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A DECADE OF PLEADING, PRACTICE AND PROCEDURE
LEO CARLIN

This review deals with statutes, rules of court, and cases, relating to pleading, practice and procedure in West Virginia, enacted, promulgated or decided approximately within the last decade. It had its genesis in what may be described as a digest prepared at the end of the late war for distribution in mimeographic form to returning veterans, to aid them in acquiring a knowledge of legal events that had occurred in their absence. Inquiries about the resume and demands for copies have indicated that it has generated an interest broader than its distribution. Consequently, it is surmised that a sufficient number may be interested to warrant its publication; particularly if, as is attempted here, it is supplemented by including subsequent items so as approximately to round out the decade.

The material for discussion has been suggested by citations, which the writer has made from time to time and preserved, of statutes, rules and decisions which are understood to have made more or less fundamental additions to, or changes in, the local law. No attempt has been made to review numerous additional cases decided within the decade which are merely corroborative of rules already established. The number and variety of the items have forbidden any attempt at comprehensive or formal discussion. Citation of authorities has been limited, particularly of authorities to sustain familiar and fundamental propositions of law or propositions only collaterally involved.

For purposes of convenience and to facilitate reference, the material has been (to a degree arbitrarily) allocated to the following topics: Process; Remedies; Common Law Pleading; Common Law Practice and Procedure; Equity Pleading and Procedure; Motions; Garnishment; Court Rules. To a certain extent, these

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topics overlap. Some of the court rules could have been allocated wholly to some one of the preceding topics; but others, dealing with the subject matter of more than one topic, could not logically be so confined. Consequently, it was deemed advisable to deal with them as a whole in an independent topic, rather than undertake to dissect them for purposes of distribution.

**Process**

*Legal status of praecipe book.* A section in the Code provides that process to commence a suit “shall be issued on the order of the plaintiff, his attorney or agent.”¹ This order is what is familiarly known as a praecipe or precipe. The statute is silent as to its form. So far as the statute is concerned, it might be oral; although the writer has never observed an instance of delivery, or attempted delivery, of an oral praecipe, and reasons may be suggested why it ought to be in writing. A writing serves the convenience of the clerk and, since the praecipe should contain all the data necessary for issuance of process in a particular case, protects him against a charge of having issued process contrary to directions. However, the writer has always assumed that a written praecipe is intended for the use and convenience of the clerk, and in a sense is his private paper. Wherefore, it should not constitute a record in the case nor in any way be the subject of review because of anything that it may or may not contain. In accord with these concepts, the Supreme Court of Appeals, in *State ex rel. Beckley Newspaper Corp. v. Van Hunter,*² holds that a praecipe book is not a record of the court and therefore is not open to public inspection under the statute³ making court records subject to public inspection. The court says, by way of dictum, that a mere oral order to the clerk to issue process would be sufficient.

*What constitutes issuance of process.* It has been familiar law in this state that, by statute, an action or suit is started when process is issued;⁴ but it seems that until recently no case has definitely indicated what act constitutes issuance of process. The West Virginia cases have held that the date of the process is *prima facie* the date of its issuance,⁵ but of course fixing the time of the act does not determine its nature. One view is that the process is issued

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¹ W. VA. CODE c. 56, art. 3, § 4 (1931).
² 127 W. Va. 738, 34 S.E.2d 468 (1945).
when all the blanks have been filled in and it has been signed by
the clerk, although it remains in the clerk's office. A contrary view
is that process is not issued until it has gone out of the clerk's
office for service, a view based largely on the etymology of the word
"issue." The controversy was finally resolved in Virginia by enact-
ment of a statute. There is no statute in West Virginia defining
issuance, but a recent case apparently has definitely prescribed a
rule in the following language:

"Process is not issued until the summons is sent from the
clerk's office under his direction, sanction and authority for
the purpose of service."

Cases from other jurisdictions are cited for this proposition, but
no West Virginia case.

The consequences of this rule are involved in many important
phases of procedure. There are many reasons why it is vital to
know when an action or suit has been started. For instance,
starting an action stops the running of the statute of limitations;
brings into operation the principle of lis pendens; warrants the
issuance of an attachment. In order to accomplish any of these
objects, either at law or in equity, it would not now seem sufficient
to have the process filled in, signed by the clerk and then left in
his office (for instance, because the defendant is a nonresident and
there is no expectation of service), as has been the practice in some
jurisdictions in the past; but the process must go out of the clerk's
office, if not for an attempted service, at least in order to comply
with a formality.

Service of process on auditor or secretary of state. The same
case which defines issuance of process contains an adjudication
which prompted revision in 1945 of a section in the Code. This
section provided for service on the auditor of the state as attorney
in fact for a corporation. The instant case holds that, when suit
is brought against a corporation to collect a debt (license tax)
which it is the duty of the auditor to collect, the auditor is dis-
qualified to accept service of process on behalf of the corporation.
Presumably as a result of this decision, the section cited was

6 See Burks, Pleading and Practice 400 (1913).
7 "It shall not be deemed to have been issued until delivered or placed in
the course of delivery to some officer or other person to be executed." Va. Code
§ 6061 (1986).
8 Nicholas Land Co. v. Crowder, 127 W. Va. 216, 222, 32 S.E.2d. 563, 567
(1944).
9 Ibid.
amended by adding thereto a paragraph to the effect that in such cases the secretary of state, in lieu of the auditor, is constituted attorney in fact for the corporation.

Time when alias process must issue. There is a conflict in the decisions of the various jurisdictions as to the time when an alias process must issue with reference to the return day of the original. Some courts hold to a strict rule that there must be no time interval, or hiatus, as it is frequently called, between the return day of the original and the issuance of the alias, which in this state would mean that the alias must issue not later than the rule day to which the original is returnable. Other courts disregard the hiatus, permitting postponement of issuance of the alias until a time when there will be some utility in its issuance, e.g., when there is an opportunity for service. The West Virginia cases have indicated a preference for what may be described as a liberalized version of the hiatus rule. For instance, in Dunaway v. Lord, it is suggested that the alias might follow the original within "a reasonable time;" but not until some time later was a criterion prescribed by which the reasonable time might be determined. In Vogler v. Ireland, the court seems to have indicated definitely what is meant by a reasonable time. The rule is stated as follows:

"When an original process has been returned unexecuted, an uninterrupted succession of writs is not required to maintain the existence of the writ, but only that no succeeding rules shall pass without process returnable or outstanding."

Hence it is not necessary in this state that, in conformity with the strict rule, the alias issue on the return day of the original; but it must issue not later than the succeeding rules thereafter, which is what occurred in the Vogler case. Presumably, the same rule would apply in determining when a pluries must issue with reference to an alias or a pluries.

Waiver by appearance after objection to process. It is familiar law that defects in process or the service thereof are waived by a general appearance to the case without objection, e.g., by pleading to the merits; but there is a split of authority as to whether, after proper objections to such defects have been interposed and overruled and exceptions saved, the defects and objections are waived.

12 See 50 C.J. 465 (1930); Burns, Pleading and Practice 290 et seq.
13 114 W. Va. 671, 173 S.E. 568 (1934).
14 122 W. Va. 477, 10 S.E.2d 792 (1940).
15 Syl.
by a general appearance thereafter. The West Virginia cases have not been entirely harmonious on this proposition. In *Chesapeake & Ohio R.R. v. Wright,* the court seemingly held that there was a waiver. In a later case, *Fisher v. Crowley,* the court definitely held that there was no waiver by appearance and submission to trial on the merits after the objection had been interposed and overruled and exception saved. This case apparently, in effect, overrules the *Wright* case, although an attempt is made to distinguish it. As late as 1940, *Fisher v. Crowley* was definitely approved, by way of dictum, in *Hall v. Ocean Accident & Guarantee Corp.* However, only four years later, in *Stone v. Rudolph,* *Fisher v. Crowley* is in effect overruled, with the following statement of the rule:

"An alleged defect in the service of process, raised by a motion to quash a return of service thereof, is waived by a subsequent general appearance in a suit or action."

*Fisher v. Crowley* is not mentioned in the opinion and the court goes back to the *Wright* case, first above cited, which *Fisher v. Crowley* apparently overruled, as authority for its holding.

**Impeachment of return of service of process.** The courts are not in accord as to whether the truth of an officer's return of service of process may be impeached. What is supposed to be the liberal and modern rule, prevailing in many jurisdictions, permits impeachment. In other jurisdictions, the so-called verity rule prevails and the return cannot be impeached. A litigant suffering detriment from a false return ordinarily must submit to a judgment based thereon and seek retribution against the officer making the false return and his bondsmen. In the earlier cases, the West Virginia court adhered to the verity rule. In 1921, in a suit in equity attacking a return in a common law action, the court definitely, and seemingly unqualifiedly, repudiated the verity rule. Later cases, however, seem to display a repentant attitude toward the

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16 Syl.
17 50 W. Va. 653, 41 S.E. 147 (1902).
18 Fisher v. Crowley, 57 W. Va. 312, 50 S.E. 422 (1905).
19 122 W. Va. 188, 9 S.E.2d 45 (1940).
20 127 W. Va. 335, 32 S.E.2d 742 (1944).
21 21 Syl. 2.
reputation. Attempts were made to narrow the effect of the decision adopting the new rule. On the whole, it might have been surmised that the court was finally going to take the attitude that the return could be attacked only in equity, as has been held in some jurisdictions. However, in a late case, the court has taken an inventory of its earlier decisions and, with two judges dissenting, has wholly repudiated the verity rule, permitting the return to be attacked by a plea in abatement.

Craving oyer of a writ. In McKinley v. Queen, decided in 1943, the court held, in accord with other authorities, that a writ in chancery is per se a part of the record. At the same time, by way of dictum, it took occasion to express dissatisfaction with the rule that oyer is necessary to make a common law writ a part of the record:

"In view of the provisions of Code, 56-3-4 and 58-5-7, no reason is perceived why a writ commencing an action at law should not be considered a part of the record without oyer, but that question is not before us." It might have been surmised from this statement that, when the question did come before the court for decision, it would decide that the rule requiring oyer should be abandoned, if not as archaic and useless, yet as impliedly dispensed with by statute. However, in a case decided four years later, appears the following statement:

"Here the petition fails to allege that the process under attack was made a part of the record. That could have been done in an action at law only by craving oyer of the writ and return." It remained for the Legislature, in 1949, to provide that a writ, whether at law or in equity, shall be a part of the record without the formality of craving oyer. So it will no longer be necessary to crave oyer of a writ in order to make a motion to quash or plead in abatement.

Remedies

Limitation of actions. The Legislature at its last session seems to have taken a critical glance at the time periods prescribed by

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29 Id. at 623, 25 S.E.2d at 765.
For some years a section in the Code has placed an unqualified limitation of twenty years on enforcement of a vendor's lien, mortgage or deed of trust covering realty.\(^{32}\) This section was amended so as to provide for renewal of the twenty-year period by filing an affidavit showing an unpaid balance of the debt secured or interest thereon.\(^{33}\)

Another section in the Code, of long standing,\(^{34}\) has, in effect, placed a limitation of five years on an action on a tort claim that survives the death of a party. This section was amended so as to reduce the period from five to two years.\(^{35}\)

Causes of action and elements of damage distinguished. The courts have had no little difficulty in dealing with problems which arise when more rights than one of the same person are simultaneously invaded by a single tortious act. These problems most frequently arise when somebody suffers an injury to himself and damage to his property by the same tortious act.\(^{36}\) The fundamental inquiry in such a case, upon an answer to which solution of the difficulties depends, is whether the two detriments constitute separate causes of action or merely different elements of damage from a single cause of action. A proper appraisal of the situation is particularly important in these days when so many persons simultaneously suffer personal injury and property damage in automobile accidents. It is also important because many fundamental rights depend upon the theory adopted. For instance, is it proper to declare upon both items of recovery in a single count in a declaration?\(^{37}\) Or, if a party in his original declaration declares only for the personal injury, can he amend by way of adding a claim for damages to his automobile (or vice versa), or would such an amendment violate the rule that an amendment cannot be made which would change the cause of action?\(^{38}\) Or, if a plaintiff declares upon one of these matters alone and obtains a judgment, will the

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\(^{34}\) W. Va. Code c. 55, art. 2, § 12 (1931).


\(^{36}\) They can arise in other situations, as when a person suffers a violation of his absolute and his relative rights by the same tortious act. An instance is where a husband sues for injuries to himself and to his wife. See Devino v. Central Vermont R.R., 63 Vt. 98 (1890).


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judgment constitute *res judicata* as to the other matter, on the principle that one cannot split his cause of action, suing upon part of it at one time and on the other part at a subsequent time and in a different action?\textsuperscript{39} The answer to each of these questions depends upon whether the two items constitute separate causes of action or only one cause of action with two elements of damage. The authorities are not in accord as to the proper theory.

One view is that there is only one cause of action, the concept being that the defendant's act of negligence is what constitutes the cause of action and that the personal injury and the property damage are merely separate items of damage resulting from the negligence.\textsuperscript{40} In opposition to the concept upon which this view is based, it is urged that no cause of action can arise from a mere act of negligence unless an injury or damage results therefrom; in other words, that it takes both the negligence and the consequences to constitute a cause of action, this being an instance where damage is of the gist, and therefore an element, of the cause of action.\textsuperscript{41}

This being true, it results that whether there is only one cause of action or several causes of action as a result of the negligence will depend upon whether more ingredients than one have been added to the negligence. To resort to analogy, hydrogen alone is just hydrogen; but hydrogen plus oxygen becomes water and hydrogen plus nitrogen becomes ammonia. Hydrogen is in both compounds, but they are radically different substances with radically different properties. Moreover, aside from pure legal theory, it is argued that the difficulties involved in the practical application of the theory of a single cause of action are sufficient to demonstrate its invalidity. These difficulties have been fairly well summarized in a late West Virginia case as they might arise under the West Virginia law as it was then.

"The period of limitation of action for personal injury is shorter than the period for injury to property; the former dies with the person unless the injury caused death, the latter does not; the former is non-assignable, the latter is assignable; the former does not pass to the trustee of a bankrupt for the benefit of his creditors, the latter does; if the personal injury produces death the damages recovered by reason thereof are, under the express terms of the statute, conserved for the distributees of

\textsuperscript{39} See 2 Black, *Judgments* § 740 (2d ed. 1902).
\textsuperscript{40} Devine v. Central Vermont R.R., 68 Vt. 98 (1890). It may be pertinent to inquire how this theory would solve the problem if the tortious act were willfully committed.
\textsuperscript{41} 1 Am. Jur. 494-6 (1936).
the deceased, while recovery for the property damage would go to his estate primarily for the benefit of creditors. 42

In the case from which the statements above are quoted, the question was whether the plaintiff could properly seek, in a single count, recovery for injury to himself and damage to his automobile caused by a single tortious act. The court's reasoning, as indicated in the statements quoted above, and the language used when referring to the different items, would seem to indicate that the court understood that they constituted separate causes of action. However, the decision is inconclusive, since the court reasons that, nobody having died, the property claim not having been assigned, and neither claim having been barred by statute, no harm was done by joining them in a single count. 43 In a later case, Larzo v. Swift & Co., 44 any doubt about the attitude which the court was finally to take seems to have been definitely settled.

In that case, the plaintiff declared for personal injuries. She later asked leave to amend by way of adding a claim for damages to her automobile. Objection was interposed on the ground that she was seeking to introduce a new cause of action. In its ruling on this point, the court says:

"A plaintiff who has sustained personal injuries and property damage in an automobile collision has but a single cause of action and the elements of damages, consisting of injury to the person and property of the plaintiff, must be joined in the same action . . . . The cause of action is the negligent act and not the resulting damages." 45

COMMON LAW PLEADING

Parties; nonjoinder of joint tort-feasors. It is fundamental law that, in the absence of statute, joint tort-feasors may be sued severally or any number of them may be sued jointly, at the option of the plaintiff; and if fewer than all are sued, no objection can avail as to the nonjoinder. A section in the Code, enacted for the first time in 1931, provides as follows:

43 It may be pertinent to inquire why the court was so much concerned about whether the two items constituted two causes of action. In West Virginia the joinder of two causes of action in a single count, although not a commendable practice, is considered a formal defect and therefore not a reversible error. See 40 W. Va. L.Q. 241 (1934).
45 Id. at 442, 40 S.E.2d at 814.
"Whenever in any case full justice cannot be done and a complete and final determination of the controversy cannot be had without the presence of other parties, and such nonjoinder shall be made to appear by affidavit or otherwise at any time before final judgment or decree, the court of its own accord, or upon motion, may cause such omitted persons to be made parties to the action or suit, by proper amendment and process, at any stage of the cause, as the ends of justice may require, and upon such terms as may appear to the court to be just."

In Rouse v. Eagle Convex Glass Specialty Co., it was contended that this statute changed the common law rule stated above and that the trial court should have granted an application to bring a nonjoined joint tort-feasor into a personal injury action. The Supreme Court of Appeals, ruling against the contention, made the following statement:

"Code, 56-4-34, provides that whenever it shall appear in a case that full justice cannot be done and final determination of the controversy be had without the presence of others, they may be made parties by the court upon motion. This provision is construed not to apply to the motion of a defendant in a tort action to have an alleged joint tort-feasor made a party." 

Parties; refusal of coplaintiff to sue. In Vinson v. Home Insurance Co., the court dealt with the problem of what to do when one who should sue as a joint plaintiff in a common law action refuses to engage in the litigation. The court reached the conclusion that, since the unwilling party could not be made a defendant in the common law action, the only alternative for the party who desired to sue was to abandon his common law action and sue in equity, where the unwilling party could be made a defendant, expressing its conclusion in the following language:

"... But under the allegations of the declaration, Universal Credit Company stands on demurrer as declining to permit its name to be used as a party plaintiff. Since no interest in common with the insurance company requires that it be made a defendant, but to the contrary, its interests appear to conflict with those of that company and there is no manner in which process can issue against a plaintiff commanding it to appear, it would seem apparent than since Universal cannot be made a party on the law side, this case should be transferred to chancery." 

46 W. VA. CODE C. 56, art. 4, § 34 (1931).
48 Syl.
49 123 W. Va. 522, 16 S.E.2d 924 (1941).
50 Id. at 526, 16 S.E.2d at 926.
This case ignores the common law rule, unchanged by statute in this state, that when one who is a proper coplaintiff refuses to join, the one who desires to sue may make him a party plaintiff without his consent. The rule is thus stated in Sunderland's *Cases on Common Law Pleading*,\(^{51}\) quoting from Dicey on *Parties*:

“One of two coplaintiffs has a right to bring an action in the name of both, nor has the court any power to interfere, unless the coplaintiff's name be used, not only against his will, but fraudulently . . . . But a coplaintiff whose name is used without permission is not without protection. 1st. He may obtain an indemnity against costs from the party who makes use of his name: i.e., he may apply to the court to have such party's proceedings stayed until he gives security for costs. 2nd. He may release or settle the action. Any one of several coplaintiffs may give the defendant a release from the action, which is good, and may be pleaded, unless it is fraudulent.”

**Punitive or exemplary damages.** The cases are not in accord as to the necessity or manner of pleading punitive or exemplary damages.\(^{52}\) According to Mr. Chitty, if the matter alleged in aggravation does not constitute within itself a distinct cause of action, it is sufficient to allege that the defendant did other wrongs (*alia enormia*) to the plaintiff, without being more specific. For example, in trespass *quare clausum*, under the allegation of *alia enormia*, the plaintiff might prove that his servant was beaten in order to aggravate the trespass to the land; but he would not be permitted to prove the value of services lost because of the beating, without a specific allegation, because such damages would pertain to a separate and distinct cause of action.\(^{53}\) A West Virginia statute dispenses with the necessity of alleging even *alia enormia*.

“In actions of trespass on the case, where the action of trespass would formerly have been proper, general averments that the defendant committed other wrongs, and that the acts charged were done with force and arms against the peace, may be omitted; and the plaintiff may prove all that he could have proved if such averments had been inserted in the declaration.”\(^ {54}\)

It would seem that, through the operation of this statute upon the common law as stated on the authority of Mr. Chitty above, it would be proper in this state to prove matters in aggravation (which constitute the basis for punitive or exemplary damages) without

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\(^{51}\) At 622 (2d ed. 1932).

\(^{52}\) See 15 Am. Jur. 766-7 (1938); 25 C.J.S. 757-9 (1941).

\(^{53}\) 1 Chitty, *Pleading* 517-518 (16th ed. 1882).

\(^{54}\) W. Va. Code c. 56, art. 4, § 13 (1931).
any allegation at all in the declaration therefor, as long as the matters proved did not constitute an independent cause of action. However, in *O'Brien v. Snodgrass*, the court reached a contrary conclusion. The pleading requirements are set forth in the following language:

“There can be no recovery of punitive or exemplary damages, unless they are claimed *eo nomine* in the declaration, or the wrong pleaded therein is alleged to have been done wilfully, maliciously, wantonly or in some other like aggravated manner, or unless facts are pleaded from which the court can see that a jury may legally conclude therefrom that the tort was so committed.”

Necessity of pleading matters in the nature of recoupment. In actions of debt on simple contracts and of assumpsit the scope of the general issues, *nil debet* and *non assumpsit*, is very broad. It has repeatedly been said in Virginia and West Virginia cases that, at the common law, which prevails in these states, all defenses may be asserted under these general issues except the statute of limitations, bankruptcy and tender. This would mean, of course, that recoupment, failure of consideration, partial failure of consideration (which is a species of recoupment), or fraud in procurement of a contract sued upon could be proved without being specially pleaded. In fact, it has been held that matter in recoupment, since it operates merely in reduction of damages, cannot be specially pleaded but must be asserted in pursuance of a notice accompanying the general issue. Apparently the first departure from these propositions came in *Attorneys' National Clearing House v. Greever*, where the court summarizes its holding in the following language:

“In an action on a contract a defense of failure or partial failure of consideration must be grounded on a special plea which fairly puts the plaintiff on notice of that defense.”

The only authority cited for this proposition is a section in the Code which reads as follows:

“In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of warranty to him of the title to real property or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter, as would entitle him to recover damages at law from the plaintiff, or the person under whom

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55 *123* W. Va. 483, 16 S.E.2d 621 (1941).
56 Syl. 2.
57 *Davis v. Davis Trust Co.*, 114 W. Va. 635, 645, 173 S.E. 266, 270 (1934).
58 *121* W. Va. 601, 5 S.E.2d 621 (1939).
59 Syl. 1.
the plaintiff claims . . . . Every such plea shall be verified by affidavit."

A section following this section in the same article provides that the defendant, when his proof under such a plea so warrants, may recover an excess over the plaintiff's claim.

In pursuance of the construction placed upon this statute by the present case, it would seem necessary to resort to a special plea under oath in all cases where the defendant relies upon total or partial failure of consideration, fraud in procurement of a contract, breach of warranty, or recoupment in general, whether or not the defendant is attempting to recover an excess over or merely to reduce the plaintiff's recovery, since the statute on which the decision is based, by specific or general language, covers all these matters with equal force. Such a result is entirely contrary to the object of the statute as expounded in the earlier Virginia and West Virginia cases, and particularly as explained by the Virginia text writers. The view heretofore has been that the statute never was intended to encroach upon common law methods of defense, where the defendant seeks merely to reduce (even to obliteration) the plaintiff's claim, which is all that he can do under common law recoupment, but was intended to provide a method of pleading whereby the defendant may not only reduce the plaintiff's recovery but may recover an excess over.

*Necessity of pleading the statute of frauds.* It has been held unqualifiedly in several West Virginia cases that a defense based on the statute of frauds may be asserted under the general issues *nil debet* and *non assumpsit.* In *Jones v. Shipley,* apparently for the first time, it is suggested, by way of dictum, that the statute should be pleaded specially when the declaration on its face shows that the contract declared upon is oral; but that when the declaration is silent as to the form of the contract, the defense may be asserted under the general issue. In this case, the declaration disclosed an oral contract, but since no objection was interposed in the trial court to assertion of the defense under the general issue, it was held that the procedure could not be questioned on the writ of error. The cases cited to sustain the dictum are equity cases,

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60 W. VA. CODE c. 56, art. 5, § 5 (1931).
61 W. VA. CODE c. 56, art. 5, § 9 (1931).
62 See 47 W. VA. L.Q. 166-177 (1941) for a more comprehensive discussion and citation of authorities.
64 122 W. Va. 65, 7 S.E.2d 346 (1940).
where the problem has some peculiar aspects, and are not very satisfactory precedents for establishing a common law rule.\textsuperscript{65}

**COMMON LAW PRACTICE AND PROCEDURE**

*Alternate jurors.* For the first time in West Virginia the practice, somewhat common in other states, of using alternate jurors was authorized in 1949.\textsuperscript{66} The practice is limited to felony cases and is discretionary with the court—"Whenever, in the opinion of the court, the trial is likely to be a protracted one." The number of alternates is limited to four.

*Number of jurors required on panel.* In a felony case, a statute requires a panel of twenty qualified jurors to be placed in the box, upon whom peremptory challenges may be exercised.\textsuperscript{67} Such has normally been the practice in misdemeanor and civil cases, although no statute specifically so requires. However, the statute\textsuperscript{68} prescribing the number of peremptory challenges to which each party is entitled in such cases would require twenty unless a challenge or challenges were waived.

In *State v. Melanakis*,\textsuperscript{69} a misdemeanor case, only seventeen qualified jurors were available. The State, in order to expedite the trial, agreed to dispense with three of its peremptory challenges in order that the defendant might have his legal quota of four. Over objection by the defendant, a jury was so selected. The Supreme Court of Appeals held that there was no error. However, the court emphasizes the fact that the case was tried before the court rule\textsuperscript{70} went into effect requiring the clerk in any case to place twenty qualified jurors in the box, "or such number less than twenty (20) as may be agreed upon by the parties." Apparently, under this rule, any deviation from the prescribed number would require the consent of both parties, regardless of the fact that a party refusing to consent should be offered his full quota of challenges.

*Stating grounds of objections to instructions.* One of the first rules promulgated by the Supreme Court of Appeals for the regulation of trial practice required specific grounds to be stated for objections to instructions to a jury.

\textsuperscript{65} For a more comprehensive discussion of this subject and citation of additional West Virginia cases and cases from other states, see \textit{47 W. Va. L.Q.} 177-183 (1941).
\textsuperscript{66} \textit{W. Va. Acts} 1949, c. 36.
\textsuperscript{67} \textit{W. Va. Code} c. 62, art. 3, § 3 (1931).
\textsuperscript{68} \textit{Id. at} c. 56, art. 6, § 12 (1931).
\textsuperscript{69} \textit{129 W. Va.} 317, 40 S.E.2d 314 (1946).
\textsuperscript{70} See \textit{127 W. Va. Reports}.
"Objections, if any, to each instruction shall be made when the same is offered; specific grounds of objection only will be considered." 71

Although the rule itself neither states nor implies any exception to its application, the court held in State v. Belcher 72 that it does not apply to felony cases. In a later case, 73 the court refused to extend the exception to misdemeanor cases. The final result is that grounds for objections to instructions must be stated specifically in civil and misdemeanor cases but need not be stated in felony cases.

Impeachment of verdict by juror. It has repeatedly been held in this state that an affidavit or testimony of a juror cannot be received to impeach his verdict. This inhibition is based on the broad ground of public policy and applies alike to matters involving the mental state of the juror and to things which occur inside and outside the jury room. 74 On the same principle, it has been held that even before the verdict has been finally accepted by the court and the jury discharged, it is improper for the court to inquire, by way of polling the jury, whether the verdict was improperly found by the quotient method. 75 If a juror cannot impeach his verdict by his own direct testimony, it would seem equally, or even more, objectionable to permit his verdict to be impeached by proof of statements made by him in public after the trial, which was done in a recent case. 76 In this case, a young negro woman had been convicted of first degree murder without recommendation. The chief ground of reversal was the fact that three disinterested witnesses testified that one of the jurors stated in a public place that he voted for conviction because the defendant was a negro.

New trial involving weight of conflicting oral testimony. It seems to have been practically the universal holding in numerous West Virginia cases, both early and late, that the jury is the sole judge of the credibility of witnesses and that, therefore, the court will not disturb a verdict based wholly on conflicting oral evidence,

71 Rule 6(e), 116 W. Va. Reports.
72 121 W. Va. 170, 2 S.E.2d 257 (1939).
73 State v. McMillion, 127 W. Va. 107, 32 S.E.2d 625 (1944).
75 Miller v. Blue Ridge Transportation Co., 123 W. Va. 428, 15 S.E.2d 400 (1914).
76 State v. Dean, 58 S.E.2d 860 (W. Va. 1950).
regardless of an apparent preponderance against it.\textsuperscript{77} In \textit{Burgess v. Gilchrist,}\textsuperscript{78} decided in 1941, the court seems to have departed from this rule. The verdict was set aside as contrary to a plain preponderance of the evidence. Apparently the court might have brought its decision into line with prior decisions by noting the fact that the preponderance of conflicting oral evidence which it thought was contrary to the verdict was supplemented by uncontroverted facts and circumstances.\textsuperscript{79} However, although aware of the rule which had prevailed and the cases sustaining it, the court seemingly takes pains to indicate that it is not bound by it and purports to set the verdict aside wholly on a preponderance of conflicting oral testimony.

\textit{Making evidence part of the record.} Following the English Statute of Westminster as a precedent, the Legislature in this state has prescribed a bill of exceptions as a mechanism to bring the evidence into the record for purposes of review in a common law action. Like its English predecessor, the West Virginia statute indulges in a complexity of formal requirements. Not only must the bill itself be fully authenticated by the certificate and signature of the trial judge, but, in addition thereto, it finally must be made a part of the record by an order of the court or of the judge in vacation.\textsuperscript{80} Failure to comply with this latter requirement has more than once rendered abortive an attempt to seek appellate review of the evidence in a case.\textsuperscript{81}

In order to eliminate this seemingly superfluous formality and provide a simple method for authenticating matters not \textit{per se} parts of the record, including the evidence, a section was enacted in the Revised Code in 1931\textsuperscript{82} which provides simply for a certification over the signature of the trial judge, without any further formality, for the purpose of making anything a part of the record. However, following the policy of the Virginia Legislature, from whose enactment the section was taken substantially intact, the Revisers and the West Virginia Legislature, for the benefit of those who do not desire to learn new methods, left in the Code the old section\textsuperscript{83}

\textsuperscript{77} Coalmer v. Barrett, 61 W. Va. 237, 56 S.E. 385 (1907). This is a typical case among numerous others, earlier and later.
\textsuperscript{78} 123 W. Va. 727, 17 S.E.2d 804 (1941).
\textsuperscript{81} See Monongahela Ry. v. Wilson, 122 W. Va. 467, 10 S.E.2d 795 (1940).
\textsuperscript{82} W. VA. CODE c. 56, art. 6, § 36 (1931).
\textsuperscript{83} W. VA. CODE c. 56, art. 6, § 35 (1931).
providing for bills of exceptions and calling for court orders to make the bills parts of the record. The confusion that may result from this act of generosity is well exemplified in a recent case.

In this case, *Perkins v. Hanna*, the plaintiff in error apparently attempted to bring the evidence into the record by a bill of exceptions, but no court order was entered making the bill a part of the record. It apparently was conceded that the bill itself contained a sufficient certification, signed by the judge, to satisfy the new section which dispenses with a court order, if the plaintiff in error had been attempting to pursue the method prescribed by that section; but the court held that, since the instrument was labeled a bill of exceptions and contained language identifying it as a bill of exceptions, it was apparent that the plaintiff in error was attempting to resort to a bill of exceptions and the absence of a court order was fatal. Judge Rose wrote a strong dissenting opinion, in which Judge Fox concurred, arguing that to impose the requirement of a court order under the circumstances was to adhere to the very formality and technicality which the new section was intended to eliminate. In 1950, *Perkins v. Hanna* and *State v. Leadman*, in accord, are overruled by *Porter v. Woodard*, which adopts the dissenting view in *Perkins v. Hanna*, with Judges Riley and Lovins dissenting.

**Equity Pleading and Procedure**

*Allegations as to rents, issues and profits in a creditors' bill.* A recent case, *Central Trust Co. v. Feamster*, dispenses with the necessity of an allegation which is usually found in bills to enforce judgment liens and which appears in forms in local texts. The allegation is that the rents, issues and profits from the judgment debtor's lands will not be sufficient to discharge the lien debts within five years and is inserted in pursuance of a section in the Code which provides for a sale of the realty on the condition that the lien debts cannot be so discharged. The court says, "This is a matter of law, not of pleading."

*Limitation on time for reviving equity suit.* A section in the Code provides for revivor of suits in equity by scire facias or

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64 127 W. Va. 527, 34 S.E.2d 7 (1945); accord, State v. Leadman, 131 W. Va. 387, 48 S.E.2d 603 (1941).
64a Porter v. Woodard, 60 S.E.2d 199 (W. Va. 1950).
65 123 W. Va. 250, 14 S.E.2d 619 (1941).
66 W. VA. CODE c. 38, art. 3, § 9 (1951).
67 Id. at c. 36, art. 8, § 5.
motion. It has been held that the provisions of this section have not superseded the equity method of revivor by a bill of revivor, but have merely prescribed supplementary methods of procedure. Another section provides that, whenever it shall be necessary to revive a suit because of death of a party or any other event, if the party seeking the revivor

"... shall not make such motion or apply for such scire facias at or before the second term of the court next after that at which there may have been a suggestion on the record of the fact making such scire facias or motion proper, the suit of such plaintiff or appellant shall be discontinued, unless good cause be shown to the contrary."88

It will be noted that the limitation prescribed by the quoted provision, in words, applies only to a revivor by motion or scire facias, and places no time limitation upon the equity method of revivor by a bill of revivor. In Dankmer v. City Ice & Fuel Co.,89 it is held that the limitation prescribed by the statute applies by analogy to revivor by a bill of revivor. Otherwise, of course, the effect of the statute could be wholly obviated merely by resort to a bill of revivor in lieu of a motion or scire facias.

Time for filing answer after plea or demurrer overruled. A section in the Code provides that, when a plea or demurrer to a bill in equity is overruled,

"... the defendant shall file his answer, in court, if in session, or, if not in session, in the clerk's office of the court in which the suit is pending, within fifteen days after the overruling of his plea or demurrer, unless, for good cause shown, the time is enlarged by the court, or the judge thereof in vacation."90

A matter as to which the statute is silent is whether, if the time is enlarged by the court, the extension can be granted after expiration of the fifteen days. Several cases dealing with the statute under varying circumstances have held that the extension may be granted after expiration of the fifteen days.91 In a later case, the court expresses a contrary view, making the following statement:

"Under the provisions of Code, 56-4-56, a trial chancellor cannot enlarge the time for filing answer to a bill of complaint after demurrer or plea thereto has been overruled, unless

88 Id. at c. 56, art. 8, § 8.
89 123 W. Va. 492, 17 S.E.2d 441 (1941).
90 W. Va. Code c. 56, art. 4, § 56 (1931).
91 Carleton Mining & Power Co. v. West Virginia Northern R.R., 113 W. Va. 20, 166 S.E. 536 (1932); Altmeyer v. Fassig, 114 W. Va. 266, 171 S.E. 529 (1933).
motion for such enlargement is made within fifteen days from the entry of the order overruling the demurrer or plea.\textsuperscript{92} No mention is made in this case of the prior cases which it overrules. However, in a still later case,\textsuperscript{93} the interpretation of the statute adopted in the case quoted above is approved and prior cases to the contrary are cited and expressly overruled. Consequently, as the law now stands, a defendant must take care to file his answer within fifteen days from the time when his demurrer or plea is overruled unless he secures an extension of the time within that period.\textsuperscript{94}

\textit{Necessity of process on answer in equity claiming affirmative relief.} It seems to be conceded by all authorities in this state that, when a defendant in equity resorts to a cross bill for the purpose of seeking affirmative relief, process must issue against all defendants in the cross bill, regardless of whether they are plaintiffs or defendants in the original bill. If, in pursuance of the statute so providing, the affirmative relief is sought in an answer in lieu of a cross bill, the extent to which process is necessary is not quite so clear. In \textit{Goff v. Price},\textsuperscript{95} and possibly some other cases, it is said that process must issue on the answer against all parties to the original bill except the plaintiffs therein. In two comparatively recent cases,\textsuperscript{96} a contrary view has been taken, the court holding that on an answer seeking affirmative relief, the same as in the case of a cross bill, process must issue against all parties, whether plaintiffs or defendants in the original bill.\textsuperscript{97}

\textit{Reversal of partition decree.} In \textit{Hale v. Thacker},\textsuperscript{98} the court, seemingly actuated by general considerations of public policy and its view of the sanctity of real property, seems to have indulged in an unusual measure of generosity to an appellant seeking reversal of a partition decree. In this case, the commissioners for partition reported that "the parties in said cause would be best served by selling said land," but did not report, as required by statute in

\textsuperscript{92} Barnes v. Warth, 124 W. Va. 773, 22 S.E.2d 547 (1942).
\textsuperscript{94} A more comprehensive discussion of this subject, including additional phases of interpretation of the statute and citation of cases, will be found in 40 W. Va. L.Q. 360-368 (1934).
\textsuperscript{95} 42 W. Va. 384, 26 S.E. 287 (1896).
\textsuperscript{96} Meadow River Lumber Co. v. Easley, 122 W. Va. 184, 7 S.E.2d 864 (1940); Central Trust Co. v. Feamster, 123 W. Va. 250, 14 S.E.2d 619 (1941).
\textsuperscript{97} A more comprehensive discussion of this subject, including an evaluation of the West Virginia decisions and holdings in other states, will be found in 47 W. Va. L.Q. 183-190 (1941).
\textsuperscript{98} 122 W. Va. 648, 12 S.E.2d 524 (1940).
order to warrant a sale, that partition in kind could not be "conveniently made." The report was not excepted to, but it was held that the error was not waived by failing to except and could be asserted for the first time in the appellate court. It is conceded that the error did not deprive the trial court of jurisdiction and hence that the decree was not void; also, that ordinarily error in a commissioner's report cannot be relied upon in the appellate court in the absence of exceptions in the lower court; but an exception is made in this case because partition in kind is "of such a fundamental nature" and "a fundamental rule of law affecting the ownership of real property is involved."

_Power of divorce commissioner to recommend granting or refusal of divorce._ In _Currance v. Currance_, the court in effect held that, when a divorce case was referred to a commissioner in chancery under the statute then in effect, the commissioner was authorized to report only the evidence and findings of facts and was wholly without authority to advise the court that a divorce should or should not be granted. Presumably as a result of this decision, the statute was amended at the legislative session of 1945 so as to permit the commissioner to make such recommendation.

_The proper forum for contempt proceedings._ Since the case of _Smith v. Smith_ was decided in 1918, the West Virginia court has recognized the distinction between civil and criminal contempts resulting from disobedience of an equity decree—ordinarily an injunction order, but in this case a decree for the payment of alimony. The distinction is important as determining whether the contempt proceeding will be prosecuted on the equity side of the court, as a phase of the procedure in the suit in which the decree was rendered, or on the law side of the court as a criminal proceeding; the rights and immunities of the contemnor depending upon the nature of the proceeding. For instance, if the proceeding is prosecuted on the law side as a criminal proceeding, the contemnor cannot be compelled to testify against himself, can be convicted only on evidence of his guilt beyond a reasonable doubt, and in other respects is treated as a defendant prosecuted for crime; advantages which he would not have if the proceeding were civil in nature. In general, although the dividing line is not distinct,
if the object of the proceeding is to vindicate the court whose decree has been disobeyed by way of punishing the contemnor for his disobedience, the proceeding is criminal in its nature and must be conducted on the law side of the court; but if the object is primarily to secure performance of the decree for the benefit of a party, it is civil in its nature and may be conducted on the equity side in the suit in which the decree was rendered. In view of these distinctions, it may be somewhat surprising that the West Virginia court has lately held\(^{104}\) that trial of a criminal contempt on the equity side of the court is not reversible error, stating its conclusion as follows:

"A chancery court has jurisdiction of civil contempts committed therein; but in respect to a proceeding to punish for a criminal contempt, whether or not committed in a chancery cause, the matter should be docketed and heard on the law side of the court. But the entry of a punitive order on the chancery side is not reversible error."\(^{105}\)

### NOTICE OF MOTION FOR JUDGMENT

**Method of attacking sufficiency of notice.** In a proceeding by notice of motion for judgment, the notice, like a summons in unlawful detainer, serves the dual function of process and pleading. Strictly, if it is defective as process, it should be attacked by a motion to quash; but if defective as a pleading, by a demurrer. However, as might have been expected because of the liberality with which this statutory remedy has been treated, the court has refused to make a technical distinction between the two different methods of attack.

"A notice of motion for judgment serves as the summons and declaration in the action, and defects appearing on the face thereof may be taken advantage of either by motion to quash or by demurrer; and a motion to quash may be treated as a demurrer."\(^{106}\)

**Exhibits cannot be filed with notice.** It is fundamental law, in the absence of a statute, that an exhibit cannot be filed with a pleading in a common law action and become a part thereof, as in equity;\(^{107}\) the common law method of making an extraneous paper a part of a pleading being to crave oyer of it, in those instances where oyer is permitted. A proceeding by notice of motion for

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\(^{104}\) Hallam v. Alpha Coal Corp., 122 W. Va. 454, 9 S.E.2d 818 (1940).

\(^{105}\) Syl. 4.


\(^{107}\) Riley v. Yoit, 58 W. Va. 213, 52 S.E. 528 (1905).
judgment is conducted on the law side of the court and, to the extent that it is not regulated by statute, it treated as having the attributes of a common law action. Nevertheless, in *Mountain State Water Co. v. Kingwood*,\(^{108}\) the majority of the court held that it is proper to file an exhibit with the notice, being influenced perhaps by the general informality with which the proceeding has been treated. A few years later, this holding was reversed and, as the law is now, exhibits cannot be filed with the notice.\(^{109}\)

**Garnishment**

*Plaintiff as garnishee.* The authorities are about equally divided as to whether a plaintiff in attachment may designate himself as a garnishee; in other words, whether he may be both plaintiff and garnishee in the same action.\(^{110}\) The question seems to have come before the West Virginia court for decision in only one case, decided in 1942.\(^{111}\) Although the court recognizes that the unqualified language of the statute defining garnishees\(^{112}\) is broad enough to include a plaintiff, it still could not persuade itself to accede to such a practice. The fact is emphasized that the case involved a foreign attachment, in which the defendant was proceeded against by an order of publication, and that the court had no personal jurisdiction over the defendant; from which it may be surmised that the court might have taken a different view if the defendant had been personally served with process, therefore knew in general what was going on, and did not have to rely wholly upon the garnishee to notify him that his property had been attached. However, the decision is based on such broad considerations of policy that it is doubtful whether an exception would have been recognized.

**Court Rules**

The rules constituting the subject matter of this topic are rules promulgated by the Supreme Court of Appeals for the regulation of procedure in trial courts. Only those becoming effective within the last decade are noted.

*Joinder of actions against several insurers.* A rule appears in volume 125 of the West Virginia Reports which is designed to

\(^{108}\) 121 W. Va. 66, 1 S.E.2d 395 (1939).
dispense with the necessity for separate actions against several insurers which have issued separate policies covering the same risk, when the policies contain similar, or substantially similar, terms and conditions and have the same legal effect as to liability; a situation which will most frequently occur in the case of fire insurance policies, particularly as a result of the standard form prescribed by statute. The insured may, at his election, join all such insurers in a single action, or he may sue them separately as heretofore. The declaration must contain a separate count against each defendant but the issues are all to be tried together. The defendants are collectively entitled to four peremptory challenges of jurors. The form of the verdict or verdicts is to be prescribed by the court, and the court is empowered to prescribe the order of the opening statements, submission of evidence and closing arguments, unless the defendants shall agree upon these matters. "If the verdict is in general form and favor of the plaintiff, the court shall apportion the amount of the verdict in entering judgment, direct the amount of recovery against each defendant." The court is also given a discretion to determine preliminarily the propriety of the joinder and to prescribe a separate trial for any defendant where it appears that the cause of action against such defendant is substantially different from that against other defendants.

Consolidation of actions in negligence cases. Another rule, also appearing in volume 125 of the West Virginia Reports, provides for consolidation of cross actions in negligence cases. It is particularly designed for the purpose of determining the rights and liabilities of persons involved in motor vehicle collisions, although broad enough to cover other situations. The typical situation is where two automobiles collide and the driver of each claims that the other was at fault. In such a situation, if one of the parties sues and obtains a judgment in his favor, the other party will be concluded from seeking a judgment by the principle of res judicata. It has been reported that persons have attempted to take advantage of this possibility, when they realized that they were at fault, by suing before a justice of the peace for an amount below the limit of appealability, with the hope that by some strategy they might obtain a recovery and so prevent the persons really entitled to a recovery from recovering in a court of record. In such a situation, there would be no opportunity to vacate the judgment of the justice and it would operate by way of res judicata.
to prevent a subsequent recovery by the other party of a judgment in his favor in a court of record. The possibilities of such a result are enhanced by the fact that a judgment may be obtained so much more quickly before a justice than in a court of record, and because the party entitled to a recovery is often entitled to an amount beyond the jurisdiction of a justice, and so does not desire to submit his case to such a tribunal, even if he were willing to subject himself to the hazards of a race for judgment.

The rule and the procedure prescribed by it are somewhat complicated and no attempt will be made here to go into details. The gist of the remedial effect may be gleaned from the first paragraph, which reads as follows:

"In any action at law, when such action is based on negligence, the court shall inquire whether or not another action is pending based on the same occurrence wherein defendant in the first action is plaintiff and plaintiff in the first action is defendant; and, if it appear that such other action is pending in the same court, the court shall order a consolidation of the two actions."

Then follow provisions for consolidation when the two actions are pending in different courts of record of the same state and prescribing the venue. Further provisions provide for consolidation, under certain circumstances, where one of the actions is pending in a federal court or in a court of another state. Constitutional considerations prevented provision for consolidation when one of the actions is pending in a court of record and the other before a justice of the peace, but the difficulty is circumvented by a provision that a judgment before a justice for an amount less than fifteen dollars shall not be res judicata, and a further provision that on an appeal from a justice a consolidation may then be ordered.

*Time of amendment after demurrer sustained.* A section in the Code has provided that, when a demurrer has been sustained to a declaration or bill, an amended declaration or bill may be filed "at any time within the term at which the demurrer was sustained." Complaint has been made that demurrers have been sustained so near the end of a term of court that plaintiffs did not have time to file amended declarations or bills. Consequently, a rule, which in effect is an amendment of the Code section, has been adopted which permits the court to extend the time for amendment not to exceed thirty days after the adjournment of the term.

113 Id. at c. 56, art. 4, § 26 (1981).
This rule will be found in volume 127 of the West Virginia Reports.

**Selection of jurors.** No statute has prescribed the manner in which jurors shall be selected for trial of a case. Consequently, various methods have prevailed in the trial courts of the state, some of which have fallen far short of the supposed requirement that the jurors shall be selected by lot. A rule appearing in volume 127 of the West Virginia Reports prescribes for all trial courts a method of selection by lot which approximates methods already prevailing in some of the trial courts.

**Pretrial procedure.** This important modern device, designed for the purpose of simplifying the issues and eliminating superfluous proof by informal collaboration of the court and counsel prior to trial, was adopted by a rule which appears in detail in volume 127 of the West Virginia Reports.

**Declaratory judgment procedure.** The uniform declaratory judgment act was adopted in this state in 1941. The act is confined largely to specification of instances where the procedure may be used and is lacking in procedural details. Due, perhaps, to the fact that it was primarily designed for operation in states where common law pleading and practice and equity pleading and procedure have been superseded by practice codes, no provision is made for any procedure that would reconcile or supersede the two traditional systems. As a consequence, practitioners in this state have been in doubt as to the proper procedure to pursue. The nature of the remedy, particularly if an equitable right is involved, would suggest something analogous to equity pleading and procedure; but any procedure adequate to deal with a legal matter would necessarily be mostly foreign to common law forms and precedents. In 1947, a rule was promulgated by the Supreme Court of Appeals which prescribes a uniform procedure based on equity standards, which are most amenable to demands of the remedy. It reads in part as follows:

> "All pleadings in such proceeding shall conform, as to form, to the requirements of pleadings in suits in equity, shall be deemed to be equitable in character, and recorded in the chancery order book. The court shall hear and determine the matters in controversy as in suits in equity, except that any party shall have the right to a trial by jury of any disputed question of fact as to which he is entitled to a trial by jury

114 W. VA. CODE c. 55, art. 13 (Michie, 1949).
115 128 W. Va. XV.
under existing law, and such verdict shall have such binding effect as it would have under existing law at law and in equity respectively."