shall dispose of the estate attached, or the proceeds thereof, as to it shall seem just.

Reviser's Note:

This is present § 8-542 without any change.

§ 8.01-572. Sale of real estate attached.—No real estate shall be sold until all other property and money subject to the attachment have been exhausted, and then only so much thereof as is necessary to pay the judgment. Upon a sale of real estate, under an attachment the court shall have the same powers and jurisdiction, and like proceedings thereon may be had, as if it were a sale of real estate by a court of equity exercising general equity powers.

Reviser's Note:

This is present § 8-559 without change.

§ 8.01-573. How and when claims of other persons to the property tried.—Any person may file his petition at any time before the property attached as the estate of a defendant is sold or the proceeds of sale paid to the plaintiff under the judgment, disputing the validity of the plaintiff's attachment thereon, or stating a claim thereto, or an interest in or lien on the same, under any other attachment or otherwise, and its nature, and upon giving security for cost, the court, without any other pleading, shall inquire into such claim, or, if either party demand it, impanel a jury for that purpose. If it be found that the petitioner has title to, or a lien on, or any interest in, such property, or its proceeds, the court shall make such order as may be necessary to protect his rights. The costs of such inquiry shall be paid by either party, at the discretion of the court.

Reviser's Note:

This is present § 8-560 without change.

§ 8.01-574. Attachments in connection with pending suits or actions.—If an attachment be desired in connection with a pending suit or action, a petition for an attachment may be filed in the same court in which such suit or action is pending, and the procedure thereon shall be the same as if no suit or action were pending; but the attachment may be heard along with any suit in equity relating to the same subject so far as may be necessary for the convenient administration of justice. The suing out of an attachment in connection with a pending suit or action shall not be deemed the prosecution of a second action for the same cause.

Reviser's Note:

This is present § 8-561 without change.

§ 8.01-575. Rehearing permitted when judgment rendered on publication.—If a defendant, against whom, on publication, judgment is rendered under any attachment, or his personal representative, shall return to or appear openly in this Commonwealth, he may, within one year after a copy of such judgment shall be served on him at the instance of the plaintiff, or within two years from the date of the judgment, if he be not so served, petition to have the proceedings reheard. On giving security for costs he shall be admitted to make defense against such judgment, as if he had appeared in the case before the same was rendered, except that the title of any bona fide purchaser to any property, real or personal, sold under such attachment, shall not be brought in question or impeached. But

this section shall not apply to any case in which the petitioner, or his decedent, was served with a copy of the attachment more than ten days before the date of the judgment, or to any case in which he appeared and made defense.

Reviser's Note:

This is present § 8-562. The present five-year period of limitation has been reduced to two years in order to comport with proposed § 8.01-322. Other minor language changes have been made.

§ 8.01-576. Order of court on rehearing or new trial; restitution to defendant.—On any rehearing or new trial had under § 8.01-575, the court may order the plaintiff in the original attachment to restore any money paid to him under such judgment to such defendant if living, or if dead to the heir or personal representative of such defendant, as the same may be, the proceeds of real or personal estate, and enter a judgment therefor against him; or it may confirm the former judgment. In either case it shall adjudge the costs of the prevailing party.

Reviser's Note:

This is present § 8-563 with no material change. This section comports with proposed § 8.01-113 in the judicial sales provisions of Chapter 3, Actions.

Present Article 4.

For Small Claims or by Suit in Equity.

Present § 8-564. Attachment for claim not exceeding twenty dollars.—To be deleted.

Reviser's Note:

This article which consists of one section, present § 8-564, is to be deleted since a claim less than $20 is de minimis and would not likely merit the attachment remedy.

Present Article 5.

For Rent.

Reviser's Note:

This article is to be deleted.

Present § 8-566. Against tenant removing his effects from leased premises.

Present § 8-567. Where and when attachment for rent for twenty dollars or more returnable.

Present § 8-568. Attachments for rent for less than twenty dollars.

Article 6.

Capias ad Respondendum.

Reviser's Note:

This article is to be deleted.

Present § 8-569. When and how bail required of defendant leaving the State; form of writ.

Present § 8-570. Plaintiff to give bond before suing out capias.

Present § 8-571. Arrest and commitment unless bond given; its condition.

Present § 8-572. Notice of interrogatories.

Present § 8-573. Who may take bond; where filed.

Present § 8-574. When and how capias quashed, and defendant discharged.

Present § 8-575. Interrogatories to defendant in custody.

Present § 8-576. Discharge from custody.

Present § 8-577. Conveyance or other disposition of property.

CHAPTER 21.

ARBITRATION AND AWARD.

§ 8.01-577. Submission of controversy; agreement to arbitrate.—A. Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court in person or by counsel, it shall be entered in the proceedings of such court; and thereupon a rule shall be made, that the parties shall submit to the award which shall be made in pursuance of such agreement.

B. Notwithstanding any other provision of law, the parties may enter into a written agreement to arbitrate which will be as binding as any other agreement. If, after entry into such agreement, either party refuses to cooperate in the appointment of an arbitrator or arbitrators, or if the parties cannot agree upon the arbitrator or arbitrators, then after ten days' notice on motion of either party, the court which has jurisdiction of the claim shall act for the party so refusing or failing to agree in the appointment, then the arbitration shall proceed and be as binding as if both parties had cooperated throughout the proceedings. Neither party shall have the right to revoke an agreement to arbitrate except

on a ground which would be good for revoking or annulling other agreements.

§ 8.01-578. Submission irrevocable; power of court over it.—No such submission, entered or agreed to be entered of record in any court, shall be revocable by any party to such submission, without the leave of such court; and such court may, from time to time, enlarge the term within which an award is required to be made.

§ 8.01-579. How award entered as the judgment of court.—Upon the return of any such award, made under such an agreement, whether any previous record of the submission, or a rule thereupon, has been made or not, it shall be entered up as the judgment or decree of the court, unless good cause be shown against it at the first term after the parties have been summoned to show cause against it.

§ 8.01-580. For what award set aside.—No such award shall be set aside, except for errors apparent on its face, unless it appear to have been procured by corruption or other undue means, or that there was partiality or misbehavior in the arbitrators or umpires, or any of them. But this section shall not be construed to take away the power of courts of equity over awards.

§ 8.01-581. Fiduciary may submit to arbitration.—Any personal representative of a decedent, fiduciary of a person under a disability, or other fiduciary may submit to arbitration any suit or matter of controversy touching the estate or property of such decedent, or person under a disability or in respect to which he is trustee. And any submission so made in good faith, and the award made thereupon, shall be binding and entered as the judgment of a court, if so required by the agreement, in the same manner as other submissions and awards. No such fiduciary shall be responsible for any loss sustained by an award adverse to the interests of the person under a disability or beneficiary under any such trust, unless it was caused by his fault or neglect.

Reviser's Note:

§ 8.01-577 B. has been changed to require that arbitration agreements be in writing.

No substantive changes have been made in present §§ 8-503 through 8-507 The terms "fiduciary" and "person under a disability", as defined in Article 8 of Chapter 3, have been used in § 8.01-581.

CHAPTER 21.1.

Medical Malpractice.

Article 1.

Medical Malpractice Review Panels; Arbitration of Malpractice Claims.

Reviser's Note:

The sections in this article are present §§ 8-911 through 8-922

without substantive change.

§ 8.01-581.1. Definitions.—As used in this chapter:

1. "Health care provider" means a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist or a nursing home as defined in § 54-900 of the Code of Virginia except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination, or an officer, employee or agent thereof acting in the course and scope of his employment.

2. "Physician" means a person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 12 (§ 54-273 et seq.) of Title 54.

3. "Patient" means any natural person who receives or should have received health care from a licensed health care provider except those persons who are given health care in an emergency situation which exempts the health care provider from liability for his emergency services in accordance with § 54-276.9 of the Code of Virginia.

4. "Hospital" means a public or private institution licensed pursuant to Chapter 16 (§ 32-297 et seq.) of Title 32 or Chapter 8 (§ 37.1-179 et seq.) of Title 37.1 or subject to the provisions of Chapter 10 (§ 32-147 et seq.) of Title 32.

5. "Malpractice" means any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

6. "Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement.

§ 8.01-581.2. Notice or claim for medical malpractice required; request for review by medical malpractice review panel.—No action may be brought for malpractice against a health care provider unless the claimant notifies such health care provider in writing prior to commencing the action. The written notification shall include the time of the alleged malpractice and a reasonable description of the act or acts of malpractice. The claimant or health care provider may within sixty days of such notification file a written request for a review by a medical malpractice review panel established as provided in § 8.01-581.3. The request for review shall be mailed to the Chief Justice of the Supreme Court of Virginia. No actions based on alleged malpractice shall be brought within ninety days of the notification by the claimant to the health care provider and if a panel is requested within the period of review by the medical review panel.

§ 8.01-581.3. Composition, selection, etc., of such panel.—The medical review panel shall consist of (i) three impartial attorneys and three impartial health care providers, licensed and actively practicing their professions in the congressional district in which is found a court of proper venue having jurisdiction over a motion for judgment based on such claim and (ii) one sitting judge of a circuit court who shall serve as chairman of the panel. The chairman shall have no vote except in the case of a tie vote. The medical review panel shall be selected by the Chief Justice of the Supreme Court of Virginia from a list of health care providers submitted to him by the State Board of Medicine and a list of attorneys submitted by the Virginia State Bar. In the selection of the health care provider members, the Chief Justice shall give due regard to the nature of the claim and the nature of the practice of the health care provider. The members of the medical review panel shall be sworn by the chairman to render an opinion faithfully and fairly.

§ 8.01-581.4. Submission of evidence to panel; depositions; duties of chairman; access to material.—The evidence to be considered by the medical review panel shall be promptly submitted by the respective parties in written form only, unless the medical review panel determines that a hearing should be held. The evidence may consist of medical charts, X rays, laboratory tests, excerpts of treatises, and depositions of witnesses, including parties. Depositions of parties and witnesses may be taken prior to the convening of the panel. The chairman of the panel shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel as provided in § 8.01-581.7. A copy of the evidence shall be sent to each member of the panel. All parties shall have full access to any material submitted to the panel.

§ 8.01-581.5. When hearing to be held; notice to parties.—The claimant or health care provider may request the medical review panel to hold a hearing on any claim referred to the medical review panel. The medical review panel, in its discretion, shall determine whether a hearing on the claim is warranted. If the medical review panel determines that a hearing on a claim is warranted, it shall conduct a hearing on the claim after notifying the parties by means adequate to assure their presence at the time and place of the hearing.

§ 8.01-581.6. Conduct of proceedings.—In the conduct of its proceedings:

1. The testimony of the witnesses shall be given under oath. Members of the medical review panel, once sworn, shall have the power to administer oaths.

2. In the event a hearing is held, the parties are entitled to be heard, to present evidence, and to cross-examine witnesses, but rules of evidence need not be observed. The medical review panel may proceed with the hearing and render an opinion upon the evidence produced, notwithstanding the failure of a party duly notified to appear.

3. The medical review panel may issue or cause to be issued, on its own motion or on application of any party, subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. Subpoenas so issued shall be served and, upon application by a party or the panel to a court of proper venue having jurisdiction over a motion for judgment based on such claim, enforced in the manner provided for the service and enforcement of subpoenas in a civil action. All provisions of law compelling a person under subpoena to testify are applicable.

4. On application of a party and for use as evidence, the medical review panel may permit a deposition to be taken, in the manner and upon the terms designated by the panel, of a witness who cannot be subpoenaed or is unable to attend the hearing.

5. The hearing shall be conducted by all members of the medical review panel but a majority may determine any question and may render an opinion.

§ 8.01-581.7. Opinion of panel.—A. Within thirty days, after receiving all the evidence, the panel shall have the duty, after joint deliberation, to render one or more of the following opinions:

1. The evidence does not support a conclusion that the health care provider failed to comply with the appropriate standard of care;

2. The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages;

3. The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is not a proximate cause in the

alleged damages; or

4. The evidence indicates that there is a material issue of fact, not requiring an expert opinion, bearing on liability for consideration by a court of jury.

B. If the review panel's finding is that set forth in subdivision 2. of subsection A. of this section, the panel may determine whether the claimant suffered any disability or impairment and the degree and extent thereof.

C. The opinion shall be in writing and shall be signed by all panelists who agree therewith. Any member of the panel may note his dissent. All such opinions shall be mailed to the claimant and the health care provider within five days of the date of their rendering.

§ 8.01-581.8. Admissibility of opinion as evidence; appearance of panel members as witnesses; immunity from civil liability.—An opinion of the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the panel as a witness. If called, each witness shall be required to appear and testify. The panelists shall have absolute immunity from civil liability for all communications, findings, opinions and conclusions made in the course and scope of duties prescribed by this chapter.

§ 8.01-581.9. Notice of claim to toll statute of limitations; when notice of claim or request for review deemed given.—The giving of notice of a claim pursuant to § 8.01-581.2 shall toll the applicable statute of limitations for and including a period of one hundred twenty days following the notice to the health care provider as specified in § 8.01-581.2, or sixty days following issuance of any opinion by the medical review panel, whichever is later.

The notice of a claim pursuant to § 8.01-581.2 or the request for review of such claim by a medical review panel shall be deemed to be given when delivered or mailed by registered or certified mail to the appropriate claimant or health care provider at his office, residence or last known address.

§ 8.01-581.10. Per diem and expenses of panel.—Each member of the medical review panel shall be reimbursed for his actual and necessary expenses and shall be paid at a rate of twenty-five dollars per diem for work performed as a member of the panel exclusive of time involved if called as a witness to testify in court. Per diem and expenses of the panel shall be borne by the parties in such proportions as may be determined by the chairman in his discretion.

§ 8.01-581.11. Rules and regulations.—The Chief Justice of the Supreme Court of Virginia shall promulgate all necessary rules and regulations to carry out the provisions of this chapter.

§ 8.01-581.12. Arbitration of medical malpractice claims.—A. Persons desiring to enter into an agreement to arbitrate medical malpractice claims which have then arisen or may thereafter arise may submit such matters to arbitration under the provisions of Chapter 21 (§ 8.01-577 et seq.) of this title and an agreement to submit such matters shall be binding upon the parties if the patient or claimant or his guardian, committee or personal representative is allowed by the terms of the agreement to withdraw therefrom, and to decline to submit any matter then or thereafter in controversy, within a period of at least sixty days after the termination of health care or, if the patient be under disability by reason of age and at the time of termination without a guardian who could take such action for him, or if he be insane and without a committee who could take such action for

him, or if such termination be by death or if death occur within sixty days after termination, then within a period of at least sixty days after the appointment and qualification of the guardian or committee or personal representative.

B. Proof of agreement to arbitrate and submission of a medical malpractice claim pursuant thereto shall be in accordance with Chapter 21 of this title, and a medical malpractice panel appointed under this article may be designated to arbitrate the matter, either by the arbitration agreement or by the parties to the agreement.

C. An insurer of a health care provider shall be bound by the award of an arbitration panel or arbitrators acting pursuant to a good faith submission hereunder to the extent to which it would have been obligated by a judgment entered in an action at law with respect to the matter submitted; provided, that such insurer has agreed prior to the submission to be bound by the award of such arbitration panel or arbitrators.

Article 2.

Miscellaneous Provisions.

Reviser's Note:

The sections in this article are present §§ 8-654.6 through 8-654.10 without substantive change.

§ 8.01-581.13. Civil immunity for physician or dentist members of certain boards or committees.—Any physician or dentist who is actively engaged in the practice of his profession shall be immune from civil liability for any act, decision or omission done or made in performance of his duties while serving as a member of any committee, board, group, commission or other entity, which entity functions primarily to review the duration of patient stays in health facilities or to review professional services furnished with respect to the medical or dental necessity for such services, for the purpose of promoting the most efficient use of available health facilities and services, the adequacy or quality of professional services, or the reasonableness or appropriateness of charges made by or on behalf of physicians or dentists; provided that such entity has been established pursuant to a federal or State law, or has been established and duly constituted by one or more public or licensed private hospitals, or a medical or dental society or association affiliated with the American Medical Association or the American Dental Association, or with a governmental agency and provided that such act, decision or omission is not done or made in bad faith or with malicious intent. The immunity provided hereunder shall not extend to any person with respect to actions, decisions or omissions, liability for which is limited under the provisions of the federal Social Security Act or amendments thereto.

§ 8.01-581.14. Immunity of members of rate review board established by Virginia Hospital Association.—Each member of the rate review board established by the Virginia Hospital Association pursuant to Senate Joint Resolution No. 17 of the 1972 Session of the General Assembly shall be immune from civil liability for any act, decision or omission done or made in performance of his duties while serving as a member of such board provided that such act, decision or omission is not done or made in bad faith or with malicious intent.

§ 8.01-581.15. Limitation on recovery in certain medical malpractice actions.—In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after April one, nineteen hundred seventy-seven, which is tried by a jury or in any judgment entered against a health care provider in such

an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars.

In interpreting this section, the definitions found in § 8.01-581.1 of the Code of Virginia shall be applicable.

§ 8.01-581.16. Civil immunity for members of certain boards or committees.—Every member of any committee, board, group, commission or other entity shall be immune from civil liability or any act, decision, omission, or utterance done or made in performance of his duties while serving as a member of such committee, board, group, commission or other entity, which functions primarily to review, evaluate, or make recommendations on (i) the duration of patient stays in health care facilities, (ii) the professional services furnished with respect to the medical or dental necessity for such services, (iii) the purpose of promoting the most efficient use of available health care facilities and services, (iv) the adequacy or quality of professional services, (v) the competency and qualifications for professional staff privileges, or (vi) the reasonableness or appropriateness of charges made by or on behalf of health care facilities; provided that such entity has been established pursuant to federal or State law or regulation, or pursuant to Joint Commission on Accreditation of Hospital requirements, or established and duly constituted by one or more public or licensed private hospitals, or with a governmental agency and provided further that such act, decision, omission, or utterance is not done or made in bad faith or with malicious intent.

§ 8.01-581.17. Privileged communications of certain committees.—The proceedings, minutes, records, and reports of any medical staff committee, utilization review committee, or other committee as specified in § 8.01-581.16, together with all communications, both oral and written, originating in or provided to such committees are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. Nothing in this section shall be construed as providing any privilege to hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital nor to any facts or information contained in such records nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient.

CHAPTER 22.

RECEIVERS, GENERAL AND SPECIAL.

Article 1.

General Receivers.

§ 8.01-582. Appointment of general receivers; their duties.—Every circuit court shall appoint a general receiver of the court, who may be the clerk of the court, who shall hold his office at its pleasure, and whose duty it shall be, unless it be otherwise specially ordered, to receive, take charge of, hold or invest in such manner as the court orders, all moneys paid into the court, or into a bank or other place of deposit, to the credit of the court, and all moneys thereafter so paid under any judgment, order or decree of the court, and also to pay out or dispose of same as the court orders or decrees; and, to this end, the general receiver is authorized to check for, receive, and give acquittances for all such moneys, as the court may direct.

Reviser's Note:

This is present § 8-725 without change.

§ 8.01-583. How securities taken and kept; power of receivers over same.—The securities in which under the orders of the court such investments may be made shall be taken in the name of the general receiver and be kept by him, unless otherwise specially ordered; and he shall have power to sell, transfer or collect the same, only upon order of the court; and in case of his death, resignation or removal his successor, or any person specially appointed by the court for that purpose, shall have like power.

Reviser's Note:

This is present § 8-726 without material change.

§ 8.01-584. How dividends and interest collected and invested.—The general receiver shall collect the dividends and interest on all the securities in which investments have been or may be made, under the orders or decrees of his court, or under the provisions of § 8.01-582, when and as often as the same may become due and payable thereon, and shall invest the same in like securities, unless the court has ordered or decreed some other investment or disposition to be made thereof; and in such case he shall invest or dispose of the same as the court shall have ordered or decreed.

Reviser's Note:

This is present § 8-727 without change.

§ 8.01-585. How accounts kept by receivers.—Each such general receiver shall keep an accurate and particular amount of all moneys received, invested and paid out by him, showing the respective amounts to the credit of each case in the court and designating in the items the judgments, orders or decrees of court under which the respective sums have been received, invested or paid out; and at least semiannually, on days to be designated by the court in its order of appointment, he shall report to his court a statement showing the balance to the credit of each case in the court in which money has been received by him, the manner of each case in the court in which money has been received by him, the manner in which it is invested, the amounts received, invested or paid out since his last report and the whole amount then invested and subject to the future order of the court; and he shall, at any time when required by the court so to do, furnish a statement of the amount subject to the order of the court in any case pending therein and any other information required by the court as to any money or other property in his hands and shall annually make formal settlement of his accounts before the court or before the commissioner mentioned in § 8.01-617 which settlement shall be recorded in the book entitled "Settlements of Receivers and Commissioners".

Reviser's Note:

This is present § 8-728 without change.

§ 8.01-586. Inquiry as to unknown owners of funds.—When funds are held because of

inability to find the person to whom payable, such receiver may be ordered by the court to make inquiry and due diligence to ascertain such person in order that payment may be made; and for this purpose, and to secure any other relevant information, he shall have power to summon witnesses and take evidence; and he shall report specifically to the court in each semi-annual report, and at any other time when so ordered by the court, the details and results of his efforts.

Reviser's Note:

This is present § 8-729 without change. See § 8.01-602.

§ 8.01-587. Liability of general receivers.—Such a general receiver shall be liable for all moneys which may come into his hands as general receiver; and if at any time he fail to invest any sum of money, as required by §§ 8.01-582 through 8.01-586, for the space of sixty days after the same shall be, or ought to have been, received by him, or fail to pay out any sum of money, when required by the court to pay the same, for the space of sixty days after it shall come into his hands for the purpose of such payment, he shall be charged with interest thereon, from the day when such money was, or ought to have been, received by him, until such investment or payment is made, unless, for good cause shown to the court, it shall order otherwise.

Reviser's Note:

This is present § 8-730 without change.

§ 8.01-588. Their bonds.—A general receiver shall annually give before the court a bond with surety to be approved by it, in such penalty as the court directs, sufficient at least to cover the probable amount in his hands in any one year, and he shall give such additional bond from time to time as the court orders.

This section shall apply to the clerk, if the clerk be appointed such receiver, and his official bond as clerk shall not cover money or property in his hands as general receiver.

Reviser's Note:

This is present § 8-731 without change.

§ 8.01-589. Their compensation; when none to be allowed.—A general receiver shall receive as compensation for his services such amount as the court deems reasonable, to be apportioned among the funds under his control in such manner as the court orders; and, out of the compensation so allowed, he shall pay the premium on his bond or bonds; and if such receiver be the clerk of the court such compensation shall not be considered clerk's fees.

He shall promptly report to the court the execution of the bond or bonds required in § 8.01-588, and make the reports and perform the duties required of him; and no compensation shall be allowed him until he has performed the duties aforesaid.

Reviser's Note:

This is present § 8-732 without change.

§ 8.01-590. Penalty for failure of duty.—If a general receiver fail to keep the account, or to make out and return the statements required by § 8.01-585, he shall be subject to a fine of not less than one hundred nor more than one thousand dollars, to be imposed by the court at its discretion; and the condition of his official bond shall be taken to embrace the liability of himself and his sureties for any such fine.

Reviser's Note:

This is present § 8-733 without change.

Present § 8-734. When interest payable.—To be deleted.

Reviser's Note:

This statute is obsolete and undesirable.

Article 2.

Special Receivers.

§ 8.01-591. Notice required prior to appointment of receiver.—Whenever the pleadings in any suit make out a proper case for the appointment of a receiver and application is made therefor to any court, such court shall designate the time and place for hearing such application, and shall require reasonable notice thereof to be given to the defendant and to all other parties having a substantial interest, either as owners of or lienors of record and lienors known to the plaintiff, in the subject matter. The court to whom such application is made shall inquire particularly of the applicant as to the parties so substantially interested in the subject matter, and such applicant, for any intentional or wilful failure to disclose fully all material information relating to such inquiry, may be adjudged in contempt of court.

Reviser's Note:

This is present § 8-735 without change. See § 18.2-456 for provisions relating to contempt proceedings.

§ 8.01-592. Notice not required in emergencies.—Section 8.01-591 shall not apply to those cases in which an emergency exists and it is necessary that a receiver be immediately appointed to preserve the subject matter. In such emergency cases a receiver may be appointed and the order of appointment shall state the emergency and necessity for immediate action, and shall require bond in proper amount of the applicant or some one for him with sufficient surety conditioned to protect and save harmless the owners, lienors and creditors, lien or general, in the subject matter taken over by the receiver, from all damages and injury properly and naturally flowing from such emergency appointment of a receiver.

Reviser's Note:

This is present § 8-736 with no material change.

§ 8.01-593. Subsequent proceedings after emergency appointment.—Such emergency appointment shall be limited to a period of not longer than thirty days, during which period notice shall be given by the applicant to all parties having a substantial interest, either as owner of or lienor in the subject matter, of any motion to extend such receivership; and upon the hearing on such motion, the court shall hear the matter de novo, and shall discharge such receiver, or shall appoint the same receiver, or other receivers to act with him, or new receivers as to the court may seem right. Unless such receivership shall be so extended, all the rights and powers of such emergency receiver over the subject matter, at the end of such period for which he shall have been appointed, shall cease and determine, and such receiver shall forthwith file with such court an account of his dealing with such estate. The notices required to be given under this section and §§ 8.01-591 and 8.01-592 shall be served, as to residents of this Commonwealth, in any of the modes prescribed by § 8.01-296, and as to nonresidents of this Commonwealth, or persons unknown, or in any case in which the number of persons to be given notice exceeds thirty, in the manner prescribed by § 8.01-319.

Reviser's Note:

Proposed § 8.01-319 provides for two weeks notice by publication and therefore the exception in the source section, present § 8-737, is unnecessary and has been deleted. Other minor changes and corrected references have been made.

§ 8.01-594. Notice not required to parties served with process.—In any suit matured and docketed in which the bill or petition prays for the appointment of a receiver, no notice shall be required under this article to be given to any defendant upon whom process to answer such bill or petition shall have been served.

Reviser's Note:

This is present § 8-738 without change.

§ 8.01-595. Preparation of list of creditors; notice to them.—When a receiver has been appointed he shall immediately prepare or cause to be prepared a list of all creditors, lien and general, of the person, firm, corporation or of any other legal or commercial entity for which he is a receiver; and the court may by proper order compel any defendant for whom a receiver is appointed, or any officer of the corporation or of any other legal or commercial entity for whom the receiver is appointed, to furnish or deliver to the receiver a list, duly sworn to, of all creditors, lien or general, together with their addresses if known. The receiver shall then promptly notify by mail each creditor whose name and address has been ascertained of the appointment of the receiver.

When a permanent receiver is appointed he shall not be required to make a new list of creditors if a temporary receiver or a prior receiver appointed in the same proceedings has already prepared one which is adequate, nor shall he be required to mail other notices to creditors if the prior receiver has given proper notice to the parties entitled thereto.

Reviser's Note:

Added after "...of the person, firm, (or) corporation..." is the language "...or any other legal or commercial entity..." This language is designed to expand those for whom a receiver may be appointed. The language suggested is an adaptation of the "Long Arm Statute" definition of "person" See § 8.01-327 In the second paragraph, the Revisers have added language with respect to the list and notice given by a prior receiver so as not to relieve the permanent receiver of these duties if they have not been adequately or properly discharged by his predecessor.

§ 8.01-596. No sale prior to such notification; exceptions.—No court shall order the sale of any assets of the receivership until a receiver has reported to the court in writing that he has mailed such notices to such creditors at least five days prior to the filing of such report, except that the court may at any time permit the sale of perishable or seasonable goods when necessary to preserve the estate, or may permit the receiver to conduct the business for which he is a receiver as a going business and to sell in the usual course of such business.

Reviser's Note:

This is present § 8-740 without material change.

§ 8.01-597. Suits against receivers in certain cases.—Any receiver of any property appointed by the courts of this Commonwealth may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver was appointed; but the institution or pendency of such suit shall not interfere with or delay a sale by trustees under a deed of trust or a decree of sale for foreclosure of any mortgage upon such property.

Reviser's Note:

This is present § 8-741. The language after the word "delay" "...a sale by trustees under a deed of trust or..." has been added to clarify the last sentence.

§ 8.01-598. Effect of judgment against receiver.—A judgment against a receiver under § 8.01-597 shall not be a lien on the property or funds under the control of the court, nor shall any execution issue thereon, but upon filing a certified copy of such judgment in the cause in which the receiver was appointed, the court shall direct payment of such judgment in the same manner as if the claim upon which the judgment is based had been proved and allowed in such cause.

Reviser's Note:

This is present § 8-742 with no material change.

§ 8.01-599. Warrant or motion for judgment against receiver in general district court,

when to be tried.—A warrant or motion for judgment before a general district court under §§ 8.01-597 and 8.01-598 may be tried not less than ten days after service of process.

Reviser's Note:

This is present § 8-743. Since § 16.1-81 et seq. permits use of a motion for judgment in the general district courts, the Revisers have included motion for judgment in this section. Other minor changes have been made.

Article 3.

Moneys Under Control of Court.

§ 8.01-600. How money under control of court deposited; record kept.—Whenever any court orders any money under its control or in its custody to be deposited in any bank or banking institution, it may order the same deposited to the credit of its general receiver appointed under § 8.01-582, to be held and accounted for in the manner required as to other funds paid to such general receiver; or, the court may order the officer or person making the deposit to make it to the credit of the court, and to take a certificate of deposit therefor and deliver the same to the clerk of the court. The clerk shall file such certificate in the papers of the suit or proceedings in which the order was made, and shall keep a record of the money, showing the style of the suit or other proceedings, the date of the order of such deposit, the amount of the deposit, the place of deposit, and the court in which the order was entered; and he shall from time to time as decrees are drawn on the fund charge same against such deposits. Such withdrawals shall be by court checks, signed by the person authorized by formal order or decree to check on the funds.

Reviser's Note:

This is present § 8-744. The reference to a court order which states that the fund will be promptly paid out has been deleted as unnecessary.

§ 8.01-601. Deposit with general receiver of certain funds under supervision of fiduciary and belonging to a person under a disability.—Whenever it appears to any fiduciary as defined in § 8.01-2 that a person under a disability as defined in § 8.01-2 is not represented by a fiduciary as defined above and is entitled to funds not exceeding three thousand dollars under the supervision and control of the fudiciary in charge of such funds, he may report such fact to the commissioner of accounts of the court in which he was admitted to qualify. With the approval of such commissioner of accounts, the fiduciary in charge of such funds may deposit such funds with the general receiver of the court in which he was admitted to qualify. The general receiver shall issue a receipt to such fiduciary which shall show the source of such fund, the amount and to whom it belongs and shall enter the amount and such facts in his accounts.

Reviser's Note:

This is present § 8-744.1. Used in this section as it has been rewritten are the terms "a person under a disability" and "fudiciary" as those terms are defined in § 8.01-2. Other minor word changes have been made. See also §§ 8.01-606 and 64.1-124.

Present § 8-745. Reports and collection of taxes thereon. To be deleted.

Reviser's Note:

This section is unnecessary since there is no longer a tax on intangibles.

§ 8.01-602. Proceedings when owner of money under control of court unknown.—Whenever any money has remained for five years in the custody or under the control of any court of this Commonwealth without anyone known to the court claiming the same the court shall, when the amount is five hundred dollars or more, cause a publication to be made once a week for two successive weeks in some newspaper of general circulation in the city or county in which the court is located setting forth the amount of the money, the source from which it was derived, in what court and in what suit or proceeding it is held, and in whose hands it is, and requiring all persons having any claim to it to appear before the court within such time after the completion of the publication as the court prescribes and establish their claim. If the sum be less than five hundred dollars, the court shall direct the same to be paid into the State treasury, and a proper voucher for the payment taken and filed among the records of the court.

Reviser's Note:

A minor change with respect to the requirement of newspaper publication has been made. See § 8.01-586.

§ 8.01-603. When court shall order it to be paid into the treasury.—If no person appear and show title in himself the court shall order the money, after deducting therefrom the costs of such publication if such publication is made, and any other proper charges, to be paid into the State treasury and a proper voucher for the payment to be taken and filed among the records of the court.

Reviser's Note:

This is present § 8-747 without change.

§ 8.01-604. How Comptroller to keep account of it.—The Comptroller shall keep an account of all money thus paid into the State treasury, showing the amount thereof, when, by whom, and under what order it was paid, and the name of the court, and, as far as practicable, a description of the suit or proceeding in which the order was made, and, as far as known, the names of the parties thereto.

Reviser's Note:

This is present § 8-748 without material change.

§ 8.01-605. How person entitled to the money may recover it.—Money paid into the State treasury under the provisions of this article shall be paid to any person entitled thereto, who has not asserted a claim to the same in the suit or proceeding in which it was held as aforesaid, upon satisfactory proof that he is so entitled. Such claim shall be presented to the comptroller and may be allowed by him upon satisfactory proof. If such claim be disallowed, the claimant may proceed for its recovery in an appropriate circuit court in the manner provided in §§ 8.01-192 through 8.01-195. If, in such proceeding, the claim be established, the net amount thereof, after deducting costs and other proper charges, shall be paid to the claimant out of the treasury on the warrant of the Comptroller. No limitations shall bar any claim presented or asserted under this section.

Reviser's Note:

This is present § 8-749 to which several important changes have been made. A reference to this "article" has been inserted in order to point out that the application of this statute is limited to money paid into the State Treasury under the conditions outlined in this article. The limitation on the amount which the Comptroller may allow upon satisfactory proof has been eliminated. Also, the Revisers have eliminated the requirement of venue in the Circuit Court of the City of Richmond when the Comptroller disallows a claim and have inserted that the claimant may apply to an appropriate circuit court. The reference to the statute of limitations on claims against the State has been replaced by the provision that no statute of limitations shall bar any claim presented under this section. The Revisers made this change in order that an unknown person will not be barred of his rights to funds held by the Commonwealth when he has a proper claim thereto.

§ 8.01-606. Payment of small amounts to persons under a disability through court without intervention of fiduciary.—A. Whenever there is due to any person under a disability, any sum of money from any source, not exceeding three thousand dollars, the same may be paid into the circuit court of the county or city in which such fund became due or such person resides. Such court may, by an order entered of record, (i) pay such fund into the hands of such person to whom the same is due, if such person be considered by such court competent to expend and use the same in his behalf, or (ii) pay such funds into the hands of some other person, who is considered competent to administer the same, for the benefit of the person entitled to the fund, without the intervention of a fiduciary, whether such other person reside within or without this Commonwealth. The clerk of such court shall take a receipt from the person to whom such money is paid, which shall show the source from which the same was derived, the amount, to whom it belongs, and when and to whom it was paid. Such receipt shall be signed and acknowledged by the person so receiving such money, and entered of record in the book in such clerk's office in which the current fiduciary accounts are entered and indexed.

Upon such payment into court the person owing such money shall be discharged of such obligation.

No bond shall be required of the party to whom such money is paid by the court.

B. Whenever it appears to the court having control of a fund, tangible personal property or intangible personal property or supervision of its administration, whether a

suit be pending therefor or not, that a person under a disability who has no fiduciary, is entitled to a fund arising from the sale of lands for a division or otherwise, or a fund, tangible personal property or intangible personal property as distributee of any estate, or from any other source, or whenever a judgment, decree, or order for the payment of a sum of money or for delivery of tangible personal property or intangible personal property to such person under a disability is rendered by any court, and the amount to which such person is entitled or the value of the tangible personal property or intangible personal property is not more than three thousand dollars, or whenever such person under a disability is entitled to receive payments of income, tangible personal property or intangible personal property and the amount of the income payments is not more than three thousand dollars in any one year, or the value of the tangible personal property is not more than three thousand dollars, or the current market value of the intangible personal property is not more than three thousand dollars, the court may, without the intervention of a fiduciary, cause such fund, property or income to be paid or delivered to any person deemed by the court capable of properly handling same, to be used solely for the education, maintenance and support of the person under a disability; and in any case in which an infant is entitled to such fund, property or income, the court may, upon its being made to appear that the infant is of sufficient age and discretion to use the fund, property or income judiciously, cause the same to be paid or delivered directly to the infant.

Whenever such a person under a disability is entitled to a fund or such property distributable by a fiduciary settling his accounts before the commissioner of accounts of the court in which such fiduciary qualified, and the amount or value of such fund or property, or the value of any combination thereof, is not more than five hundred dollars, the commissioner of accounts may approve distribution thereof in the same manner and to the extent of the authority hereinabove conferred upon a court.

Reviser's Note:

Present §§ 8-750 and 8-751 have been combined. Certain of the monetary limits of these sections have been changed. The term "person under a disability" has replaced the phrase "incompetent person or infant" in all but one place, the last sentence of the first paragraph of subsection B., the use of this term comports with its use throughout this Revision. Also, the term "fiduciary" has been used instead of "administrator", etc. Other clarifying language changes have been made.

Present § 8-750.1. Personal representatives for recipients of welfare funds. To be transferred to Title 63.1.

CHAPTER 23.

COMMISSIONERS IN CHANCERY.

§ 8.01-607. Appointment and removal.—Each circuit court shall, from time to time, appoint such commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of such court. Such commissioners shall be removable at pleasure.

Reviser's Note:

The present section, § 8-248, has been updated to reflect, inter alia , 1973 amendments to Title 17 (Courts of Record).

§ 8.01-608. How accounts referred.—Accounts to be taken in any case shall be referred to a commissioner appointed pursuant to § 8.01-248, unless the parties interested agree, or the court shall deem it proper, that they be referred to some other person.

Reviser's Note:

The first sentence of the present section, 8-249, has been retained without change. The second sentence has been modified and is set forth in separate § 8-249.1 infra. Cross Ref. - Rule 2:18 (Proceedings before a Commissioner in Chancery).

§ 8.01-609. The Commissioner's duty and procedure.—Every commissioner shall examine, and report upon, any matters as may be referred to him by any court. The proceedings before a commissioner in chancery shall be conducted as set forth in this chapter and the Rules of Court.

Reviser's Note:

This proposed section sets forth the second sentence of present § 8-249 with minor modifications and with the addition of language referring to the provisions of this Chapter and the Rules of Court for the conduct of proceedings before Commissioners in Chancery. Cross Ref. - Rule 2:18.

§ 8.01-610. Weight to be given commissioner's report.—The report of a commissioner in chancery shall not have the weight given to the verdict of a jury on conflicting evidence, but the court shall confirm or reject such report in whole or in part, according to the view which it entertains of the law and the evidence.

Reviser's Note:

No change has been made to present § 8-250. The cases that have construed this section require that the reviewing court give considerable weight to the Commissioner's report, e.g., *Leckie v. Lynchburg Trust...Bank*, 191 Va. 360, 60 S.E. 2d 923 (1950), but the report may be confirmed or rejected, in whole or in part, as the reviewing court deems appropriate.

§ 8.01-611. Notice of time and place of taking an account.—The court , ordering an account to be taken, may direct that notice of the time and place of taking it be published once a week for two successive weeks in a newspaper meeting the requirements of § 8.01-324, and may also require notice to be served on the parties in the manner set forth in the Rules of Court for the taking of depositions.

Reviser's Note:

Present § 8-251 has been updated. The clause stating that publication shall be equivalent to personal service has been removed as being constitutionally suspect; to insure more adequate notice, a provision has been added to permit mailing or delivering the notice of the time and place of taking the account to counsel of record and to a party having no counsel. Cross Ref. - Rule 4:2 (Depositions Before Action or Pending Appeal).

§ 8.01-612. Commissioner may summons witnesses.—A commissioner in chancery, to whom has been referred any matter, may compel the attendance of all needed witnesses by summons. A summonsed witness who fails to attend shall be reported to the court for appropriate contempt proceedings.

Reviser's Note:

The proposal changes present § 8-252 by making the court solely responsible for the punishment of witnesses who fail to respond to a summons initiated by a commissioner in chancery.

§ 8.01-613. Commissioner may ask instructions of court.—A commissioner, who has doubts as to any point which arises before him, may, in writing, submit the point to the court, who may instruct him thereon.

Reviser's Note:

The proposal has minor language changes which update present § 8-253.

§ 8.01-614. His power to adjourn his proceedings.—A commissioner in chancery may adjourn his proceedings from time to time, after the day to which notice was given, without any new notice, until his report is completed; and, when it is completed, it may be filed in the clerk's office at any time thereafter. The commissioner may, if it shall appear to him necessary, adjourn such proceedings, to any place within the Commonwealth, and there continue such proceedings and take depositions and other evidence in like manner and with like force and effect as if the same were done in the place where he was appointed, and the commissioner shall have the power to compel the attendance of witnesses before him in the manner prescribed by § 8.01-612.

Reviser's Note:

This section combines and condenses present §§ 8-254 and 8-255 without substantive change.

Present § 8-256. How report to be made out; what to be returned with it; when liable for costs. To be deleted.

Reviser's Note:

This section is to be deleted as the matters set forth are largely addressed by the Rules of Court. (See Rule 2:18). Costs are currently provided under Chapter 3 in Title 14.1 (Costs, Etc.).

§ 8.01-615. When cause heard on report.—A cause may be heard by the court upon a commissioner's report. Subject to the Rules of Court regarding dispensing with notice of taking proofs and other proceedings, reasonable notice of such hearing shall be given to counsel of record and to parties not represented by counsel.

This section shall not apply to the report of a commissioner appointed to sell property; in such cases the report of such commissioner, when filed in the clerk's office, may be confirmed forthwith.

Reviser's Note:

The proposal eliminates the requirement in present § 8-257 that the commissioner's report generally must lie in the clerk's office for ten days before there can be a hearing. This requirement is no longer considered necessary. The court can provide for reasonable notice of a hearing. The second paragraph permits the confirmation, without notice, of a commissioner's report regarding the sale of property.

§ 8.01-216. Delivery of original papers of suit by clerk to commissioner.—The clerk of a court shall, upon the request of any commissioner in chancery who has before him for execution an order made in such action , deliver to him the original papers thereof; and it shall not be necessary for the clerk to copy such papers, nor shall he charge any fee for copies of any of them, unless the same be specially ordered. The commissioner to whom such papers may be delivered, shall give his receipt therefor, and return the papers as speedily as possible to the office of the clerk of the court.

Reviser's Note:

This is present § 8-258 with minor language changes.

§ 8.01-617. Settlement of accounts of special receivers and special commissioners.—Every circuit court, by an order entered of record, shall appoint one of its commissioners in chancery, who shall hold office at its pleasure, to state and settle the accounts of all special receivers and of all special commissioners holding funds or evidences of debt subject to the order of the court.

All special receivers and special commissioners shall, unless their accounts have been previously verified and approved by the court, and ordered to be recorded, with reasonable promptness, and not longer than four months after any money in their hands should be distributed or at other intervals specified by the court, present to such commissioner in chancery an accurate statement of all receipts and disbursements, duly signed and supported by proper vouchers; and the commissioner in chancery shall examine and verify the same, and attach his certificate thereto approving it, if it is correct, or stating any errors or inaccuracies therein, and file same in the cause in which the special receiver or special commissioner was appointed, and present the same to the court.

The court may at any time appoint any of its other commissioners in chancery

perform the duties herein required in any case in which the regular commissioner in chancery appointed hereunder is himself the special receiver or special commissioner whose accounts are to be settled.

For his services performed hereunder the commissioner in chancery shall receive such compensation as the court allows, to be paid out of the fund in the hands of the special receiver or special commissioner.

If any special receiver or special commissioner fail to make settlement as herein required within the time herein provided, he shall forfeit his compensation, or so much thereof as the court orders.

The court may order its general receiver also to state and settle his accounts in the manner herein provided.

Reviser's Note:

Minor language changes have been made to update present § 8-259.

§ 8.01-618. Reports of such settlements; when new bond required.—The court shall examine the reports required by the preceding section, when the same are made to it; and, if satisfied of the correctness thereof, shall order them to be recorded. If it appears from the report of the commissioner that any bond of a receiver, or any bond or other security given by any person to whom money has been loaned under its order, is insufficient, the court shall order additional security to be given, or a new bond to be executed before it, in such penalty as may seem right, and with sufficient sureties. But the execution of such new bond shall not discharge the sureties in any prior bond for their liability for acts of the principal obligor done previous to the execution of such new bond.

Reviser's Note:

This is present § 8-260 without change.

§ 8.01-619. Recordation of reports of such settlements.—The circuit court clerk shall record reports of receivers and commissioners when approved by the court, in a fiduciary book and properly index same to show the name of the receiver or commissioner and also the style of the suit in which the report is made; and such book shall be kept as a public record in the office of the clerk.

Reviser's Note:

The proposal alters present § 8-261 by providing that the clerk shall file the commissioner's reports after approval by the Court in "a fiduciary" book [some clerk's offices apparently do not maintain the "Settlement of Receivers and Commissioners" books called for under the present statute] .

Present § 8-262. Fees of clerks and Commissioners. To be transferred to Title 14.1.

Reviser's Note:

This section which is concerned with fees for recording commissioners' reports is to be inserted in Title 14.1 (Costs, Etc.).

CHAPTER 24.

Injunctions

§ 8.01-620. General jurisdiction of circuit court to award injunctions.—Every circuit court shall have jurisdiction to award injunctions, whether the judgment or proceeding enjoined be in or out of the circuit, or the party against whose proceedings the injunction be asked resides in or out of the circuit.

Reviser's Note:

This is present § 8-610 with minor word changes.

§ 8.01-621. Venue.—Venue to award an injunction to any judgment or judicial proceeding shall be in the court in which the judgment was rendered or such proceeding is pending; except that venue to award an injunction to a judgment of a general district court or Juvenile and Domestic Relations District Court, or to any proceeding in either such court, shall be in the circuit court of the county or city in which the judgment was rendered or such proceeding is pending; and venue to award an injunction to any other act or proceeding shall be in the circuit court of the county or city in which the act is to be done, or being done, or is apprehended to be done, or the proceeding is pending.

Reviser's Note:

The Revisers have made minor language changes to allow this section present § 8-611, to comport with the present court system. Juvenile and Domestic Relations District Courts have been added to the present courts which are subject to an injunction. The section is also clarified in that "venue" is substituted for "jurisdiction". Other minor language changes have been made. A cross reference to this section shall be placed in the Venue Chapter.

§ 8.01-622. Injunction to protect plaintiff in suit for specific property.—An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property.

Reviser's Note:

This is present § 8-612 without change.

§ 8.01-623. Injunction against decree subject to bill of review; limitations to bill of review.—A court allowing a bill of review may award an injunction to the decree to be

reviewed. But no bill of review shall be allowed to a final decree, unless it be exhibited within six months next after such decree, except that a person under a disability as defined in § 8.01-2 may exhibit the same within six months after the removal of his or her disability. In no case shall such a bill be filed without the leave of court first obtained, unless it be for error of law apparent upon the face of the record.

Reviser's Note:

This is present § 8-613. The language "...an infant or insane person..." has been replaced with the language "...a person under a disability as defined in § 8.01-2". This change is made in conformity with the recommendation to embrace all such persons as defined in § 8.01-2, Definitions. Although this section is less used than in former times, it is a limited procedure which ought to be retained.

§ 8.01-624. Duration of temporary injunctions to be fixed therein.—When any court authorized to award injunctions shall grant a temporary injunction, either with or without notice to the adverse party, such court shall prescribe in the injunction order the time during which such injunction shall be effective and at the expiration of that time such injunction shall stand dissolved unless, before the expiration thereof, it be enlarged. Such injunction may be enlarged or a further injunction granted by the court in which the cause is pending or by the court to whom the bill is addressed in the event the cause be not matured, after reasonable notice to the adverse party, or to his attorney of record of the time and place of moving for the same.

Reviser's Note:

This is present § 8-614. The words "at law or in fact" following "attorney" have been replaced with "of record". The reference to an attorney in fact of the adverse party has been deleted since the Revisers could not envision a situation where notice to an attorney in fact would be appropriate.

§ 8.01-625. Dissolution of injunctions.—Any court wherein an injunction has been awarded may at any time when such injunction is in force dissolve the same after reasonable notice to the adverse party, or to his attorney of record, in which notice shall be set forth the grounds upon which such dissolution will be asked, unless such grounds be set forth in an answer previously filed in the case by the party giving such notice.

Reviser's Note:

This is present § 8-615. The reference to the adverse party's attorney in fact has been deleted. Other minor language changes have been made.

Present § 8-616. Records of certain orders in vacation. To be deleted.

Reviser's Note:

The deletion of this section is in conformity with the recommendation heretofore made with respect to elimination of the distinction between what a court may or may not do in term and vacation. (See § 8.01-445) Moreover, it is assumed that the clerk will handle the papers and orders of the case as he does in all other cases.

Present § 8-617. No appeal from certain orders. To be deleted.

Reviser's Note:

The Revisers recommend the deletion of this section since it is inconsistent with proposed § 8.01-670 which permits an appeal from an interlocutory or final order granting or dissolving an injunction.

§ 8.01-626. When court grants or refuses injunction, justice of Supreme Court may review it.—Wherein a circuit court

(i) grants an injunction or (ii) refuses an injunction or having granted it, dissolves or refuses to enlarge it, an aggrieved party may, within fifteen days of the court's order, present a petition to a Justice of the Supreme Court. The petition shall be accompanied by a copy of the proceedings, including the original papers and the court's order respecting injunction. The Justice may take such action thereon as he considers appropriate under circumstances of the case.

Reviser's Note:

Present § 8-618 provides an extraordinary procedure for review by a single Supreme Court Justice of the trial court's action respecting an injunction. The proposal alters present § 8-618 in two major respects: (1) The presentation of a petition to a single Justice shall be within 15 days of the circuit court's order respecting an injunction. No time limitations are provided by the present statute and since this is an extraordinary remedy, a short period is deemed appropriate. (2) The petition may be with respect to an injunction granted by the circuit court as well as an order refusing to grant an injunction or an order dissolving or refusing to enlarge a temporary injunction. Expansion of the procedure to encompass the trial court's granting of an injunction is deemed equitable.

Future development of the interrelationship of the extraordinary procedure of § 8-618 and the appeal from the granting or dissolution of an injunction under § 8.01-670 et seq. is left to the courts.

§ 8.01-627. To what clerk order for injunction directed.—Every order, awarding an injunction made under § 8.01-620 or § 8.01-626, shall be directed to the clerk of the court which has venue under § 8.01-621 and the proceedings thereupon shall be as if the order has been made by such court.

Reviser's Note:

This is present § 8-619 with no material change.

§ 8.01-628. Equity of prayer for temporary injunction to be shown by affidavit or otherwise.—No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity.

Reviser's Note:

This is pesent § 8-620 with minor language changes.

§ 8.01-629. Notice required.—Any court may require that reasonable notice be given to the adverse party, or to his attorney of record, of the time and place of moving for it, before the injunction is granted, if, in the opinion of the court, it be proper that such notice be given.

Reviser's Note:

The Revisers have: (1) deleted reference to the attorney in fact of an adverse party, (2) replaced "attorney at law" with the language "attorney of record", (3) and deleted the last sentence as surplusage.

§ 8.01-630. Forthcoming bond in connection with injunction against removal of property.—A court awarding an injunction to restrain the removal of property out of this Commonwealth may require bond with security to be given before such officer and in such penalty as the court may direct, with condition to have the property forthcoming to abide the future order or decree of the court and, unless such bond be given, may order the officer serving its process to take possession of the property and keep it until the bond be given or until further order of the court.

Reviser's Note:

This is present § 8-622 with no material change.

§ 8.01-631. Injunction bond.—Except in the case of a fiduciary or any other person from whom in the opinion of the court awarding an injunction it may be improper or unnecessary to require bond, no injunction shall take effect until bond be given in such penalty as the court awarding it may direct, with condition either to pay the judgment or decree, proceedings on which are enjoined, or to pay the value of the property levied on by the officer, when there has been a levy, or to have the property forthcoming to abide the future order or decree of court, and, in either case, to pay all such costs as may be awarded against the party obtaining the injunction, and all such damages as may be incurred, in case the injunction shall be dissolved, and with a further condition, if a forthcoming bond has been given under such judgment or decree, to indemnify and save harmless the sureties in such forthcoming bond and their representatives against all loss or damage in consequence of such suretyship, or, if the injunction be not to proceedings on a judgment or decree, with such condition as the court or judge may prescribe. The bond shall be given before the clerk of the court in which the judgment or decree is, and, in other cases, before the clerk of the court in which the suit is, wherein the injunction is awarded.

For any temporary or permanent injunction sought by, or awarded to, the Commonwealth, or any of its officers or agencies, no bond shall be required.

Reviser's Note:

The last two sentences of present § 8-623 have been deleted. The procedural practice outlined therein existed before the Rules of Court were adopted where the clerk issued a subpoena in chancery or summons pursuant to a memorandum commencing the suit. These two sentences have no modern utility and are most confusing to the clerk and the practitioner. Minor language changes have been made to clarify the statute.

§ 8.01-632. How surety in forthcoming bond may obtain additional security.—Any surety in the forthcoming bond described in §§ 8.01-630 and 8.01-631, or his personal representative, may move for and obtain an order for other or additional security, in the same manner as the defendant in an injunction.

Reviser's Note:

This is present § 8-624 without material change.

§ 8.01-633. Damages on dissolution.—When an injunction to stay proceedings on a judgment or decree for money is dissolved wholly or in part there shall be paid to the party having such judgment or decree damages at the rate of ten per centum per annum from the time the injunction took effect until the dissolution, on such sum as appears to be due, including the costs; but the court wherein the injunction is may direct that no such damages be paid, or that there be paid only such portion thereof as it may deem just. In a case wherein a forthcoming bond was forfeited, and no execution was had thereon before the injunction took effect, a court awarding such execution shall include in its judgment or decree damages as aforesaid. In other cases damages may be included in the execution on the judgment or decree to which the injunction was awarded.

Reviser's Note:

The last sentence of present § 8-625 has been deleted as unnecessary. Otherwise, no changes have been made.

§ 8.01-634. Dismissal of injunction bill.—When an injunction is wholly dissolved the bill shall stand dismissed with costs, unless sufficient cause be shown against such dismissal.

Reviser's Note:

The following requirements in present § 8-626 have beer deleted: (1) that a showing not to dismiss the injunction be carriec over to the next term and (2) that the clerk shall enter the dismissa on the last day of term. These requirements are inconsistent witl

modern practice. Other minor word changes have been made.

CHAPTER 25.

EXTRAORDINARY WRITS.

Article 1.

Writ of Quo Warranto.

§ 8.01-635. Common law writ of quo warranto and information in the nature of writ of quo warranto abolished; statutory writ of quo warranto established.—The common law writ of quo warranto and information in the nature of writ of quo warranto is hereby abolished and superseded by the statutory writ of quo warranto.

Reviser's Note:

This is a new section. Since neither proceeding by the writ of quo warranto nor information in the nature of a writ of quo warranto ever seems to have been understood and have fallen into disuse, the proposed section abolishes them. [See Burks Pleading and Practice; 4th ed., 1952, § 201] . Instead, a single procedure, a statutory writ of quo warranto, is created and provides the same relief as possible under the former writs.

§ 8.01-636. In what cases a writ of quo warranto issued.—A writ of quo warranto may be issued and prosecuted in the name of the Commonwealth in any of the following cases:

1. Against a domestic corporation, other than a municipal corporation, for the misuse or nonuse of its corporate privileges and franchises, or for the exercise of a privilege or franchise not conferred upon it by law, or when a charter of incorporation has been obtained by it for a fraudulent purpose, or for a purpose not authorized by law;

2. Against a person for the misuse or nonuse of any privilege conferred upon him by law;

3. Against any person or persons acting as a corporation, other than a municipal corporation, without authority of law; and

4. Against any person who intrudes into or usurps any public office. But no writ shall be issued or prosecuted against any person now in office for any cause which would have been available in support of a proceeding to contest his election.

Provided that nothing herein shall be construed to give jurisdiction to any court to judge the election, qualifications, or returns of the members of either house of the General Assembly.

Reviser's Note:

This proposed section has made minor language changes to present § 8-857, but no alteration of substantive law is intended. Added to the present section is the proviso preserving to the General Assembly the authority to judge the elections, qualifications, and/or returns of its members. [See Constitution of Virginia, 1971, Article IV, § 7.]

§ 8.01-637. By whom filed; when leave granted and writ issued.—A. The Attorney General or Attorney for the Commonwealth of any county or city of which the circuit court has jurisdiction of the proceeding, at his own instance or at the relation of any interested person, or any interested person, may apply to such court by petition verified by oath for a writ of quo warranto.

B. If, in the opinion of the court, the matters stated in the petition are sufficient in law to authorize the issuance of such writ, a writ shall issue thereon, commanding the sheriff to summon the defendant to appear at a date set forth in the writ.

C. If the petition is filed on the relation of any person or by any person at his own instance, before the clerk shall issue the writ the court shall require the relator or person to give bond with sufficient surety, to be approved by the clerk, to indemnify the Commonwealth against all costs and expenses of the proceedings, in case the same shall not be recovered from and paid by the defendant.

Reviser's Note:

The proposed section is a consolidation of §§ 8-858 (When, where, how, and by whom writ to be applied for), 8-859 (When awarded; where returnable; how signed and attested; when bond required), and 8-860 (Information in nature of writ of quo warranto; when leave granted and summons issued). Subsection A. adopts the substance of §§ 8-859 and 8-860 regarding who may file the writ. Subsection B. also adopts the substance of these two sections granting to the court the discretion to decide the sufficiency/insufficiency of the matters stated in the petition. However, instead of making the summons returnable to the next term of court (see present § 8-859), proposed subsection B. requires the defendant to appear at a date set forth in the writ. Subsection C. has combined and rewritten the last sentences of §§ 8-859 and 8-860; however, no change in substance is intended.

§ 8.01-638. Venue.—Venue in proceedings by writ of quo warranto shall be in the circuit court of the city or county wherein any of the defendants reside.

Provided that if the defendant be a corporation, the city or county wherein its registered office is, or wherein its mayor, rector, president, or other chief officer resides; and,

Provided further, that if there be no such office or officer, or none of the defendants reside in the Commonwealth, venue shall be in the Circuit Court of the City of Richmond.

Reviser's Note:

This is a new section.

Venue for proceedings by writ of quo warranto was excluded from the application of Chapter 5. (See proposed § 8.01-259 and Reviser's Note.) This proposed section adopts the geographical locations of present § 8-41, but relates them only to venue for a proceeding by writ of quo warranto. [Proposed § 8.01-258 (Venue not jurisdictional) and Reviser's Note applicable here.] Jurisdiction of circuit courts of such proceedings is granted by § 17-123.

§ 8.01-639. How summons directed and served.—The writ and a copy of the petition attached thereto may be directed to the sheriff of any county or city and shall be served as in other actions.

Reviser's Note:

The proposed section alters present § 8-861 by requiring that a copy of the petition be attached to the writ. Otherwise, the substance of the present section is not altered. See Chapter 8, Process.

§ 8.01-640. Judgment when defendant fails to appear.—If the defendant fails to appear in accordance with the writ, the court may hear proof of the allegations of the petition, and if the allegations are sustained, shall give judgment accordingly.

Reviser's Note:

This proposed section adopts the substance of present § 8-862. See § 8.01-637.

§ 8.01-641. Reopening same when made on service by publication.—But if service is made by publication, the defendant against whom the judgment is rendered may file a motion within thirty days from the rendition of judgment to have such judgment set aside, upon giving bond with good security as prescribed by the court, with condition to pay all such costs as shall be awarded in the cause against the defendant. The defendant may then make such defense to the petition as he might have made, and in the same manner, before the judgment was rendered.

Reviser's Note:

The proposed section alters present § 8-863 by replacing the period provided by "at the next term of the court" with the uniform period of "thirty days from the rendition of judgment". Otherwise, the minor changes in language do not alter the substance of present § 8-863.

§ 8.01-642. Pleading when defendant appears.—The defendant against whom the writ was issued may plead, demur or answer the petition within the time set forth in the writ for his appearance.

Reviser's Note:

The proposed section condenses and simplifies present § 8-864. The reference to pleading "not guilty" and to allegations not denied by the answer has been eliminated as no longer necessary in view of the pleading provisions of the Rules of Court. (See Rule 3:5 - Defendant's Response). Also, the reference to the next term is deleted and replaced by the time provision of proposed § 8.01-637 B., and the references to the abolished writ and information are eliminated.

§ 8.01-643. Trial; verdict; judgment; costs; attorney's fee.—Unless the defendant shall ask for a trial by jury, the court shall hear the same. If the case is tried by jury and the defendant is found guilty as to only a part of the charges, the verdict shall be guilty as to such part and shall particularly specify the same. As to the residue of such charges, the verdict shall be not guilty.

If the defendant appears and is found guilty the court shall give such judgment as is appropriate and authorized by law and for costs incurred in the prosecution of the information, including a reasonable attorney's fee to be prescribed by the court.

Reviser's Note:

This rewrites present § 8-865. This proposed section alters present Virginia case law by requiring a trial by jury of proceedings by writ of quo warranto only when the defendant so requests. See *Dotson* v. *Commonwealth*, 192 Va. 565, 66 S.E. (2d 490). Also, the specific monetary limits on recovery of attorney's fees is replaced with a reasonableness standard.

Article 2.

Mandamus and Prohibition.

COMMENT

After Federal Rule of Civil Procedure 81(b) abolished the writ of mandamus, many state jurisdictions followed suit. Yet some difficulty has been experienced by both the bench and bar regarding the proper form of civil action to accomplish the purposes of the former writ of mandamus. Both the declaratory judgment and injunction form have been used.

In at least one state the elimination of the writ of mandamus also had the practical effect of eliminating the peremptory writ. See Minn. R.CP 81.02, Advisory Committee Note (1968). Minnesota resolved this confusion by restoring the writ as a statutory writ.

Accordingly, in view of possible uncertainty existing in the minds of the bench and bar regarding proper procedures, the revisers recommend the retention of the writ of mandamus.

§ 8.01-644. Application for mandamus or prohibition.—Application for a writ of mandamus or a writ of prohibition shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made.

Reviser's Note:

This is present § 8-704 without change.

§ 8.01-645. What petition to state; where presented.—The petition shall state plainly and concisely the grounds of the application, concluding with a prayer for the writ, and shall be presented to the court having jurisdiction, unless the application is to the Supreme Court.

Reviser's Note:

The proposed section deletes the reference to the judge in vacation in present § 8-705. The word "is" is substituted for the word "be," and "of Appeals" is deleted so as to conform with Article VI, § 1 of the Virginia Constitution.

§ 8.01-646. When writ awarded if no defense made.—When the application is made, on proof of notice and service of the copy of the petition as aforesaid, if the defendant fails to appear, or appearing fails to make defense, and the petition states a proper case for the writ, a preemptory writ shall be awarded with costs.

Reviser's Note:

This is present § 8-706 with minor language changes.

§ 8.01-647. Defense; how made.—The defendant may file a demurrer or answer on oath to the petition, or both. The court may permit amendments of the pleadings as in other cases.

Reviser's Note:

This is present § 8-707 without material changes to current procedure. [Cross Ref: Present § 8-122 proposed § 8.01-274.]

Present § 8-708. Adjournment. To be deleted.

Reviser's Note:

This section is unnecessary as it relates to the judge in vacation.

§ 8.01-648. What judgment to be rendered.—The court shall award or deny the writ

according to the law and facts of the case, with or without costs.

Reviser's Note:

The proposed section deletes the reference to the judge in vacation from present § 8-709.

§ 8.01-649. The proceedings when application is to Supreme Court.—If the application is to the Supreme Court, the procedure shall be in accordance with the provisions of Rule of Court 5:5.

Reviser's Note:

The proposed section conforms present § 8-710 with Rule of Court 5:5 which relates to the procedure in mandamus proceedings when the Supreme Court has original jurisdiction.

§ 8.01-650. Suspension of proceedings, where prohibition applied for.—On petition for a writ of prohibition, the court may, at any time before or after the application for the writ made, make an order, a copy of which shall be served on the defendant, suspending the proceedings sought to be prohibited until the final decision of the cause.

Reviser's Note:

The proposed section deletes the reference to the judge in vacation from present § 8-711.

§ 8.01-651. Suspension of proceedings by justice of Supreme Court.—Whenever a court having jurisdiction shall refuse to suspend proceedings as provided in § 8.01-710 of this chapter, a copy of the proceedings in court, with any orders entered in the proceedings, may be presented to a Justice of the Supreme Court who may thereupon award a suspension of the proceedings sought to be prohibited until the final decision of the cause, provided that the Supreme Court is not in session and that an application for a writ of prohibition is pending in that court.

Reviser's Note:

The proposed section eliminates the references to the judge in vacation from present § 8-711.1.

Present § 8-712. How proceedings in vacation certified and entered. To be deleted.

Reviser's Note:

This section is unnecessary since it is concerned only with the court in vacation.

§ 8.01-652. Service of writ; how obedience enforced.—Service of a copy of the order awarding the writ shall be equivalent to service of the writ, and obedience to the writ or order may be enforced by process of contempt.

Reviser's Note:

The proposed section eliminates the reference to the judge in vacation from present § 8-713.

§ 8.01-653. Mandamus to secure construction of act directing payment out of treasury of the Commonwealth.—Whenever the Comptroller or the Treasurer of the Commonwealth shall notify the Attorney General, in writing, that they, or either of them, entertain such doubt respecting the proper construction or interpretation of any act of the General Assembly which appropriates or directs the payment of money out of the Treasury of the Commonwealth, or respecting the constitutionality of any such act, that they, or either of them, do not feel that it would be proper or safe to pay such money until there has been a final adjudication by the Supreme Court determining any and all such questions, and that, for such reason, they will not make payments pursuant to such act until such adjudication has been made, the Attorney General may file in such court a petition for a writ of mandamus directing or requiring the Comptroller or Treasurer of the Commonwealth, or both, to pay such money as provided by any such act at such time in the future as may be proper. In order to avoid delays in payments after the time for making them has arrived, any such petition may be filed at any time after the passage of any such act although the time for making such payments has not arrived and no demand for such payments has been made. In any such proceeding the court shall consider and determine all questions raised by the Attorney General's petition pertaining to the constitutionality or interpretation of any such act, even though some of such questions may not be necessary to the decision of the question of the duty of such Comptroller and Treasurer of the Commonwealth to make payment of the moneys appropriated or directed to be paid.

The Comptroller and the Treasurer of the Commonwealth, or either of them, as the case may be, shall be made a party or parties defendant to any such petition and the court may, in its discretion, cause such other officers or persons to be made parties defendant as it may deem proper, and may make such order respecting the employment of an attorney or attorneys for any officer of the Commonwealth who is a party defendant as may be appropriate. The compensation of any such attorney shall be fixed by such court and upon its order paid out of the appropriation to the office or department of any such public officer represented by any such attorney in such proceeding.

Reviser's Note:

This is present § 8-714 without substantial change. The term "State" has been changed to read "Commonwealth".

Article 3.

Habeas Corpus.

§ 8.01-654. When and by whom the writ granted; what petition contain.—A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any

person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97 of this Code, only the court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the original trial court, may be held at any court within the circuit of such original trial court as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

Reviser's Note:

The proposed section deletes the references to corporation courts and the judge in vacation from present § 8-596.

§ 8.01-655. Form and contents of petition filed by prisoner.—A. Every petition filed by a prisoner seeking a writ of habeas corpus must be filed on the form set forth in subsection B. The failure to use such form and to comply substantially with such form shall entitle the court to which such petition is directed to return such petition to the prisoner pending the use of and substantial compliance with such form. The petitioner shall be responsible for all statements contained in the petition and any false statement contained therein, if the same be knowingly or wilfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

B. Every petition filed by a prisoner seeking a writ of habeas corpus shall be filed on a form to be approved and provided by the Office of the Attorney General, the contents of which shall be substantially as follows:

IN THE.....COURT

.....	
Full name and prisoner number (if any) of Petitioner	*Case No. .....* *(To be supplied by the Clerk of the Court)*
-vs-	

.....
.....
Name and Title of Respondent

PETITION FOR WRIT OF HABEAS CORPUS

Instructions - Read Carefully

In order for this petition to receive consideration by the Court, it must be legibly handwritten or typewritten, signed by the petitioner and verified before a notary or other officer authorized to administer oaths. It must set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on an additional page. Petitioner must make it clear to which question any such continued answer refers. The petitioner may also submit exhibits.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury under § 18.2-434. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

When the petition is completed, the original and two copies (total of three) should be mailed to the Clerk of the Court. The petitioner shall keep one copy.

NOTICE

The granting of a writ of habeas corpus does not entitle the petitioner to dismissal of the charges for conviction of which he is being detained, but may gain him no more than a new trial.

.....

Place of detention:.....

A. Criminal Trial

1. Name and location of court which imposed the sentence from , which you seek relief:

.....
.....

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

a. .....
b. .....
c. .....

3. The date upon which sentence was imposed and the terms of the sentence:

a. .....
b. .....
c. .....

4. Check which plea you made and whether trial by jury: Plea of guilty:___; Plea of not guilty:___; Trial by jury:___; Trial by judge without jury:___.

5. The name and address of each attorney, if any, who represented you at your criminal trial:

.....
.....

6. Did you appeal the conviction?_____

7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari:

a. .....
b. .....

citations of the appellate court opinions or orders:

a. .....
b. .....

8. List the name and address of each attorney, if any, who represented you on your appeal:

.....
.....

B. Habeas Corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court?_____

10. If you answered "yes" to 9, list with respect to each petition: the name and location of the court in which each was filed:

a. .....
b. .....

the disposition and the date:

a. .....
b. .....

the name and address of each attorney, if any, who represented you on your habeas corpus:

a. .....
b. .....

11. Did you appeal from the disposition of your petition for habeas corpus?____

12. If you answered "yes" to 11, state: the result and the date of each petition:

a. .....
b. .....

citations of court opinions or orders on your habeas corpus petition:

a. .....
b. .....

the name and address of each attorney, if any, who represented you on appeal of your habeas corpus:

a. .....
b. .....

C. Other Petitions, Motions or Applications

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you.

a. .....
b. .....
c. .....

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

a. .....
b. .....
c. .....

15. List each ground set forth in 14, which has been presented in any other proceeding:

a. .....
b. .....
c. .....

List the proceedings in which each ground was raised:

a. .....
b. .....
c. .....

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

a. .....
b. .....
c. .....

.....
Signature of Petitioner

.....
Address of Petitioner

STATE OF VIRGINIA

CITY/COUNTY OF .....

The petitioner being first duly sworn, says:

1. He signed the foregoing petition;

2. The facts stated in the petition are true to the best of his information and belief.

.....
Signature of Petitioner

Subscribed and sworn to before me

this....day of....., 19.....

.....

Notary Public

My commission expires:.....

The petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the affidavit in forma pauperis.

The petitioner who proceeds in forma pauperis shall be furnished, without cost, certified copies of the arrest warrants, indictment and order of his conviction at his criminal trial in order to comply with the instructions of this petition.

AFFIDAVIT IN FORMA PAUPERIS

TATE OF VIRGINIA

CITY/COUNTY OF .....

The petitioner being duly sworn, says:

1. *He is unable to pay the costs of this action or give security therefor;*

2. *His assets amount to a total of $.....*

.....
Signature of Petitioner

Subscribed and sworn to before me

this ..... day of .....,19.....

.....
Notary Public

My commission expires:.....

Reviser's Note:

The proposed section only changes present § 8-596.1 by adding the last sentence under the heading Present Petition for Writ of Habeas Corpus. This addition represents a codification of *McCoy* v. *Lankford* 210 Va. 264, 170 S.E. 2d 11(1969). Otherwise, the indigent

prisoner without a lawyer may think he is unable to comply with the instructions and be discouraged from filing a potentially meritorious petition. To prevent this, the law is spelled out on the petition form.

§ 8.01-656. Bond may be required of petitioner.—Before granting the writ, the court may require the petitioner to give bond with surety in a reasonable amount for the payment of such costs and charges as may be awarded against him.

Such bond shall be made payable to the person to whom the writ is directed, with condition that the petitioner will not escape, and shall be filed with the other proceedings on the writ, and may be sued on for the benefit of any person injured by the breach of its condition.

Reviser's Note:

The proposed section changes the language but not the substance of present § 8-597.

§ 8.01-657. How directed and returnable.—The writ shall be directed to the person in whose custody the petitioner is detained and shall be made returnable as soon as may be before the court ordering the same, or any other of such courts.

Provided that in the event the allegations of illegality of the petitioner's detention present a case for the determination of unrecorded matters of fact relating to any previous judicial proceeding, such writ shall be made returnable before the court in which such judicial proceeding occurred.

Reviser's Note:

The proposed section deletes the references to the judge in vacation from present § 8-598.

§ 8.01-658. How writ served.—The writ shall be served on the person to whom it is directed, or, in his absence from the place where the petitioner is confined, on the person having the immediate custody of him.

Reviser's Note:

No change from present § 8-599.

§ 8.01-659. Penalty for disobeying it.—If the person on whom such writ is served shall, in disobedience to the writ, fail to bring the petitioner, with a return of the cause of his detention, before a court before which the writ is returnable, he shall forfeit to the petitioner three hundred dollars.

Reviser's Note:

The proposed section changes present § 8-600 by deleting any

obsolete reference to the three day period for compliance.

§ 8.01-660. When affidavits may be read.—In the discretion of the court or judge before whom the petitioner is brought, the affidavits of witnesses taken by either party, on reasonable notice to the other, may be read as evidence.

Reviser's Note:

No change from present § 8-601.

§ 8.01-661. Facts proved may be made part of record.—All the material facts proved shall, when it is required by either party, be made a part of the proceedings and entered by the clerk among the records of the court.

Reviser's Note:

The proposed section eliminates from present § 8.01-602 the language that pertains to the judge in vacation.

§ 8.01-662. Judgment of court or judge trying it; payment of costs and expenses when petition denied.—After hearing the matter both upon the return and any other evidence, the court before whom the petitioner is brought shall either discharge or remand him, or admit him to bail and adjudge the cost of the proceeding, including the charge for transporting the prisoner.

Provided, however, that if the petition is denied, the costs and expenses of the proceeding and the attorney's fees of any attorney appointed to represent the petitioner shall be assessed against the petitioner. If such cost, expenses and fees are collected, they shall be paid to the Commonwealth.

Reviser's Note:

This is present § 8-603 with minor language changes.

Present § 8-604. Judge to have same power as court and his judgment the same effect. To be deleted.

§ 8.01-663. Judgment conclusive.—Any such judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment.

Reviser's Note:

The proposed section is present § 8-605 without change.

§ 8.01-664. How and when Supreme Court summoned to try appeal therefrom.—If, during the recess of the Supreme Court, the Governor or the Chief Justice of the Court should think the immediate revision of any such judgment to be proper, he may summon

the court for that purpose, to meet on any day to be fixed by him.

Reviser's Note:

The proposed section is present § 8-606 without change except for deletion of "of Appeals" from the title from the Supreme Court.

§ 8.01-665. When execution of judgment suspended; when prisoner admitted to bail.—When the prisoner is remanded, the execution of the judgment shall not be suspended by a writ of error, or for the purpose of applying for such writ; but when he is ordered to be discharged, and the execution of the judgment is suspended for the purpose of applying for a writ of error, the court making such suspending order may admit the prisoner to bail until the expiration of the time allowed for applying for the writ of error, or, in case the writ of error is allowed, until the decision of the Supreme Court thereon is duly certified.

Reviser's Note:

The proposed section deletes the reference to the judge in vacation from present § 8-607, eliminates the unnecessary words "in its or his discretion" after the word "may" and changes the obsolete reference to the Supreme Court of Appeals.

§ 8.01-666. When and by whom writs of habeas corpus ad testificandum granted.—Writs of habeas corpus ad testificandum may be granted by any circuit court in the same manner and under the same conditions and provisions as are prescribed by this chapter as to granting the writ of habeas corpus ad subjiciendum so far as the same are applicable.

Reviser's Note:

The proposed section eliminates the references to corporation courts and the judge in vacation for present § 8-608.

§ 8.01-667. Transmission of records to federal court.—Whenever any habeas corpus case is pending in a federal court, upon written request of the Attorney General or any Assistant Attorney General, a court of this State shall transmit to such federal court such records as may be requested.

Reviser's Note:

This is present § 8-608.1 without change.

§ 8.01-668. Writ de homine abolished.—The writ de homine replegiando is abolished.

Reviser's Note:

This is present § 8-609 without change.

CHAPTER 26.

APPEALS.

Article 1.

Definitions.

§ 8.01-669. Definitions.—As used in this chapter, unless the context otherwise requires, the term:

1. "Judgment" shall include a decree, order, finding, or award.

2. "Petitioner" shall mean a party who petitions to the Supreme Court for an appeal.

3. "Appellant" shall mean a party who has an appeal of right or who has been granted an appeal by the Supreme Court if he believes himself aggrieved.

Article 2.

When Granted.

§ 8.01-670. In what cases awarded.—A. Any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved:

1. By any judgment in a controversy concerning:

a. The title to or boundaries of land,

b. The condemnation of property,

c. The probate of a will,

d. The appointment or qualification of a personal representative, guardian, committee, or curator,

e. A mill, roadway, ferry, wharf, or landing,

f. The right of the Commonwealth, or a county, or municipal corporation to levy tolls or taxes,

g. The construction of any statute, ordinance, or county proceeding imposing taxes; or

2. By the order of a court refusing a writ of quo warranto or by the final judgment on any such writ; or

3. By a final judgment in any other civil case; or

B. Any party to any case in chancery wherein there is an interlocutory decree or

order:

1. Granting, dissolving or denying an injunction; or

2. Requiring money to be paid or the possession or title of property to be changed; or

3. Adjudicating the principles of a cause.

§ 8.01-671. Time within which petition must be presented.—A. No petition shall be presented for an appeal from any final judgment whether the Commonwealth be a party or not, (i) which shall have been rendered more than four months before the petition is presented, or (ii) if it be an appeal from a final decree refusing a bill of review to a decree rendered more than four months prior thereto, unless the petition be presented within three months from the date of such decree.

B. When an appeal from an interlocutory decree or order is permitted, the petition for appeal shall be presented within the appropriate time limitation set forth in subsection A. hereof.

§ 8.01-672. Jurisdictional amount.—No petition shall be presented for an appeal from any judgment of a circuit court except in cases in which the controversy is for a matter of five hundred dollars or more in value or amount, and except in cases in which it is otherwise expressly provided; nor to a judgment of any circuit court when the controversy is for a matter less in value or amount than five hundred dollars, exclusive of costs, unless there be drawn in question a freehold or franchise or the title or bounds of land, or some other matter not merely pecuniary.

Article 3.

The Record.

Present § 8-468.1. Compensation of clerk for making up, certifying and transmitting original record. To be transferred to Title 14.1.

Present § 8-471. Supreme Court may make or change rules for making out and printing records. To be deleted.

§ 8.01-673. Inspection and return of records; certiorari when part of record is omitted; binding or retention of records.—A. The Supreme Court may, when a case has before been in such court, inspect the record upon the former appeal; and the court may, in any case, after reasonable notice to counsel in the appellate court, award a writ of certiorari to the clerk of the court below, and have brought before it, when part of a record is omitted, the whole or any part of such record.

B. When an appeal is refused or after it has been allowed and decided, the Clerk of the Supreme Court shall return the record to the clerk of the circuit court or other tribunal. The clerk of such court or tribunal shall return the record upon the request of the Clerk of the Supreme Court. As soon as a case is decided, the Clerk of the Supreme Court shall cause the printed record (appendix) in the case to be bound, along with the briefs of counsel, in the same manner that Acts of Assembly are bound; and he shall, when he collects the writ tax in each case, collect of appellant a fee of one dollar and fifty cents to pay the cost of such binding.

The manuscript of the record in a case in which an opinion was delivered prior to

nineteen hundred fifty by the Supreme Court upon refusal of an appeal shall not be destroyed and shall be retained by the Clerk of such Court in his files.

Article 4.

The Petition.

§ 8.01-674. With whom filed; endorsement thereon; reference to justice or justices; when deemed to be filed.—The petition shall be filed with the Clerk of the Supreme Court. The Clerk shall endorse thereon the day and year he received it and shall refer it to one or more justices of the Supreme Court as the Court shall direct. A petiton shall, for the purposes of § 8.01-679, be deemed to be timely filed if it is mailed postage prepaid to the Clerk by registered or certified mail and if the official postal receipt therefor is exhibited upon the demand of the Clerk or any party and it shows mailing within the prescribed time limits.

§ 8.01-675. Action on petition; finality thereof.—The justice or justices to whom the petition is referred, if of opinion that the decision complained of ought to be reviewed, may allow an appeal. Counsel for the petitioner shall be afforded, if he so desires, reasonable opportunity to state orally his reason or reasons why such appeal should be granted. The petition shall be rejected when it is from an interlocutory decree or order, if the justice or justices to whom it is referred deems it proper that the case should be proceeded in further in the court below before an appeal is allowed therein. If the court shall find that there is no reversible error in the judgment complained of and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained.

Article 5.

Appeal Bond.

§ 8.01-676. Appeal bond; how party desiring to present such petition may procure suspension of execution; suspension of execution; exceptions; changes in penalty by trial court or by Supreme Court on appeal; appeals from State Corporation Commission.—A. Upon the motion of any party who indicates his intention to appeal to the Supreme Court, the court entering the judgment to be appealed from shall, prior to the expiration of thirty days from its entry, suspend the execution of such judgment so long as the petitioner timely prosecutes the appeal and thereafter so long as the matter is under consideration by the Supreme Court; provided such party or someone for him shall file an appeal bond in the clerk's office of the trial court within the time prescribed by the trial court, with surety to be approved by the judge or clerk of such court, in the penalty of one thousand dollars or such greater sum as the court may require, reciting such judgment and the intention of such person to present such petition, which bond shall be conditioned to perform and satisfy the judgment or the part thereof proceedings on which are stayed, in case such judgment or such part be affirmed in whole or in part, or the appeal not be timely prosecuted, or the appeal be denied, and which bond shall also be conditioned to pay all damages, costs, and fees which may be awarded against the appellant in the Supreme Court and all actual damages incurred in consequence of the suspension; provided, however, that when the judgment appealed from dissolves, grants, or denies an injunction the judge may in his discretion decline to grant a suspension thereof.

B. When an appeal is proper to protect the estate of a decedent or person under

disability, or to protect the interest of any county, city, or town of this Commonwealth or the Commonwealth no appeal bond shall be required.

C. The Supreme Court may, when it considers the petition for appeal, order that the penalty of the appeal bond be decreased or increased if such request is made in the petition for appeal or the appellee's brief in opposition. Affidavits and counter-affidavits may be filed by the parties containing facts pertinent to such request. Any increase or decrease in an appeal bond so ordered shall be effected in the clerk's office of the trial court within fifteen days of the Supreme Court's order, and if an increase so ordered is not effected within fifteen days, the appeal shall be dismissed. Such increase or decrease in the penalty of the appeal bond may also be considered and ordered by the trial court, on motion of either party, at any time until the Supreme Court acts upon the amount of penalty, and failure to increase such penalty as hereinabove provided shall also cause the appeal to be dismissed.

D. If no appeal bond has been filed, the Supreme Court may, upon granting an appeal, order the suspension of the judgment appealed from upon the appellant's filing in the trial court a bond conditioned pursuant to subsection A. of this section in such penalty and within such period as shall be prescribed by the Supreme Court.

E. When an appeal of right is entered from the State Corporation Commission to the Supreme Court, such appeal bond shall be filed when and in the amount required by the Clerk of the Supreme Court, whose action shall be subject to review by the Supreme Court.

Present §§ 8-479 through 8-480.1. To be deleted.

Present Article 5.

Printing the Record.

To be deleted. (See Rule 5:35, et seq.)

Article 6.

Errors Insufficient in the Appellate Court.

§ 8.01-677. Errors corrected on motion instead of writ of error coram vobis.—For any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court.

Present § 8-486. Judgment on confession, a release of errors. To be deleted.

§ 8.01-678. For what a judgment not to be reversed.—When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed:

1. For the appearance of either party, being under the age of eighteen years, by attorney, if the verdict, where there is one, or the judgment be for him and not to his prejudice; or

2. For any other defect, imperfection, or omission in the record, or for any error committed on the trial.

Article 7.

Limitations. Hearing and Decision.

§ 8.01-679. Failure of trial court clerk to deliver record to Supreme Court.—Notwithstanding any provision of law to the contrary, no appeal shall be refused or dismissed for failure to deliver the record within the required time if it shall appear from evidence satisfactory to the Supreme Court that the clerk of the court below failed to deliver to the Clerk of the Supreme Court the record on appeal within the required time after having been notified to do so in accordance with the provisions of the Rules of the Supreme Court.

Present § 8-490. Issuance of process and supersedeas; service on Attorney General. To be deleted.

Present § 8-490.1. Notice to interveners; when intervener to be made appellee. To be deleted.

§ 8.01-680. When judgment of trial court not to be set aside unless plainly wrong.—When a case, civil or criminal, is tried by a jury and a party objects to the judgment .. action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case is decided by a court without the intervention of a jury and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.

§ 8.01-681. Decision of Supreme Court.—The Supreme Court shall affirm the judgment if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment as to the court shall seem right and proper and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for a trial de novo except when the ends of justice require it, but the Supreme Court shall, in the order remanding the case, if it be remanded, designate upon what questions or points a new trial is to be had.

§ 8.01-682. What damages awarded appellee.—When any judgment is affirmed, damages shall be awarded to the appellee; such damages, when the judgment is for the payment of money, shall be the interest to which the parties are legally entitled, from the time the appeal took effect, until the affirmance, or if the affirmance be by the Supreme Court, until a copy of its decision is entered in the order book of the court below. Such interest shall be computed upon the whole amount of the recovery, including interest and costs, and such damages shall be in satisfaction of all interest during such period of time. When the judgment is not for the payment of any money, except costs, the damages shall be such specific sum as the Supreme Court may deem reasonable, not being more than one hundred dollars nor less than thirty dollars.

§ 8.01-683. When clerk of Supreme Court to transmit its decisions.—When any term of the Supreme Court is ended, or sooner if the court so direct, the clerk thereof shall certify and transmit its decision to the clerk of the court or tribunal below, as the case may be, except that it shall not be his duty to certify or transmit a copy of a judgment of

affirmance unless the appellee shall have paid all fees due from him in the case, or shall endorse on such copy so much of the judgment, for the benefit of the clerk, as the unpaid fees shall amount to. If any clerk fail to comply with this section for twenty days, except as aforesaid, he shall forfeit fifty dollars to any person aggrieved thereby.

Present § 8-497. Postage to be paid by clerk, and repaid out of treasury. To be deleted.

§ 8.01-684. Copies of Court's opinions to be furnished counsel.—When a case is decided by the Supreme Court the clerk shall furnish a copy of the opinion rendered by the court thereon to each counsel of record without making any charge therefor.

§ 8.01-685. Entry of decision in lower court; issue of execution thereon.—The court or other tribunal from which any case may have come to the Supreme Court shall enter the decision of the Supreme Court as its own, and execution or other appropriate process may issue thereon accordingly. When that decision is received by the clerk or secretary of the court or tribunal below, he shall enter it of record in his order book, and thereupon such execution may issue and such proceedings be had in the case as would have been proper if the decision had been entered in court or by such tribunal.

If the judgment of the lower court or tribunal be affirmed, in whole or in part, by the decision of the Supreme Court, execution or other appropriate process may issue thereon against the principal and surety on any appeal bond which may have been given, for the amount of such judgment, including the interest and cost and the damages awarded by the Supreme Court, not exceeding, however, the penalty of such bond.

§ 8.01-686. When dismissal final; when reinstated.—After the dismissal of an appeal, no other appeal shall be allowed to or from the same judgment. When an appeal is dismissed by reason of the non-payment of the writ tax within the time required by law, the court at its first place of session after such dismissal may on motion of any party for good cause shown and upon payment of such tax set aside the dismissal; and thereupon the appeal may be perfected as though no such dismissal had taken place. A motion under this section shall be made only after reasonable notice to the adverse party or his counsel.

§ 8.01-687. Rehearing.—The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing; provided, however, that a notice of a petition for rehearing shall be filed as provided by the Rules of Court and the petition for rehearing shall be filed within thirty days after the entry of the judgment with the clerk who shall note the date of such filing on the order book. The judgment resulting from any such rehearing shall be entered forthwith by the clerk who shall transmit a certified copy thereof to the clerk of the court below, to be entered by him as provided by § 8.01-685.

Article 8.

Miscellaneous Provisions.

§ 8.01-688. Order books, etc., of former district courts in custody of clerk of Supreme Court, etc.—The order books, dockets and other office books formerly belonging to the several former district courts shall remain in the custody of the clerk of the Supreme Court. Said clerk shall furnish transcripts of the records and proceedings of such district courts when required, and perform all other duties in respect to records and proceedings of such district courts as might have been performed by the clerks of such district courts if

such courts had continued to exist. All printed and manuscript orders, and other papers pertaining to cases decided in such district courts, shall remain in the custody of the clerks of the circuit courts at the several places where such district courts held their sessions, who shall be charged with the same duties in respect to such records and papers as might have been performed by the clerks of such district courts respectively, if such courts had continued to exist, and who shall receive for any such service fees similar to those charged by the clerks of district courts for such services.

Appendix A.

§ 65.1-98. Conclusiveness of award; appeal.—The award of the Commission, as provided in § 65.1-96, if not reviewed in due time, or an award of the Commission upon such review, as provided in § 65.1-97, shall be conclusive and binding as to all questions of fact. No appeal shall be taken from the decision of one commissioner until a review of the case has been had before the full Commission, as provided in § 65.1-97, and an award entered by it. Appeals shall lie from such award to the Supreme Court in the manner provided in the Rules of the Supreme Court; provided, however, that the petition for such appeal shall be filed with the clerk of the Supreme Court, ~~or presented to one of its justices~~, within thirty days from the date of such award or within thirty days after receipt of notice to be sent by registered mail of such award. Cases so appealed shall be placed upon the privileged docket of the Court and be heard at the next ensuing term thereof. In case of an appeal from the decision of the Commission to the Supreme Court, the appeal shall operate as a suspension of the award and no employer shall be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined in accordance with the provisions of this Act.

§ 12.1-39. Appeals generally. The Commonwealth, any party in interest, or any party aggrieved by any final finding, decision settling the substantive law, order, or judgment of the Commission shall have, of right, an appeal to the Supreme Court ~~only, irrespective~~ *of the amount involed; provided, however, that the petition for such appeal shall be filed with the clerk of the Supreme Court within four months from the final judgment or finding of the State Corporation Commission; and provided further that an appeal bond is filed pursuant to § 8.01-676.*

No other court of the Commonwealth shall have jurisdiction to review, reverse, correct, or annul any action of the Commission or to enjoin or restrain it in the performance of its official duties; provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission.

The Commission shall, whenever an appeal is taken therefrom, file in the record of the case a statement of the reasons upon which the action appealed from was based.

Reviser's Notes to Chapter 26, Appeals.

Article 1. (Definitions). A new article which consists of one section, 8.01-669, proposes definitions for certain terms appearing throughout Chapter 26. The terms defined will also serve to economize the language of various sections which presently use multiple terms, e.g., "judgment, decree or order".

Note: The terms "writ or error" and "supersedeas" have been deleted since the procedures contemplated are generally obsolete - (Cf. § 8.01-676 regarding appeal bonds substituted for "supersedeas" bonds). Thus "appeal" is the generic term utilized in the chapter in lieu of the present "appeal, writ of error or supersedeas".

Article 2. (When Granted). § 8.01-670. This section, present § 8-462, has been reordered and shortened. The references to appeals from judgments of the State Corporation Commission have been deleted because § 12.1-39 (Appeals Generally) in Title 12.1 (State Corporation Commission) covers such appeals. Similiarly, see § 65.1-98 for appeals from awards of the Industrial Commission.

§ 8.01-670 B. 1. permits an appeal from and interlocutory order or decree granting, dissolving, or denying an injunction. This expands the present provision which permits an appeal only from the dissolution of injunction. The present statute is inequitable to the defendant who suffers an injunction. Conforming changes have been made in § 8.01-626 (When court or judge refuses injunction, justice of Supreme Court may award it). It should be noted that final orders or decrees effecting an injunction can be appealed under § 8.01-670 A. 3.

§ 8.01-671. The one material change to present § 8-463 is the insertion of subsection B. regarding time within which petitions for appeal from interlocutory orders must be presented. This is not specifically set forth in the present chapter. Thus the subsection is inserted for clarity [for appeals from interlocutory decrees generally, see *Southwest Virginia Hospital* v. *Lipps*, 193 Va. 191 (1951)]. References to the State Corporation Commission and Industrial Commission were deleted. [See proposed amendment of §§ 12.1-39 and 65.1-98 in Appendix A.]

§ 8.01-672. The only material change made to present § 8-464 is the increase of the minimum dollar amount for appeal from certain cases from $300 to $500. The existing reference to an appeal from action of the State Corporation Commission being permitted irrespective of the dollar amount was deleted as unnecessary. See proposed amendment of § 12.1-39 in Appendix A.

Present § 8-465. Has been absorbed by § 8.01-676.

Article 3. (The Record). Present § 8-468.1. To be transferred to Title 14.1.

Present § 8-471. To be deleted. This section is adequately covered in Rules of Court.

§ 8.01-673. The subject matter of present §§ 8-473 and 8-501 is

similar. Thus these sections have been combined in separate subsections without material change. The specific reference to return of records to the State Corporation Commission and Industrial Commission was deleted and the phrase "or other tribunal" was inserted (thus, return of records to both the State Corporation and Industrial Commissions should be covered thereby).

Article 4. (The Petition). § 8.01-674. This is present § 8-475 without change.

§ 8.01-675. The only material change made to present § 8-476 is deletion of the last sentence in the current section "but the denial of such petition by a justice in vacation shall not prevent the filing of the petition to the court at its next term". This sentence is considered unnecessary and does not conform to present Supreme Court practice utilized under § 8.01-674. Cf. Rule 5:29 (Denial of appeal; petition for rehearing).

Article 5. (Appeal Bond). § 8.01-676. This section is a consolidation of present §§ 8-465, 8-477 and 8-478. In addition to providing for an "appeal" bond (the generic term used to include bonds for "cost", "suspending" and "supersedeas" bonds) containing the conditions of a suspending bond (§ 8-465) and a supersedeas bond (§ 8-477), the proposed statute retains the exceptions in favor of an estate, a person under disability, and a city, county, or town (cf. § 8-477), and adds an exception for the Commonwealth. The five-day period in which no execution may issue (unless the trial court orders otherwise) upon a judgment the suspension of which has been ordered, being the period provided to enable the appellant to obtain the bond and have it executed by himself and his surety (§ 8-465) has been deleted; § 8-399 provides that upon request of the judgment creditor execution may be issued twenty-one days after the judgment unless the trial court orders issuance at an earlier period; and if the judgment debtor wishes to prevent the issuance of execution, it behooves him to obtain a suspension order earlier than the full thirty days in which the trial court will be empowered to suspend the judgment or decree. The new thirty-day period is, of course, the same as the time allowed by new Rule 5:6. Present § 8-465 allows thirty days from "the end of the term" for the trial court to order suspension; co-ordination with the time allowed for appeal appears appropriate, so that these two parallel provisions concerning appeal—the time for the petition for appeal to be filed and the statutory provisions for suspension of the judgment—may be appropriately co-ordinated.

The discretion in the lower court to decline a suspension of a judgment, or the granting, denying, or dissolving an injunction has been preserved and expanded (§ 8-465); see discussion below. The exoneration of the surety on an injunction bond has been deleted.

The proposal's main purpose is to provide an understandable set of provisions for the appeal bond, giving the maximum opportunity to minimize expense and to assure that litigants are not deprived of a full consideration of their respective positions by this essential part of litigation, while fully considering the appellee's

right to have his judgment protected against adverse change of circumstance. Few appellees, and this would seem to be good practice currently, require the expense of a supersedeas; and some appellants, who have inadvertently given a supersedeas bond in the full amount, have been able to effect a subsequent reduction of the penalty without objection by the other side. There nevertheless may be cases in which the appellee may reasonably be apprehensive that the appellant, having suspended the judgment, may convert his assets and flee the country. In such event the trial court may be asked to fix the penalty of the bond in more than a nominal amount. As it considers the appeal, the Supreme Court panel is authorized, as under present law, to review the amount of the penalty. Failure to increase the bond when the Supreme Court so orders results in dismissal of the appeal. (Cf. § 8-489) Such a review of the penalty may also be made by the trial court if requested by a party prior to the time of the Supreme Court's review.

Where the appeal is from an interlocutory judgment, the time within which such judgment may be suspended by the trial court is also fixed at thirty days, the same period during which the trial court's power to act on a final judgment continues. There is no intention, however, to change the present law that the right to appeal an interlocutory judgment is not lost by failure to appeal within such 30 days; and appellate review of such appealable interlocutory orders may still be originally sought after final judgment.

It would seem that appropriate changes or references should be made to or following Rule 1:1, to provide for suspension of execution in a civil case as well as the postponement of execution of a sentence in a criminal case. The words "writ of error and supersedeas" should likewise be changed if the new statute is adopted.

As to the State Corporation Commission, neither § 8-465 nor § 8-477 refers expressly to appeals other than from trial courts. A footnote to § 8-465 refers to § 12-64 (now § 12.1-42) for suspending bonds on appeal from the State Corporation Commission. That section provides that the State Corporation Commission "may" require a suspending bond but does not say anything about the condition or penalty of such bond. Section 8-478 provides that a § 8-411 bond "shall" be taken by the State Corporation Commission clerk before an appeal of right is entered. Rule 5:18(g) provides for the clerk of the Supreme Court to require "...such bond as he shall deem proper. His action shall be subject to review by this Court." In the event the appellant has not obtained the suspension of the judgment appealed from the Supreme Court is given the power to order such suspension upon the appellant's filing an appeal bond.

That such confusion has created little difficulty is indicated by the scarcity (or absence) of litigation on the subject. Actually the necessity for any bond for State Corporation Commission appeals is hard to imagine.

As usual, Industrial Commission procedure is sensible and practical. Where the appeal is by the employee there is little danger

in suspending the judgment. Section 65.1-98 provides for automatic supersedeas: "...The appeal shall operate as a supersedeas." There is an unfortunate reference in the Rules to the requirement that the appellant state if he wishes supersedeas [Rule 5:19 referring to Rule 5:22(d)] ; this reference should be amended. It is also suggested that the Industrial Commission's award should be suspended upon the appellant's noting his intention to appeal, and no appeal bond at all would or should be required.

Because of proposed amendments to § 8-462 permitting appeals from orders granting or denying an injunction, as well as from an order dissolving an injunction, the bond proposal is expanded such that the trial judge may continue the bond in effect pending such appeal.

If the proposed statute is adopted, Rules of Court 5:30 and 5:31 should be amended accordingly.

The provision for an appeal bond in an attachment proceeding (present § 8-543) is not affected by these proposals.

Present §§ 8-479 through 8-480.1. To be deleted. See preceding Reviser's Note and § 8.01-676.

Present Article 5. (Printing the Record). §§ 8-482 through 8-484. To be deleted. These sections do not comport with modern practice; e.g., see Rule 5:35, et seq.

Article 6. (Errors Insufficient in the Appellate Court). § 8.01-677. This is present § 8-485 without material change.

Present § 8-486. To be deleted. This statute has no modern utility.

§ 8.01-678. Present § 8-487 has been dramatically rewritten and shortened. In present subdivision 1., the age requirement has been reduced to 18. Present subdivisions (2), (3), (4) and (5) have been deleted; they are the old statute of jeofails and believed to be no longer necessary.

Article 7. (Limitations, Hearing and Decision). § 8.01-679. This is present § 8-489. "Process" is not utilized under modern practice in the granting of an appeal since the procedure under Rule 5:30 is used. Thus, the first two paragraphs in § 8-489 are deleted. The third paragraph is a provision limiting the time within which an appeal bond must be filed after the appeal is granted. Since the proposed appeal bond provisions of § 8.01-676 comtemplate such bonds being set initially by the trial court, there is no need for the limitations of present § 8-489 and the third paragraph is deleted. The title to the section is changed because the fourth paragraph is all that remains from the present statute.

Present § 8-490. To be deleted. This section is adequately covered by Rule 5:30.

Present § 8-490.1. To be deleted. This section is adequately

covered by Rule 5:18(h).

§ 8.01-680. This is present § 8-491. The limitation that this section applied to a "case at law" is removed and the section made applicable to civil and criminal cases generally. There are instances where a jury is provided in equity cases. See § 8.01-336.

§ 8.01-681. This is present § 8-493 with no material change.

§ 8.01-682. This is present § 8-495 with no material change.

§ 8.01-683. This is present § 8-496 with no material change.

Present § 8-497. To be deleted. This section is unnecessary.

§ 8.01-684. This is present § 8-497.1 rewritten to ensure that each counsel of record is furnished a copy of the court's opinion without charge.

§ 8.01-685. There has been no material change made in present § 8-498; "other tribunal" has been inserted in the first line to refer to the State Corporation Commission and the Industrial Commission.

§ 8.01-686. This is present § 8-499 without material change.

§ 8.01-687. This statute, present § 8-500, was updated (e.g., sits only at Richmond; see § 17-99). A reference to a "notice" of the petition for rehearing was added to comport with the requirements of Rule 5:53).

Present § 8-501. This section has been combined with § 8-473 in proposed § 8.01-673. See Reviser's Note thereunder.

Article 8. (Miscellaneous Provisions). § 8.01-688. This is present § 8-502. No material change has been made to this section.

PRESENT CHAPTER 38.

TRESPASSES; FENCES.

Article 1.

In General.

§ 8-866. Trespass on the case.—To be deleted.

Reviser's Note:

The Revisers recommend the deletion of this section since it is obsolete.

§ 8-867. In trespass, what general averments omitted.—To be deleted.

Reviser's Note:

The Revisers recommend the deletion of this section since it is obsolete and without modern utility.

§ 8-868.1. Fencing lands by voluntary associations.—See Reviser's Note to this section.

Reviser's Note:

This section will be deleted but the 1858 Act incorporated by reference therein will be retained.

§ 8-868.2. Unlawful to construct, install or maintain certain electric fences upon agricultural lands.—See Reviser's Note to this section.

Reviser's Note:

The penal provision of this section will be transferred to Article 8 of Chapter 7 of Title 18.2 which is entitled Miscellaneous Dangerous Conduct. Otherwise, the provisions of this section will be transferred to Title 55.

NOTE: With a few exceptions, it is suggested that all the remaining sections in this Chapter be transferred to Title 55. The sections to be excepted from this general transfer are noted in the Reviser's Notes to those sections.

Changes in the internal cross references of the following sections necessitated by this transfer will be made.

Article 2.

What Constitutes a Lawful Fence.

§ 8-869. Definition of a lawful fence.—To be transferred to Title 55.

Reviser's Note:

No change is recommended for this section.

§ 8-870. Court may declare a stream of water or canal a lawful fence; proceeding therefor.—To be transferred to Title 55.

Reviser's Note:

No change is recommended for this section.

§ 8-871. Revocation of order.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-872. Boundary lines of certain low grounds on James River, a lawful fence.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-873. Statutes declaring watercourses a lawful fence continued.—To be transferred to Title 55.

Reviser's Note:

This section is to be transferred without change. The Code referred to in this section is the 1887 Code (§ 2060).

Article 2.1.

Cattle Guards and Gates across Rights of Ways.

§ 8-873.1. Property owner may place cattle guards or gates across right of way.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-873.2. Persons having easement may replace gate with cattle guard; maintenance and use thereof.—Any person having an easement of right of way across the lands of another, may, at his own expense, replace any gate thereon with a substantial cattle guard sufficient to turn livestock. Said cattle guards shall be maintained ~~and kept in good repair~~ by the owner of the easement; provided that if the gate to be replaced is needed or used for the orderly ingress and egress of ~~horse drawn~~ equipment ~~or any equipment drawn by any other draft animal~~ or ~~for the passage of~~ animals thereover, then such persons acting under the authority of this section shall construct such cattle guards so as to allow *such ingress and egress* ~~the crossing or passage of aforesaid referred to~~

~~equipment and animals~~ ; or if such easement is of sufficient width, may place such cattle guard adjacent to such gate.

Such a cattle guard shall be deemed a lawful gate and not an interference with such easement.

Reviser's Note:

This section is to be transferred to Title 55. The last paragraph of this section is present § 8-873.3. No substantive change is intended by the proposed amendments to § 8-873.2.

§ 8-873.3. Cattle guard deemed lawful gate.—See Reviser's Note to preceding section.

Article 3.

Trespass in Crossing Lawful Fence.

§ 8-874. Damages for trespass by animals.—If any horse, mule, cattle, hogs, sheep or goats shall enter into any grounds enclosed by a lawful fence, *as defined in §§ 8-869 through 8-873* ~~or by a river or stream or any part thereof which is by law a lawful fence, or into any ground in counties or magisterial districts, or selected portions thereof, wherein the boundary lines of lots or tracts of land have been constituted lawful fences~~ , the owner or manager of any such animal ~~shall be liable for the~~ actual damages sustained ~~, if the amount of such damage shall be one dollar or more, and such damage shall be assessed for each such entry and not for each such animal, except as hereinafter provided, and shall in no case be estimated and assessed at less than one dollar. And in case of such entry within that part of Henrico county, within three miles of the corporate limits of the city of Richmond, the minimum amount of damage assessed in any case shall be two dollars for each animal~~ .

When punitive damages are awarded, the same shall not exceed twenty dollars in any case.

For every succeeding trespass the owner or manager of such animal shall be liable for double damages, both actual and punitive ~~, in no case to be less than two dollars~~ .

Reviser's Note:

This section is to be transferred to Title 55. It is recommended that the minimum amount of damage referred to in the section and the special provision for Henrico County be deleted. The last two paragraphs of the above are present §§ 8-875 and 8-876. "Lawful fence" is defined in § 8-869.

§ 8-875. Punitive damages. See Reviser's Note to the preceding section.

§ 8-876. Double damages for succeeding trespasses. See Reviser's Note to § 8-874.

§ 8-877. Lien on animals.—To be transferred to Title 55.

Reviser's Note:

No substantive change is recommended for this section.

§ 8-878. Impounding animals.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-879. Duty to issue warrant when animal impounded.—To be transferred to Title 55.

Reviser's Note:

No material change is recommended.

Article 4.

No-Fence Law.

§ 8-880. How governing body of county may make local fence law.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-881. Effect of such law on certain fences.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-882. Application to railroad companies.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-883. No authority to adopt more stringent fence laws.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-884. Effect on existing fence laws or no-fence laws.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-885. Lands under quarantine.—The boundary line of each lot or tract of land in any county in this State which is under quarantine shall be a lawful fence as to any and all of the animals mentioned in § 8-886.

The owner or manager of any animal mentioned in ~~such section~~ , 8-886, who shall knowingly permit such animal to run at large in any county or portion thereof, under quarantine, shall be deemed to be guilty of a *Class 4* misdemeanor , ~~and shall be fined not less than five nor more than twenty five dollars, in the discretion of the trial justice or court trying the case~~ .

Reviser's Note:

The first paragraph of this section will be transferred to Title 55. The second paragraph of this section will be transferred to Article 5 of Chapter 5 of Title 18.2 as amended above.

§ 8-886. When unlawful for animals to run at large.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

Article 5.

Division Fences.

§ 8-887. Obligation to provide division fences.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-888. When no division fence has been built.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-889. When division fence already built.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-890. Recovery of amount due in connection with division fence.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-891. Requirements for agreement to bind successors in title.—To be transferred to Title 55.

Reviser's Note:

No substantive change is recommended.

§ 8-892. How notice given.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

Article 6.

Special Provisions for Unincorporated Communities.

§ 8-893. Courts to fix boundaries of villages to prevent animals from running at large.—To be transferred to Title 55.

The penalty prescribed by this section has been increased to that of a Class 4 misdemeanor.

§ 8-899. Costs; by whom fines imposed.—To be transferred to Title 55.

Reviser's Note:

No substantive change is recommended.

§ 8-900. Owner of animals liable for trespasses.—To be transferred to Title 55.

Reviser's Note:

No substantive change is recommended.

Article 7.

Special Provisions for Certain Counties.

Reviser's Note:

This article, which consists of §§ 8-901 through 8-905, is being deleted because it serves no purpose today.

Article 8.

Cutting Timber.

§ 8-906. Damages recoverable for encroachment in timber cutting.—If any person, firm or corporation, in the course of cutting timber on any timberlands in the State, encroach and cut timber on any ~~adjoining~~ timberland, except *when acting prudently and* under bona fide claim of right, the owner thereof shall, in addition to all other remedies afforded by law, have the benefit of a right to, and a summary remedy for recovery of, damages in an amount as hereinafter specified and recovered as hereinafter provided.

If the trespass is proven the defendant shall have the burden of proving that he acted prudently and under a bona fide claim of right.

Reviser's Note:

This section will be transferred to Title 55. The added language concerning the burden of proof merely states the existing practice.

§ 8-907. Procedure for determination of damage.—The owner of

Reviser's Note:

No change is recommended.

§ 8-894. Petition for action under preceding section.—To be transferred to Title 55.

Revisers' Note:

No substantive change is recommended.

§ 8-895. Entry of order if petition not contested.—To be transferred to Title 55.

Reviser's Note:

No substantive change is recommended.

§ 8-896. Procedure in case of contest.— ~~Any person residing within such boundaries wishing~~ *Any person having a lawful interest in any land within the boundaries referred to in any petition as provided for in § 8-894 who wishes* to contest such petition may have himself entered as a party defendant thereto. In case of such contest the court, without a jury, shall hear the evidence, and, if in doubt as to the facts, may appoint one or more persons to canvass such community and report to the court the number of persons residing within such boundaries, and also the names of all the freeholders residing therein, and whether the latter are for or against the petition.

Reviser's Note:

This section will be transferred to Title 55. The language "Any...who wishes" in the first two lines of the proposed section has been substituted for the language "Any person residing within such boundaries wishing".

§ 8-897. Order of court.—To be transferred to Title 55.

Reviser's Note:

No substantive change is recommended for this section.

§ 8-898. Animals may not run at large after entry of order.—To be transferred to Title 55.

Reviser's Note:

the land on which such trespass was committed shall have the right, within fifteen days after the discovery of such trespass *and the identity of the trespasser*, to notify the trespasser and to appoint an experienced timber estimator to determine the amount of damages. *For the purposes of determining damages the value of the timber cut shall mean the value of the timber on the stump.* Within ten days after receiving notice of the alleged trespass and of the appointment of such estimator, the alleged trespasser, if he does not deny the fact of trespass, shall appoint an experienced timber estimator to participate with the one already so appointed in the estimation of damages. If the two estimators cannot agree they shall select a third person, experienced and disinterested, and the decision thereafter made shall be final and conclusive and not subject to appeal. The estimation of damages and the rendition of statement must be effected within fifteen days from the receipt of notice of appointment, by the trespasser, of an estimator.

If the alleged trespasser fails to appoint an estimator within the prescribed time, or to notify, within such time, that the allegation of the fact of trespass is disputed, the estimator appointed by the injured party may make an estimate, and collection or recovery may be had accordingly.

Reviser's Note:

This section will be transferred to Title 55 with the amendments indicated above.

§ 8-908. What payment to be made; expenses included.—Double the amount of the damages thus determined, together with necessary expenses incurred in making the estimate, including a per diem allowance at the rate of ~~twenty~~ *fifty* dollars a day for an eight-hour day to the estimators, shall be paid by the trespasser within thirty days after a statement of the estimate shall have been rendered.

If, however, the trespasser acknowledges the trespass but claims that he acted prudently and under a bona fide claim of right he may tender the value of the timber on the stump and the expenses incurred to date and defend as to the remainder of the damages claimed. Such payment must be made within 30 days after the statement of the estimate is rendered or his claim that he acted prudently and under a bona fide claim of right shall be barred.

Reviser's Note:

The per diem allowance to be paid by the trespasser for the services of the estimator has been raised from $20 to $ 50. The second paragraph is new.

§ 8-909. When person damaged may proceed in court.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.

§ 8-910. Effect of article.—To be transferred to Title 55.

Reviser's Note:

No change is recommended.