



Fall 9-1-1965

Removal Of Names From Virginia Voter Registration Rolls

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Recommended Citation

Removal Of Names From Virginia Voter Registration Rolls, 22 Wash. & Lee L. Rev. 320 (1965).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol22/iss2/19>

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VIRGINIA COMMENTS

REMOVAL OF NAMES
FROM VIRGINIA VOTER REGISTRATION ROLLS

In the national election of 1964, two ballots, one each from Halifax and Fairfax counties, were found in the Lexington Precinct, Rockbridge County, Virginia, ballot box.¹ This raises the question of how a ballot from one county was cast in a ballot box of another county.

To obtain a ballot in Virginia, one must be a registered voter in the precinct where application for a ballot is made,² whether presenting one's self in person or applying for an absentee ballot.³ Similarly, one must be a registered voter in the precinct where the ballot is cast.⁴ The possibility exists, therefore, that the persons who cast these two ballots were registered voters in two counties.

Since there is no provision for a cross-check of voter lists among cities and counties in Virginia, it is impossible to determine whether a person is registered in more than one locality. Even among precincts within most counties, there is not an official cross-check of voter lists to determine if any person is registered in more than one precinct.⁵ Since the trend today is toward enlarging the electorate and making it easier for transients to vote,⁶ it appears that the problem of persons voting in more than one locality may increase.

A factor contributing to the possibility that a person may be registered to vote in more than one locality is the difficulty of remov-

¹Letter from Mrs. Austin M. Drumm, Election Clerk, Lexington Precinct, Rockbridge County, Virginia, to Donald W. Huffman, March 31, 1965.

²Va. Code Ann. § 24-244 (Repl. Vol. 1964).

³Va. Code Ann. § 24-321 (Supp. 1964).

⁴Va. Code Ann. §§ 24-248, -341 (Repl. Vol. 1964).

⁵When a voter moves to a new precinct and makes application to register to vote in that precinct, he is required to answer whether he has ever voted before and, if so, to state where he last voted. Letter from Levin Nock Davis, Secretary, State Board of Elections, Richmond, Virginia, to Donald W. Huffman, April 22, 1965. If the voter replies that he has voted before, adequate machinery exists to have his name transferred. Va. Code Ann. §§ 24-85 -86 (Repl. Vol. 1964). The problem concerning a voter being registered in more than one precinct might occur when a voter, either through mistake, ignorance, or intent, replies that he has not voted before.

⁶Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823 (1963); 77 Harv. L. Rev. 574 (1964).

ing a voter from the registration rolls after he has moved from a precinct in which he is a registered voter. The Virginia Election Laws provide for removal of a name from the registration list after the expiration of thirty days from the time the voter has moved from that precinct.⁷ Although this provision seems clear, many considerations enter into the determination of when a person has changed his voting residence.

The term "residence," or "resident," is used in many different contexts. In discussing a voter residence question, the Virginia Supreme Court of Appeals in *Williams v. Commonwealth*⁸ stated: "The meaning of these words is to be determined from the facts and circumstances taken together in each particular case."⁹ The term residence, when used to mean eligibility to vote, is generally construed as being synonymous with domicile.¹⁰ The Virginia courts have followed this general rule.¹¹ Even though this rule of determining voting residence appears well-settled, the question of what constitutes voting residence is continually presented to the Attorney General of Virginia for clarification.¹² The reason it is so frequently raised seems to be the uncertainty as to what constitutes a sufficient showing of intent to retain domicile in one location after having physically moved to another location.¹³

Although the intention of the voter appears to determine his voting residence, an analysis of cases in jurisdictions other than Virginia shows that the intention of the voter must be evidenced by something more than a mere expression of intent. The New York Supreme Court in *Application of Woolley*,¹⁴ a case involving an attempt by twelve persons to have their names restored to the election rolls, stated: "Although one may properly declare an intent, the truth of such

⁷Va. Code Ann. § 24-17 (Repl. Vol. 1964).

⁸116 Va. 272, 81 S.E. 61 (1914).

⁹Supra note 8, at 63.

¹⁰In 1 Beale, *Conflict of Laws* 112 (1935), in discussing residence as a qualification for voting, it was stated: "The cases almost universally interpret residence in election statutes as meaning domicile."

¹¹*Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917); *Bruner v. Bunting*, 15 Va. Law Reg. 514 (Corp. Ct. Bristol 1909). The Supreme Court of Appeals of Virginia in the case of *Long v. Ryan*, 71 Va. (30 Gratt.) 718, 719-20 (1887), defined domicile when it stated: "To constitute a domicile, two things must concur—first, residence; secondly, the intention to remain there. . . . Domicile, therefore, means more than residence."

¹²[July 1958-June 1959] Ops. Att'y Gen. of Va. 129; [July 1954-June 1955] Ops. Att'y Gen. of Va. 101; [July 1953-June 1954] Ops. Att'y Gen. of Va. 83; [July 1947-June 1948] Ops. Att'y Gen. of Virginia 77.

¹³Supra note 8.

¹⁴108 N.Y.S.2d 165 (Sup. Ct. Lewis County 1951).

statement must be determined from the conduct of the person and all attendant circumstances."¹⁵ A New Jersey Circuit Court in *In re Erickson*,¹⁶ a case arising out of a contested election in which certain voters' qualifications were challenged, reached a similar conclusion: "The best and most trustworthy evidence of a voter's residence, as a general rule, are his acts rather than his declarations concerning his residence."¹⁷

These cases indicate the importance of conduct in determining voting residence. A further survey of the various jurisdictions indicates the conduct that the courts have held sufficient to establish such residence. Although a voter absents himself from a precinct, he may retain his voting residence there due to the nature of the absence. Where a job is migratory in nature, such as that of a Methodist preacher¹⁸ or a migratory worker,¹⁹ it has been held that the voter does not lose his residence because he changes his abode at regular intervals.²⁰ Thus, a temporary absence, where there is a definite intention to return, does not result in a loss of voter residence,²¹ even though the absences may recur at regular intervals.²² An absence, however, even for a short time, which was intended to be a permanent change of residence, does result in loss of voting residence.²³

Many of the voter residency problems confronting the courts have arisen where a voter owns a home in more than one voting district. In this situation, the courts have held that the voting residence is in the district where the voter actually resides.²⁴ If the voter lives part

¹⁵Supra note 4, at 169.

¹⁶18 N.J. Misc. 5, 10 A.2d 142 (Cir. Ct. 1939).

¹⁷Supra note 16, at 147.

¹⁸Everman v. Thomas, 303 Ky. 156, 197 S.W.2d 58 (1946).

¹⁹Kay v. Strobeck, 81 Colo. 144, 254 Pac. 150 (1927).

²⁰Owens v. Chaplin, 229 N.C. 797, 48 S.E.2d 37 (1948).

²¹Bentley v. Wright, 303 Ky. 618, 197 S.W.2d 420, 423 (1946), moved in with daughter to allow her to care for him while he was sick; Everman v. Thomas, 303 Ky. 156, 197 S.W.2d 58, 65 (1946), putting out a crop elsewhere; Thompson v. Emmert, 242 Ky. 415, 46 S.W.2d 502, 503 (1932), temporary absence to enroll children in school in another district, putting out a crop elsewhere, temporary absence to care for sick parents; Jordon v. Overstreet, 352 S.W.2d 296, 300 (Tex. Civ. App. 1961), moved to be near doctor during pregnancy; Aldridge v. Hamlin, 184 S.W. 602, 604 (Tex. Civ. App. 1916), temporary transfer by company, temporary absence due to poor business conditions.

²²Aldridge v. Hamlin, 184 S.W. 602, 604 (Tex. Civ. App. 1916).

²³Siler v. Brown, 215 Ky. 199, 284 S.W. 997, 1003-04 (1926). Virginia case of Dotson v. Commonwealth, 192 Va. 565, 66 S.E.2d 490, 494 (1951), is also in accord on this point.

²⁴Harris v. Textor, 234 Ark. 497, 361 S.W.2d 75, 76 (1962); Matney v. Elswick, 242 Ky. 183, 45 S.W.2d 1046, 1047 (1932); Coffey v. Board of Election Comm'rs, 375 Ill. 385, 31 N.E.2d 588 (1940); Application of Woolley, 108 N.Y.S.2d 165 (Sup. Ct. 1951).

of the year in each home, however, it has been held that he has a right to select which district he wishes to be his voting residence.²⁵

Although the problem of determining voting residence is relatively simple where a voter owns a home in more than one precinct, a more acute problem arises where a voter owns a home in one district but lives elsewhere though not owning the home where he resides. It has been held that he votes where he lives as long as he does not definitely plan to return to the district where he owns the residence.²⁶ If the voter does plan to return, however, it has been held that his voting residence is retained in that district.²⁷ Real property, other than a home, is treated in the same manner. When actual residence is in one district, a voting residence in another district may not be retained by the mere ownership of real property in that district.²⁸ If there is a showing of definite plans to return to the district where the real property is owned, such as plans to construct a house²⁹ or an apartment³⁰ with the intention of dwelling therein, the voter may retain his voting residence there. Personal property, such as household furniture, left in the precinct from which the voter has moved can be evidence of an intention to return.³¹

Where a voter actually resides in one district and has his business or is employed in another district, he does not gain voter residency by reason of his business or employment.³² In the case of *Ingram v. State*,³³ an elector was prosecuted for making a false statement as to his residence on the voter registration certificate when he gave his place of employment, the City Hall, as his residence rather than his

²⁵Application of People ex rel. Croen, 2 App. Div. 2d 696, 152 N.Y.S.2d 706 (1956). See also Bentley v. Wright, 303 Ky. 618, 197 S.W.2d 420 (1946).

²⁶Felker v. Henderson, 78 N.H. 509, 102 Atl. 623 (1917); Application of Woolley, 108 N.Y.S.2d 165 (Sup. Ct. 1951); Aldridge v. Hamlin, 184 S.W. 602 (Tex. Civ. App. 1916).

²⁷Jordan v. Overstreet, 352 S.W.2d 296 (Tex. Civ. App. 1961); Aldridge v. Hamlin, 184 S.W. 602 (Tex. Civ. App. 1916). A Virginia case which held this point is Williams v. Commonwealth, 116 Va. 272, 81 S.E. 61 (1914).

²⁸Ison v. Watson, 169 Ky. 150, 183 S.W. 468 (1916); Application of Davy, 281 App. Div. 137, 120 N.Y.S.2d 450 (1952); Application of Wooley, 108 N.Y.S.2d 165 (Sup. Ct. 1951).

²⁹Thompson v. Emmerts, 242 Ky. 415, 46 S.W.2d 502 (1932).

³⁰Supra note 8.

³¹Application of Woolley, 108 N.Y.S.2d 165 (Sup. Ct. 1951); Aldridge v. Hamlin, 184 S.W. 602 (Tex. Civ. App. 1916). A Virginia case which gives weight to this fact is Dotson v. Commonwealth, 192 Va. 565, 66 S.E.2d 490 (1951).

³²Pope v. Board of Election Comm'rs, 370 Ill. 196, 18 N.E.2d 214 (1938); Johnson v. State Election Bd., 370 P.2d 551 (Okla. 1962); Ingram v. State, 275 P.2d 334 (Okla. Crim. App. 1954).

³³275 P.2d 334 (Okla. Crim. App. 1954).

actual abode. The Criminal Court of Appeals of Oklahoma, in holding that a voter does not gain voter residence by reason of his employment, said that "the qualifications of electors to be entitled to vote in Oklahoma, means to be in residence, one's place of abode, as distinguished from a place where one is employed or an office or place devoted strictly to commercial enterprise."³⁴ Similarly, a patient in a hospital or sanatorium gains no voter residence by virtue of his confinement there.³⁵

The above analysis of what conduct has been held to constitute intention to retain voting residence in a precinct from which the voter has moved his actual residence was summed up in *In re Erickson*,³⁶ when the court said:

"To be a 'voting residence' there must be not only the intention of having the address for the purposes of voting but that intention must be accompanied by acts of living, dwelling, lodging or residing sufficient to reasonably establish that it is the real and actual residence of the voter. . . . The voter must not only have the intent of designating a place as his or her residence but such expression of intention must be accompanied by acts in furtherance of that intention and those acts should be actual."³⁷

With the many different circumstances which affect the determination of voter residence, it is difficult for a registrar to determine who are qualified voters. These difficulties and the possibility that a person could be registered in more than one voting district emphasize the need for better control of the registration rolls. The Virginia Election Laws do not require the removal of names from the registration rolls when a voter moves his residence from the precinct, but only ambiguously advise when this removal can be done.³⁸ The Election Laws also require a purge³⁹ of the registration books only once every six years, although the local electoral board may direct that this be done whenever it is deemed proper.⁴⁰

It is submitted that a continuous purge should be required by statute. Whenever a registrar has knowledge of the removal of a

³⁴Supra note 33, at 342.

³⁵*Merrill v. Shearston*, 73 Colo. 230, 214 Pac. 540 (1923); *Perri v. Kisselbach*, 34 N.J. 84, 167 A.2d 377 (1961).

³⁶18 N.J. Misc. 5, 10 A.2d 142 (Cir. Ct. 1939).

³⁷Supra note 36, at 146-147.

³⁸Va. Code Ann. § 24-17; §§ 24-85-86 (Repl. Vol. 1964).

³⁹Va. Code Ann. § 24-97 (Repl. Vol. 1964).

⁴⁰Va. Code Ann. § 24-96 (Repl. Vol. 1964).

voter to another voting district,⁴¹ the Election Laws should require that the registrar, after a stated length of time, notify the voter that his name will be removed from the registration rolls of that precinct, unless the voter makes a sufficient showing that he definitely intends to return to that district. This suggested change in the Election Laws would place the burden on the voter, when challenged, to establish his intention. It would change, in this situation, the general rule followed in Virginia under which the burden of proving a change in domicile is on the party alleging it.⁴² Such statutory change would serve to keep the registration rolls current and to decrease the possibility of a voter being registered in more than one precinct in Virginia.

DONALD W. HUFFMAN

THE GRAND JURY IN VIRGINIA

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⁴¹This presents a situation where the routine functioning of political parties can serve local registrars. If a competitive two-party system is in operation, the parties for their own purposes usually keep a close check on the registration rolls. Each party is anxious to notify the registrar when members of the opposition have died or moved. In addition to this source of information, the registrar must be a citizen of the precinct he serves. Va. Code Ann., § 24-52 (Repl. Vol. 1964). Therefore, he is in a good position to know when a voter dies or moves.

⁴²*Dotson v. Commonwealth*, 192 Va. 565, 66 S.E.2d 490 (1951); *Cooper v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917).

The Grand Jury serves as an investigating agency and protects the citizen against baseless charges. It may investigate the commission of felonies, conditions in a community, and the conduct of public officials. Since all proceedings of the grand jury are secret, the citizen is protected from unfounded accusations.¹

The fifth amendment of the United States Constitution guarantees use of grand juries in the prosecution of federal capital and infamous crimes² but this amendment does not apply to the states.³

Most states provide in either their constitutions or statutes for a grand jury. The Virginia Constitution does not require use of a grand jury, but section eight states, in part, "That in a criminal prosecution, a man has a right to demand the cause and nature of his accusation. . . ." The Virginia Code provides that a person can be tried for a felony only after indictment or presentment by a grand jury, but this requirement can be waived by the accused.⁴

The thirteenth and fourteenth amendments to the Federal Constitution, as interpreted by the United States Supreme Court, prohibit discrimination on the ground of race, color, religion, or national origin in the selection of grand jurors. This does not mean that an accused is entitled, as a matter of right, to a grand jury with one or more members of his race or creed.⁵

While discrimination has been alleged in Virginia cases, it has never been established. In two cases, it was not proved, and in a third case it was alleged for the first time on retrial when the grounds for

¹See the dissenting opinion in *Sullivan v. Commonwealth*, 157 Va. 867, 884, 161 S.E. 297, 302 (1931). For a discussion of the history and common law purpose of the grand jury see Orfield, *Criminal Procedure from Arrests to Appeal* 137-42 (1947) and 4 Wharton, *Criminal Law and Procedure* § 1685 (1957). For a history of the grand jury in Virginia see Whyte, *Is the Grand Jury Necessary?*, 45 Va. L. Rev. 462-71 (1959).

²*Ex parte Bain*, 121 U.S. 1 (1886).

³*Hurtado v. California*, 110 U.S. 516 (1884).

⁴Va. Code Ann. § 19.1-162 (Repl. Vol. 1960). This section states in part that, "no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction or unless such person, by writing signed by such person before the court having jurisdiction to try such felony or before the judge of such court in vacation, shall have waived such indictment or presentment, in which event he may be tried on a warrant or information." See also *Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652 (1917).

⁵*Rogers v. Alabama*, 192 U.S. 226 (1904); *Akins v. Texas*, 325 U.S. 398 (1945). The latter case inferred but did not hold that a limitation in the number of negroes who could serve on a grand jury was constitutional. But see *Swain v. Alabama*, 380 U.S. 202 (1964).

such allegation had existed at the first trial.⁶ The defendant in one of these cases challenged the grand jury on the ground that it had been selected only from a poll tax list. If this had been proved, the court inferred, it would have been discriminatory.⁷ In another case the Negro defendant only charged that members of his race were excluded from the grand jury, and offered evidence of the exclusion.⁸

The Virginia Code provides for both general and special grand juries; their powers are the same.⁹ Generally, a special grand jury is impaneled to alleviate a special situation and so may be called as needed.¹⁰ Thus a special grand jury is called for a special term of court and can be carried over to the next regular term of court.¹¹ A special grand jury may be summoned when the general grand jury is found to be incompetent, so that its indictments must be quashed.¹² It is also used to indict convicts charged with criminal offenses.¹³ It is not necessary to enter of record the order for a special grand jury.¹⁴

9.00 ORGANIZATION

9.01 *Number of Members*

A grand jury in Virginia, regular or special, consists of not less than five nor more than seven persons,¹ a reduction in number from the grand jury of the common law, which consisted of twelve to twenty-three members, with twelve required to indict. The size of the grand jury is smaller in Virginia than in most states,² perhaps because of

⁶*Patterson v. Commonwealth*, 139 Va. 589, 123 S.E. 657 (1924), error dismissed, 270 U.S. 632 (1925); *Waller v. Commonwealth*, 178 Va. 294, 16 S.E.2d 808, Cert. denied, 316 U.S. 679 (1941); *Bailey v. Commonwealth*, 193 Va. 814, 71 S.E.2d 368, cert. denied, 344 U.S. 886 (1952).

⁷*Waller v. Commonwealth*, 178 Va. 294, 299, 16 S.E.2d 808, 810, cert. denied, 316 U.S. 679 (1941).

⁸*Patterson v. Commonwealth*, 139 Va. 589, 602, 123 S.E. 657, 661 (1924), error dismissed, 270 U.S. 632 (1925).

⁹Va. Code Ann. § 19.1-147 (Repl. Vol. 1960). A court can not give a special grand jury powers different from those of a regular grand jury. *Lyles v. Commonwealth*, 88 Va. 396, 397, 13 S.E. 802 (1891).

¹⁰Va. Code Ann. § 19.1-149 (Repl. Vol. 1960). *Robertson v. Commonwealth*, 1 Va. Dec. 851, 855, 20 S.E. 362, 363 (1894).

¹¹Va. Code Ann. § 19.1-149 (Repl. Vol. 1960). A special grand jury may be called by a judge in vacation.

¹²*Shinn v. Commonwealth*, 73 Va. (32 Gratt.) 899, 908 (1879).

¹³Va. Code Ann. § 53-298 (1950).

¹⁴*Mesmer v. Commonwealth*, 67 Va. (26 Gratt.) 976, 981 (1875).

¹Va. Code Ann. § 19.1-150 (Repl. Vol. 1960).

²*Orfield, Criminal Procedure from Arrest to Appeal* 139 (1947) (hereinafter cited as *Orfield*).

the absence of a constitutional basis. The reduction in the number of grand jurors has been upheld as constitutional.³

9.02 *Qualifications*

A grand juror must be at least twenty-one years of age, honest, intelligent, of good demeanor, and in other respects qualified.⁴ He must have been a citizen of Virginia for at least one year and a resident of the county or city for at least six months.⁵ A naturalized citizen is qualified to serve as a grand juror, and the validity of the naturalization cannot be attacked collaterally.⁶ An inhabitant of a city can not serve as a grand juror for a county circuit court unless that court's jurisdiction extends to the city.⁷

Advanced age is a ground for claiming an exemption, but it is not a disqualification as such; therefore, a person over seventy is eligible to serve as a grand juror unless he chooses to be exempted.⁸

The requirement that a grand juror must be "in other respects a qualified juror" is nebulous. An early Virginia case enumerated factors which are now covered by statute, such as being over the age of twenty-one and being a citizen. This case also suggested that persons convicted of major felonies could not qualify as grand jurors. To say simply that the phrase means the usual common law qualifications is erroneous, as some common law requirements have been eliminated.⁹

An 1833 case held that one who asks to be a grand juror is not thereby disqualified, unless it "appears" that his reason is corrupt.¹⁰ It has been suggested that such a result would not be reached today

³Hausenfluck v. Commonwealth, 85 Va. 702, 704, 8 S.E. 683, 684 (1889).

⁴Va. Code Ann. § 19.1-148 (Repl. Vol. 1960).

⁵Va. Code Ann. § 19.1-150 (Repl. Vol. 1960).

⁶Commonwealth v. Towles, 32 Va. 743, 746 (1835). Generally one must be able to understand the English language. 4 Wharton, Criminal Law and Procedure § 1691 (1957) (hereinafter cited as 4 Wharton).

⁷Va. Code Ann. § 19.1-150 (Repl. Vol. 1960).

⁸Va. Code Ann. § 19.1-148 (Repl. Vol. 1960). Booth v. Commonwealth, 57 Va. (16 Gratt.) 519, 525 (1861). In this case the age to claim exemption was sixty, but it is assumed that the same applies with the age of seventy.

⁹The phrase is found in Va. Code Ann. § 19.1-150. In the Booth case, supra note 8, at p. 528, the phrase was held to mean the usual common law qualifications. This case was cited in Waller v. Commonwealth, 178 Va. 294, 302, 16 S.E.2d 808, 811 (1941), for the same proposition. The cases suggest that one who is an alien or a minor, or who was not returned by the proper officer or at the request of the prosecutor is disqualified to act as a grand juror. One convicted of treason, a felony, or perjury was also disqualified. Today, many of the common law qualifications such as being a freeholder, are not required. In summary it appears that some common law qualifications are still applicable while the majority are not. See 9 Michie's Jurisprudence Virginia and West Virginia 228 (1950).

¹⁰Commonwealth v. Thompson, 31 Va. (4 Leigh) 667, 668 (1833).

"since one who requests to serve on a petit jury is disqualified," as also is one who has someone ask for him.¹¹

The general rule in the absence of statute is that bias, prejudice, or opinion regarding the defendant, or an interest other than pecuniary in the outcome does not disqualify one as a grand juror.¹² There are no Virginia cases on this point. The oath taken in Virginia by grand jurors takes into account that they may know the witnesses or the defendant since they can make a presentment on their own knowledge.¹³

No Virginia case discusses whether or not kinship to the accused is a disqualification.

One can be a witness and a grand juror; this is inherent in the functioning of the grand jury. There is a conflict as to whether one can serve on two grand juries investigating the same offense or can serve on the trial jury of the same offense. There is also disagreement as to whether the complaining witness or prosecutor can be a grand juror.¹⁴

A party must already have been indicted before he has standing to challenge the qualification or summoning of a grand juror.¹⁵ This objection, made by way of a plea in abatement,¹⁶ must be made before entering a plea to the merits, or the objection is waived,¹⁷ unless the whole proceeding is null and void.¹⁸ While the judge has discretion to permit the withdrawal of one plea and the entry of another, this is rarely done to allow a dilatory plea.¹⁹ The challenge cannot be raised for the first time on appeal.²⁰

¹¹Whyte, *Is the Grand Jury Necessary?*, 45 Va. L. Rev. 461, 477 (1959).

¹²*Id.* Wharton § 1692.

¹³Va. Code Ann. § 19.1-152 (Repl. Vol. 1960).

¹⁴Wharton § 1692. During the prohibition era, a prohibition officer, at the court's discretion, could be disqualified from grand juror service, *Webb v. Commonwealth*, 137 Va. 833, 835, 120 S.E. 155, 156 (1923).

¹⁵*Commonwealth v. Cherry*, 4 Va. (2 Va. Cas.) 20 (1815); *Commonwealth v. Carter*, 4 Va. (2 Va. Cas.) 319 (1822); *Hunter v. Mathews*, 39 Va. (12 Leigh) 228 (1841). This is because the defendant is not a party to the organization of the grand jury.

¹⁶*Commonwealth v. Cherry*, 4 Va. (2 Va. Cas.) 20 (1815); *Commonwealth v. Long*, 4 Va. (2 Va. Cas.) 318 (1822); *Moore v. Commonwealth*, 36 Va. (9 Leigh) 639 (1838).

¹⁷*Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795, (1890); *Taylor v. Commonwealth*, 90 Va. 109, 17 S.E. 812 (1893).

¹⁸*Curtis v. Commonwealth*, 87 Va. 589, 593, 13 S.E. 73, 74 (1891); *Bailey v. Commonwealth*, 193 Va. 814, 820, 71 S.E.2d 368, 370 (1952).

¹⁹*Id.* In these two cases the defendant tried to enter a plea in abatement for the first time on a retrial after reversal on appeal, but it was disallowed since the grounds of his plea were present at the first trial.

²⁰*Taylor v. Commonwealth*, 90 Va. 109, 113, 17 S.E. 812, 814 (1893).

Whether one is qualified as a grand juror has been held to be a question of fact. The defendant challenged a grand juror and the Commonwealth replied. Since it was thus an issue in the case, the question was for the jury.²¹ This result may be different today. Some initial issues in a case have been held to involve questions of law to be decided by the court, such as the voluntariness of a confession.²²

A grand juror may serve on more than one grand jury at the same term of court.²³ The presence of an unqualified juror on the judge's list is not a ground to quash the indictment, if the jurors finally chosen are qualified.²⁴ It has been suggested that questions of qualifications are somewhat academic since a deficiency in the number of grand jurors appearing for duty may be filled from bystanders.²⁵

9.03 *Compensation*

A grand juror receives the same compensation and mileage allowance as jurors in civil cases. This compensation is paid out of the local tax levy.²⁶

9.04 *Summoning*

In June, July, or August, each Judge of a court of general criminal jurisdiction selects sixty persons as a panel of grand jurors for the ensuing twelve months. They are selected from the different magisterial districts and wards of cities in proportion to population.²⁷

Not more than twenty days before the convening of a court re-

²¹Day v. Commonwealth, 43 Va. (2 Gratt.) 562, 563 (1845).

²²Jackson v. Denno, 378 U.S. 368 (1964). Perhaps reasons for this decision do not extend to the question of a grand juror's qualifications.

²³Richardson v. Commonwealth, 76 Va. 1007, 1008 (1882). In this case a juror served on both a special and a regular grand jury in the same term of court.

²⁴Shinn v. Commonwealth, 73 Va. (32 Gratt.) 899, 907 (1879).

²⁵Whyte, *supra* note 11, at 477.

²⁶Va. Code Ann. § 19.1-160 (Repl. Vol. 1960). The compensation for civil jurors is provided for in Va. Code Ann. § 8-204 (1950). The commonwealth pays compensation, fees, mileage and allowances for grand jurors of the Circuit Court of the City of Richmond. Va. Code Ann. § 19.1-161 (Repl. Vol. 1960). The Circuit Court of the City of Richmond has jurisdiction of all criminal proceedings against convicts in the penitentiary. Va. Code Ann. § 53-295 (Repl. Vol. 1958).

²⁷Va. Code Ann. § 19.1-148 (Repl. Vol. 1960). In James City County the grand jury is drawn from both the county and the city of Williamsburg in such proportion as the judge deems proper. There appears to be no specific sources the judge is required or forbidden to use, and presumably may consult telephone and city directories, and choose persons he knows are willing to serve. Grand jury duty usually requires less time than petit jury duty.

quiring a grand jury, the clerk issues to the sheriff a *venire facias*²⁸ of not less than five or more than seven persons from the list. The exact number is designated by the judge by an order entered of record. When the list is made up, the clerk is required to notify the women named, who in turn are required to notify the clerk within fifteen days if they do not wish to serve.²⁹

A special grand jury is summoned from a list prepared by the judge, and not the list from which the regular grand jurors were selected.³⁰ A *venire facias* is not required.³¹

Vacancies on the grand jury so selected are filled by the judge from his list, or he may dispense with the list and name bystanders.³² If a grand juror is legally disqualified, he must be discharged and another sworn in his place.³³

An objection to the method by which grand jurors are summoned is made in the same way as an objection to qualification.³⁴ The record does not need to show that a grand juror was summoned.³⁵

A fine of twenty dollars can be imposed on an officer of the court who fails without good cause in his duty to summon a grand jury and to return a list of their names. Likewise one who is summoned as a grand juror and fails to appear without a "reasonable excuse" can be fined not less than five dollars.³⁶

9.05 Foreman

The judge appoints one of the grand jurors to be foreman.³⁷ If one is not appointed and sworn, objection may be made by a plea in abate-

²⁸A *venire facias* is a writ to the Sheriff from the court of jurisdiction in which the jurors are to be summoned. It has been held that a wrong date on a writ is of no consequence as long as it is correctly complied with. *Davis v. Commonwealth*, 89 Va. 132, 15 S.E. 388 (1892). There is no Virginia case that considers whether a *venire facias* may be dispensed with when there is an otherwise properly formed regular grand jury.

²⁹Va. Code Ann. § 19.1-148 (Repl. Vol. 1960).

³⁰*Robertson v. Commonwealth*, 1 Va. Dec. 851, 854, 20 S.E. 362, 363 (1894); *McDaniel v. Commonwealth*, 165 Va. 709, 716, 181 S.E. 534, 537 (1935). The latter case stated that the list for the special grand juries was not the list for regular grand jurors.

³¹*Robinson v. Commonwealth*, 88 Va. 903, 14 S.E. 627, 628 (1892). In this case the objection to a lack of writ came after the verdict.

³²*Richardson v. Commonwealth*, 76 Va. 1007, 1008 (1892).

³³*Commonwealth v. Burton*, 31 Va. (4 Leigh) 645, 648 (1832).

³⁴See note 17 *supra*.

³⁵*Robinson v. Commonwealth*, 88 Va. 900, 902, 14 S.E. 627, 628 (1892).

³⁶Va. Code Ann. § 19.1-159 (Repl. Vol. 1960). There is no Virginia case on what constitutes a "reasonable excuse."

³⁷Va. Code Ann. § 19.1-152 (Repl. Vol. 1960).

ment.³⁸ If after being sworn the foreman does not appear, another grand juror will be so appointed.³⁹

10.00 PROCEEDINGS

10.01 *Oath*

The foreman is sworn first in the presence of the other grand jurors, who are then sworn. Any witness to appear before the grand jury can be sworn by the foreman.¹ A "de facto" clerk may swear in a grand jury.² Another grand juror may be sworn if a previously sworn juror is unable or fails to appear.³

10.02 *Charge*

The grand jury, after being sworn, is customarily charged by the judge of the court,⁴ but failure to charge will not affect an otherwise good indictment.⁵ It is reversible error, however, to charge the grand jury in the presence of the petit jury.⁶ After the charge, the jurors retire to their room.⁷

10.03 *Duties and Powers*

The grand jury has power generally to investigate any crime that may be prosecuted before the court for which it is organized.⁸ In Virginia it has the duty to investigate and "present all felonies, misdemeanors and violations of penal laws" in its jurisdiction, but it cannot indict for criminal violations where the punishment is a fine of less than five dollars.⁹ One case, involving misfeasance in public office, and citing Webster's Dictionary, said that a grand jury can act on pub-

³⁸Va. Code Ann. § 19.1-153 (Repl. Vol. 1960).

³⁹Taylor v. Commonwealth, 90 Va. 109, 113, 17 S.E. 812, 813 (1893).

¹Va. Code Ann. § 19.1-152 (Repl. Vol. 1960). The form of the oath administered is given in this section.

²Hord v. Commonwealth, 31 Va. (4 Leigh) 674 (1833). In this case the clerk had not been sworn in.

³Va. Code Ann. § 19.1-153 (Repl. Vol. 1960).

⁴Va. Code Ann. § 19.1-154 (Repl. Vol. 1960).

⁵Porterfield v. Commonwealth, 91 Va. 801, 802, 22 S.E. 352, 353 (1895). The grand jury was partly charged in this case.

⁶Va. Code Ann. § 19.1-154 (Repl. Vol. 1960).

⁷Ibid.

⁸4 Wharton § 1710 (1957).

⁹Va. Code Ann. § 19.1-155 (Repl. Vol. 1960).

lic matters such as misfeasance in office, prevalence of crime, and public nuisances.¹⁰

There is no authority in Virginia as to whether the grand jury has the power to act on complaints brought by an individual himself when the Commonwealth's Attorney or other magistrate refuses to act.¹¹

There are limitations on the power over witnesses. A grand jury cannot summon witnesses at random and make general inquiries on the possibility that a crime has been committed. Protection from self-incrimination and illegal search and seizure applies to witnesses before a grand jury. Private detectives cannot be used.¹²

As to whether an action for libel or malicious prosecution can be brought by the accused against a grand jury which has investigated and fails to indict is not answered in Virginia. Such an action, if available at all, perhaps lies against the accuser, if a private citizen.

10.04 *Commonwealth's Attorney*

It is the duty of "local officers" to give information to the Commonwealth's Attorney of the violation "of any penal law" so that he may present evidence of such violation to the grand jury. He has the power to issue or have issued by an authorized person summons for any material witness to give evidence before the grand jury.¹³

The Commonwealth's Attorney may advise the members of the grand jury of their duties but may not be present during its deliberations, except as a sworn witness.¹⁴ His mere presence in the grand jury room does not invalidate an indictment, in the absence of a showing of prejudice to the accused.¹⁵

¹⁰Cutchin v. City of Roanoke, 113 Va. 452, 478, 74 S. E. 403, 409 (1912). See also Benson v. Commonwealth, 190 Va. 744, 748, 749, 58 S.E.2d 312, 313 (1950). This case also held it was not discriminatory to choose grand jurors from a particular class of people if the grand jury is to investigate a situation or conditions in a given area. There may be a question of the validity of such a ruling now.

¹¹4 Wharton § 1710. The generally accepted rule allows a private individual to carry a complaint to a grand jury sitting as a group.

¹²Id. § 1711.

¹³Va. Code Ann. § 19.1-156 (Repl. Vol. 1960). Local officers include "every Commissioner of Revenue, Sheriff, Constable, or other officer . . ."

¹⁴Va. Code Ann. § 19.1-156 (Repl. Vol. 1960). The Commonwealth's Attorney should not in any way influence the grand jury's conclusion. Hall v. Commonwealth, 143 Va. 554, 560, 130 S.E. 416, 418 (1925).

¹⁵Mullins v. Commonwealth, 115 Va. 945, 950, 79 S.E. 324, 326 (1913); Draper v. Commonwealth, 132 Va. 648, 656, 111 S.E. 471, 473 (1922).

10.05 *Witnesses*

A witness who refuses to testify without adequate cause may be found in contempt of court, but may refuse to testify on the ground of self incrimination.¹⁶ If a witness gives testimony which subsequently becomes incriminatory, his privilege has not been violated.¹⁷

The presence of the sheriff or his deputy in the room with the grand jury while examining witnesses or deliberating is not grounds for quashing the indictment.¹⁸ Outsiders generally should not be present during deliberations but the rule apparently does not apply while witnesses are being examined.¹⁹ Wharton suggests that a stenographer can be present during grand jury deliberations if no prejudice to the accused is shown and if there is no controlling statute.²⁰ There are no Virginia cases involving the situation where one witness is present while another is testifying, or while the grand jury is voting.

10.06 *Accused Persons*

Since the purpose of the grand jury is to accuse and not to try the case, the accused has no right, under the common law, to appear before the grand jury nor to have the body hear witnesses in his behalf. Apparently this rule still prevails in Virginia.

The accused has the right to call grand jurors to testify at the trial that a state's witness testified differently before the grand jury.²¹ A third party may also testify that another person's testimony given at the trial conflicts with that given before the grand jury.²²

10.07 *Secrecy of Proceedings*

Traditionally grand jury proceeding have been secret so as to protect persons investigated but not accused and so the grand jury can operate without fear of reprisal.²³

¹⁶4 Wharton § 1714. See also *Siklek v. Commonwealth*, 133 Va. 789, 793-95, 112 S.E. 605, 606 (1922).

¹⁷*Temple v. Commonwealth*, 75 Va. 892 (1881). In this case it was stated that the witness who incriminates himself before a grand jury can invoke the privilege at his own trial. It may be possible that the ruling in *Escobedo v. Illinois*, 378 U.S. 478 (1964), as regards rights to counsel extends to grand jury proceedings.

¹⁸*Richardson v. Commonwealth*, 76 Va. 1007, 1009 (1882).

¹⁹*Lawrence v. Commonwealth*, 86 Va. 573, 577, 579, 10 S.E. 840, 842 (1890).

²⁰4 Wharton § 1715.

²¹*Harris v. Commonwealth*, 110 Va. 905, 906, 68 S.E. 834 (1909).

²²*Little v. Commonwealth*, 66 Va. (25 Gratt.) 921, 931 (1874).

²³*Little v. Commonwealth*, 66 Va. (25 Gratt.) 921 (1874); *Wadley v. Commonwealth*, 98 Va. 803, 35 S.E. 452 (1900). See also 4 Wharton § 1719. Other reasons

At common law a grand juror could be held guilty as an accessory after the fact for a premature disclosure of the proceedings.²⁴ In Virginia there are no statutory provisions for penalties for violations of the rule requiring secrecy. Most likely, a violation of the rule of secrecy by a grand juror could constitute contempt of court.²⁵

10.08 *Finding of Indictments and Presentments*

The concurrence of at least four members is required to find an indictment or presentment. Information on which an indictment or presentment is based can come from two or more of the grand jurors themselves or from witnesses, called either by the jury itself or sent to it. If only one grand juror can testify to the event being investigated, he is sworn as any other witness.

Customarily the names of persons testifying, either grand jurors or witnesses, are listed at the foot of the indictment or presentment,²⁶ but failure to do so does not invalidate the indictment or presentment.²⁷ The omission of the names does not prevent the same witnesses from testifying at the trial.²⁸ Customarily the words "a true bill" are written on the indictment and the foreman signs it, but neither are essential to its validity. An entry of the grand jury finding in the court's order book is sufficient.²⁹ Yet even if this is not done, a conviction is not void.³⁰

The Virginia Code provides that an indictment may be presented more than once, either to the same or to different grand juries, in an effort to get a true bill.³¹

given for secrecy include facilitation of free disclosure by prosecutors, prevention of the accused from fleeing, and prevention of perjury since if it were not secret the accused might persuade the witnesses for the prosecution to falsify testimony.

²⁴The State v. Fassett, 16 Conn. 457 (1844).

²⁵4 Wharton § 1719. Some courts hold one in contempt who violates the rule of secrecy, while others consider such a violation to be a common law misdemeanor.

²⁶Va. Code Ann. § 19.1-173 (Repl. Vol. 1960). For misdemeanors the prosecutor's name must appear. Va. Code Ann. § 19.1-173 (Repl. Vol. 1960).

²⁷Shelton v. Commonwealth, 89 Va. 450, 452, 16 S.E. 355, 356 (1892); Hall v. Commonwealth, 143 Va. 554, 560, 130 S.E. 416, 418 (1925).

²⁸Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 845, 853 (1878). The case was overruled on another point in Jones v. Commonwealth, 87 Va. 63, 12 S.E. 226 (1890).

²⁹Hall v. Commonwealth, 143 Va. 554, 561, 130 S.E. 416, 418 (1925).

³⁰Hanson v. Smyth, 183 Va. 32 S.E.2d 142 (1944); Bailey v. Commonwealth, 193 Va. 814, 71 S.E.2d 368, cert. denied, 344 U.S. 886 (1952); Council v. Smyth, 201 Va. 135, 109 S.E.2d 116 (1959).

³¹Va. Code Ann. § 19.1-158 (Repl. Vol. 1960). This section also provides that: "No irregularity in the time or manner of selecting the jurors, or in the writ of venire facias, or in the manner of executing the same, shall vitiate any presentment, indictment or finding of a grand jury."

A grand jury may indict without the accused having had a preliminary hearing if no arrest has been made, but after the accused has been arrested, he is entitled to a preliminary hearing unless he waives it in writing, before a grand jury can indict.³²

Since the grand jury only accuses, it may indict if there is sufficient evidence to establish "probable cause."³³ There is a presumption that every indictment is found on proper evidence. Even if the indictment is based on inadmissible evidence the defendant, presumably, has not been prejudiced since such evidence will be excluded at the trial.³⁴

DANIEL T. BALFOUR*

ARRAIGNMENT, PRE-TRIAL MOTIONS, AND PLEAS IN VIRGINIA

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³²Webb v. Commonwealth, 204 Va. 24, 31, 129 S.E.2d 22, 27-28 (1963).

³³Britt. v. Commonwealth, 202 Va. 906, 907, 121 S.E.2d 495, 496 (1961).

³⁴Wadley v. Commonwealth, 98 Va. 803, 805, 35 S.E. 452, 453 (1900). Whyte suggests that this is a major fault in the grand jury since it is possible to have an indictment based on nothing but hearsay. Whyte, *Is the Grand Jury Necessary?*, 45 Va. L. Rev. 461, 488 (1959).

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- .06 Plea of Denial of Speedy Trial
- .07 Plea of Former Jeopardy

11.00 ARRAIGNMENT AND PRE-TRIAL MOTIONS

11.01 *Arraignment*

Arraignment is the proceeding in which the accused is brought to the bar of the court and the charge is read to him.¹ The accused then answers the charge by entering a plea or making a motion.² Judge Lacy, in *Sutton v. Commonwealth*,³ succinctly set forth the steps involved:

"The first step in the proceeding consists in calling him to the bar by his name, and commanding him to stand up. The second step is reading the indictment to him. The third step is to ask him, 'How say you; are you guilty, or not guilty?' Technically, the arraignment is now completed, and he must answer."⁴

The first three steps, which are the arraignment proper,⁵ are the action of the court; the last step, the plea, is the action of the accused.⁶

An arraignment for a felony is mandatory,⁷ and the accused must personally appear and cannot appear by attorney.⁸ An arraignment is not necessary in order to convict of a misdemeanor,⁹ this being a right which may be waived by a failure to appear.¹⁰

¹*Stoneham v. Commonwealth*, 86 Va. 523, 10 S.E. 238 (1889); *Sutton v. Commonwealth*, 85 Va. 128, 7 S.E. 323 (1888); *Whitehead v. Commonwealth*, 60 Va. (19 Gratt.) 640 (1870).

²*Sutton v. Commonwealth*, 85 Va. 128, 7 S.E. 323 (1888).

³*Ibid.*

⁴85 Va. at 132, 7 S.E. at 325.

⁵But see *Black, Law Dictionary* 139 (4th ed. 1951), which includes the plea as part of the arraignment.

⁶*Sutton v. Commonwealth*, 85 Va. 128, 7 S.E. 323 (1888); *Whitehead v. Commonwealth*, 60 Va. (19 Gratt.) 640 (1870).

⁷Va. Code Ann. § 19.1-240 (Repl. Vol. 1960).

⁸*Noell v. Commonwealth*, 135 Va. 600, 115 S.E. 679 (1923); *Gilligan v. Commonwealth*, 99 Va. 816, 37 S.E. 962 (1901); *Benton v. Commonwealth*, 91 Va. 782, 21 S.E. 495 (1895); *Coleman v. Commonwealth*, 90 Va. 635, 19 S.E. 161 (1894); *Snodgrass v. Commonwealth*, 89 Va. 679, 17 S.E. 238 (1893); *Shelton v. Commonwealth*, 89 Va. 450, 16 S.E. 355 (1892); *Culverius v. Commonwealth*, 81 Va. 787 (1886); *Bond v. Commonwealth*, 83 Va. 581, 3 S.E. 149 (1887); *Boswell v. Commonwealth*, 61 Va. (20 Gratt.) 860 (1871); *Jackson v. Commonwealth*, 60 Va. (19 Gratt.) 656 (1870); *Hooker v. Commonwealth*, 54 (13 Gratt.) 763 (1855); *Sperry v. Commonwealth*, 36 (9 Leigh) 623 (1838).

⁹Va. Code Ann. §§ 19.1-180 and 19.1-184 (Repl. Vol. 1960); *Foy v. Commonwealth*, 132 Va. 671, 111 S.E. 269 (1922); *Bare v. Commonwealth*, 122 Va. 783, 94 S.E. 168 (1917); *Shifflett v. Commonwealth*, 90 Va. 386, 18 S.E. 838 (1894).

¹⁰*Souther v. Reid*, 101 F. Supp. 806 (E.D. Va. 1951). Section 19.1-184 actually gives the court the choice of issuing a *capias* or proceeding with the trial as though the accused were present and had pleaded not guilty.

It is not necessary to re-arraign a defendant after a change of venue.¹¹ While co-defendants may be arraigned jointly, in felony cases each has a right to be tried separately.¹² It does not appear that defendants have any right to be tried jointly.¹³ There is no right to separate trials in misdemeanor cases.¹⁴

11.02 *Motion to Appoint Counsel*

The Virginia Constitution says nothing about the right to assistance of counsel.¹ However, the right is inherent in a fair and orderly trial,² and the decisions of the United States Supreme Court have given it federal constitutional sanction.³ Under the Virginia statute, a person charged with a felony must have counsel before he is arraigned.⁴ Consequently, under this statute, at least so far as felonies are concerned, it is not necessary for defendant to make a motion for appointment of counsel.⁵

11.03 *Motion for Sanity Investigation*

The Virginia Code provides: "No person shall, while he is insane or feeble-minded, be tried for a criminal offense."¹ While it has been said that this section is only declaratory of the common law,² the

¹¹Vance v. Commonwealth, 4 Va. (2 Va. Cas.) 162, 168 (1819). For motions to change venue see § 12.10 infra.

¹²Va. Code Ann. § 19.1-202 (Repl. Vol. 1960).

¹³Va. Code Ann. § 19.1-202 (Repl. Vol. 1960). At common law the Commonwealth had the right to decide, subject to the control and discretion of the court, whether defendants jointly indicted should be tried jointly or separately. By Va. Code Ann. § 19.1-202 (Repl. Vol. 1960), the defendant is given a right to elect to be tried separately. Consequently, it would seem that defendants have no right to be tried jointly if the Commonwealth wishes to try them separately, but the point has not been clearly settled. See Barnes v. Commonwealth, 92 Va. 794, 802, 23 S.E. 784, 786 (1895); Curran's Case, 48 Va. (7 Gratt.) 619, 627 (1850).

¹⁴Va. Code Ann. §§ 19.1-180 and 19.1-184 (Repl. Vol. 1960). Jones v. Commonwealth, 72 Va. (31 Gratt.) 836 (1878); Commonwealth v. Lewis, 66 Va. (25 Gratt.) 938 (1874).

¹Although some cases have indicated otherwise, See Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953); Watkins v. Commonwealth, 174 Va. 518, 6 S.E.2d 670 (1940).

²Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953); McDorman v. Smyth, 188 Va. 474, 50 S.E.2d 423 (1948); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948).

³Gideon v. Wainwright, 372 U.S. 335 (1963).

⁴Va. Code Ann. § 19.1-241.1 (Supp. 1964).

⁵The subject is discussed in Manson, *The Indigent in Virginia*, 51 Va. L. Rev. 163 (1965).

¹Va. Code Ann. § 19.1-227 (Supp. 1964).

²Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1939).

federal courts hold that it is a federal constitutional right,³ and that procedural due process requires that the accused be given an "adequate opportunity to raise the issue."⁴

The Code provides that prior to arraignment the court itself, the Commonwealth's Attorney, or counsel for the accused may move for commitment of an accused to a state hospital for the insane for observation and report as to the accused's mental condition. Thereupon the court may appoint qualified persons to examine the defendant and to report their findings to the court. Whether or not such a commission is appointed, after "hearing evidence or the representation of counsel" the court is authorized to commit white persons to Southwestern State Hospital and Negroes to Central State Hospital for observation and report.⁵

If at any time after arraignment "a court in which a person is held for trial see reasonable ground to doubt his sanity or mentality at the time at which, but for such a doubt, he would be tried," the court may suspend further proceedings in order to make a similar inquiry into the defendant's mental condition.⁶

The exercise of the court's discretion in determining whether to commit the accused for a sanity investigation will not be disturbed, unless there is a clear abuse of discretion.⁷

When the Superintendent of the State Hospital to which an accused has been committed reports that he is sane, or if insane that he has been restored to sanity, he is returned for trial.⁸ On the other hand, if the Superintendent reports that the accused is insane or feeble-minded, the accused is retained in the custody of the hospital until the further order of the court. The court may appoint a commission of not to exceed three physicians, who may be from the staff of the

³Thomas v. Cunningham, 313 F.2d 934, 938 (4th Cir. 1965); Owsley v. Cunningham, 190 F. Supp. 608, 613 (E.D. Va. 1961).

⁴Ibid. In Thomas the court held in the federal habeas corpus proceedings that on the allegations, taken to be true, the petitioner had been denied this federal constitutional right. In Owsley, the District Court held that the constitutional right had not been denied. For a discussion of the procedures in Virginia for raising the issue see Comment, 18 Wash. & Lee L. Rev. 365 (1961); however, the statutes have been rewritten since this comment was published.

⁵Va. Code Ann. § 19.1-228 (Supp. 1964).

⁶Va. Code Ann. § 19.1-229 (Supp. 1964).

⁷Tilton v. Commonwealth, 196 Va. 774, 85 S.E.2d 368 (1955); Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1949); Wood v. Commonwealth, 146 Va. 296, 135 S.E. 895 (1926). The exercise of discretion may also be reviewed on federal habeas corpus. Thomas v. Cunningham, 313 F.2d 934 (4th Cir. 1965); Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961).

⁸Va. Code Ann. § 19.1-230 (Supp. 1964).

hospital, to inquire into the facts as to the mental condition of the accused and to report.⁹ If this commission reports the accused to be sane, he is returned for trial, but if it reports he is insane, the court is required to order him to be confined in the department for the criminal insane until restored to sanity.¹⁰

11.04 *Motion for a Continuance*

A motion for a continuance may be made before or after arraignment, and by statute this is declared not to be a part of the trial so that the personal presence of the accused is not required.¹ The moving party, whether the Commonwealth or the accused, must show good cause for granting the continuance,² and the trial court's decision will be reversed only for a clear abuse of discretion in ruling on the motion.³ Normally, a continuance is entered of record, but a failure to do so does not work a discontinuance of a criminal prosecution.⁴ Ordinarily a continuance carries a case to the next term, but a term may be passed over.⁵

If an amendment of an indictment for a felony or a misdemeanor "operates as a surprise to the defendant" he is entitled to a continuance upon request.⁶ A continuance will be granted for the absence of a material witness when the following requirements are met: due

⁹Va. Code Ann. § 19.1-230.1 (Supp. 1964).

¹⁰Va. Code Ann. § 19.1-231 (Supp. 1964).

¹Va. Code Ann. § 19.1-240 (Repl. Vol. 1960); *O'Boyle v. Commonwealth*, 100 Va. 785, 40 S.E. 121 (1901); *Kibler v. Commonwealth*, 94 Va. 804, 26 S.E. 858 (1897); *Snodgrass v. Commonwealth*, 89 Va. 679, 17 S.E. 238 (1893); *Shelton v. Commonwealth*, 89 Va. 450, 16 S.E. 355 (1892); *Howell v. Commonwealth*, 86 Va. 817, 11 S.E. 238 (1890); *Anderson v. Commonwealth*, 84 Va. 77, 3 S.E. 803 (1887); *Joyce v. Commonwealth*, 78 Va. 287 (1884); *Boswell v. Commonwealth*, 61 Va. (20 Gratt.) 860 (1871); Note, 3 Va. L. Reg. 107 (1897).

²*Thompson v. Commonwealth*, 131 Va. 847, 109 S.E. 447 (1921); *Benton v. Commonwealth*, 90 Va. 328, 18 S.E. 282 (1893).

³*McDaniel v. Commonwealth*, 165 Va. 709, 181 S.E. 534 (1935); *Rosenberger v. Commonwealth*, 159 Va. 953, 166 S.E. 464 (1932); *Hurdle v. Commonwealth*, 157 Va. 948, 162 S.E. 6 (1932); *Smith v. Commonwealth*, 155 Va. 411, 156 S.E. 577 (1931); *Parsons v. Commonwealth*, 154 Va. 832, 152 S.E. 547 (1930); *McElroy v. Commonwealth*, 153 Va. 877, 149 S.E. 481 (1929); *Lufty v. Commonwealth*, 126 Va. 707, 100 S.E. 829 (1919); *Cremeans v. Commonwealth*, 104 Va. 860, 52 S.E. 362 (1905); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890); *Howell v. Commonwealth*, 86 Va. 817, 11 S.E. 795 (1890); *Commonwealth v. Mister*, 79 Va. 5 (1884); *Joyce v. Commonwealth*, 78 Va. 287 (1884); *Harman v. Howe*, 68 Va. (27 Gratt.) 676 (1876); *Hewitt v. Commonwealth*, 58 Va. (17 Gratt.) 627 (1867).

⁴Va. Code Ann § 19.1-185 (Repl. Vol. 1960).

⁵*Bolzanz v. Commonwealth*, 65 Va. (24 Gratt.) 31 (1873).

⁶Va. Code Ann. §§ 19.1-175-77 (Repl. Vol. 1960).

diligence has been used to procure the witness;⁷ the testimony is material and not merely cumulative or corroborative or sought for the purpose of impeaching a witness for the Commonwealth;⁸ there are reasonable grounds for believing the witness can be secured;⁹ and the defendant cannot safely go to trial without the witness.¹⁰ The motion will be granted for absence of counsel due to death or sickness,¹¹ required presence as a member at a session of the General Assembly,¹² or other unavoidable circumstances.¹³ Lack of time to consult authorities is a doubtful ground.¹⁴ The availability of the motion to delay trial until local prejudices have been subsided is a somewhat doubtful ground under the Virginia authorities,¹⁵ but it is clear that continuances cannot be used as a delaying tactic.¹⁶

11.05 *Demurrer and Motion to Quash*

A demurrer to an indictment lies only for defects apparent on its face,¹ while a motion to quash lies either for a defect appearing

⁷Lufty v. Commonwealth, 126 Va. 707, 100 S.E. 829 (1919); Early v. Commonwealth, 86 Va. 921, 11 S.E. 795 (1890); Schonberger v. Commonwealth, 86 Va. 489, 10 S.E. 713 (1890); Hurd v. Commonwealth 32 Va. (5 Leigh) 715 (1834).

⁸McDaniel v. Commonwealth, 165 Va. 709, 181 S.E. 534 (1935); Smith v. Commonwealth, 155 Va. 111, 156 S.E. 577 (1931); McElroy v. Commonwealth, 153 Va. 877, 149 S.E. 481 (1929); Lufty v. Commonwealth, 126 Va. 707, 100 S.E. 829 (1919); Cremeans v. Commonwealth, 104 Va. 860, 52 S.E. 362 (1905); Thompson v. Commonwealth, 88 Va. 45, 13 S.E. 304 (1891); Schonberger v. Commonwealth, 86 Va. 489, 10 S.E. 713 (1890).

⁹Smith v. Commonwealth, 155 Va. 111, 156 S.E. 577 (1931); Thompson v. Commonwealth, 88 Va. 45, 13 S.E. 304 (1891); Hurd v. Commonwealth, 32 Va. (5 Leigh) 715 (1834).

¹⁰Smith v. Commonwealth, 155 Va. 111, 156 S.E. 577 (1931); McElroy v. Commonwealth, 153 Va. 877, 149 S.E. 481 (1929); Cremeans v. Commonwealth, 104 Va. 860, 52 S.E. 362 (1905).

¹¹Kibler v. Commonwealth, 94 Va. 804, 26 S.E. 858 (1897).

¹²Rosenberger v. Commonwealth, 159 Va. 953, 166 S.E. 464 (1932); Kibler v. Commonwealth, 94 Va. 804, 26 S.E. 858 (1897).

¹³Smith v. Commonwealth, 155 Va. 111, 156 S.E. 577 (1931).

¹⁴Wright v. Commonwealth, 114 Va. 872, 77 S.E. 503 (1913).

¹⁵Joyce v. Commonwealth, 78 Va. 287 (1884).

¹⁶Smith v. Commonwealth, 155 Va. 111, 156 S.E. 577 (1931); McElroy v. Commonwealth, 153 Va. 877, 149 S.E. 481 (1929); Cremeans v. Commonwealth, 104 Va. 860, 52 S.E. 363 (1905); Welch v. Commonwealth, 90 Va. 318, 18 S.E. 273 (1893); Early v. Commonwealth, 86 Va. 921, 11 S.E. 795 (1890); Harman v. Howe, 68 Va. (27 Gratt.) 676 (1876); Hewitt v. Commonwealth, 58 Va. (17 Gratt.) 627 (1867); Wormeley v. Commonwealth, 51 Va. (10 Gratt.) 658 (1853).

¹Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10 (1932); Woods v. Commonwealth, 140 Va. 491, 124 S.E. 458 (1924); Gilreath v. Commonwealth, 136 Va. 709, 118 S.E. 100 (1923); Watts v. Commonwealth, 99 Va. 872, 39 S.E. 706 (1901); Crump v. Commonwealth, 98 Va. 833, 23 S.E. 760 (1895); Early v. Commonwealth, 93 Va. 765,

on its face or for a defect outside the indictment.² Both must be entered before the defendant pleads in bar,³ but the court may allow withdrawal of a plea in order to make a motion to quash,⁴ and the trial court's error in overruling a demurrer is not waived by entering a plea in bar.⁵

By demurring, the defendant admits facts well pleaded to be true and asserts that the indictment charges no offense,⁶ the court is without jurisdiction,⁷ or the statute on which the indictment is based is unconstitutional.⁸ When there are several counts, the defendant may demur to the faulty ones only.⁹ A demurrer must specify the grounds on which it is based,¹⁰ but it does not have to be in writing.¹¹ A general demurrer will be overruled if there is one good count to an indictment,¹² and the Supreme Court of Appeals will not consider an assignment of error based on overruling a demurrer unless the record shows the specific grounds on which it was based.¹³

A motion to quash may be used to raise a question as to whether the indictment charges an offense,¹⁴ whether the court has jurisdiction,¹⁵ and whether there has been a misjoinder of offenses.¹⁶ An

²⁴ S.E. 936 (1896); *Thomas v. Commonwealth*, 41 Va. (2 Rob.) 795 (1843); *Commonwealth v. Jackson*, 4 Va. (2 Va. Cas.) 501 (1826).

²⁵ *Watts v. Commonwealth*, 99 Va. 872, 39 S.E. 706 (1901); *Snodgrass v. Commonwealth*, 89 Va. 679, 17 S.E. 238 (1893); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890); *Shifflet*, 55 Va. (14 Gratt.) 642 (1858).

²⁶ *Pflaster v. Commonwealth*, 149 Va. 457, 141 S.E. 115 (1928); *Richards v. Commonwealth*, 81 Va. 110 (1885).

²⁷ *Pflaster v. Commonwealth*, 149 Va. 457, 141 S.E. 115 (1928); *Richards v. Commonwealth*, 81 Va. 110 (1885); *Commonwealth v. Tyree*, 4 Va. (2 Va. Cas.) 262 (1821).

²⁸ Lee, *Criminal Trial in the Virginias* § 82 (1940).

²⁹ *Stanley v. Town of Clintwood*, 143 Va. 540, 129 S.E. 257 (1925); *Rose v. Commonwealth*, 116 Va. 1023, 82 S.E. 699 (1914); *Henricks v. Commonwealth*, 75 Va. 934 (1914).

³⁰ *Ryan v. Commonwealth*, 80 Va. 385 (1885).

³¹ *Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652 (1917).

³² Va. Code Ann. § 19.1-255 (Repl. Vol. 1960).

³³ *Jolly v. Commonwealth*, 136 Va. 756, 118 S.E. 109 (1923).

³⁴ Va. Code Ann. § 8-99 (Repl. Vol. 1960).

³⁵ *Stanley v. Town of Clintwood*, 143 Va. 540, 129 S.E. 257 (1925); *Rose v. Commonwealth*, 116 Va. 1023, 82 S.E. 699 (1914); *Henricks v. Commonwealth*, 75 Va. 934 (1882).

³⁶ Va. Rule 1:8; *Saunders v. Commonwealth*, 186 Va. 1000, 45 S.E.2d 307 (1947); *Hagood v. Commonwealth*, 157 Va. 918, 162 S.E. 10 (1932); *Boyd v. Commonwealth*, 156 Va. 934, 157 S.E. 546 (1931).

³⁷ *Huff v. Commonwealth*, 55 Va. (14 Gratt.) 648 (1858); *Bell v. Commonwealth*, 49 (8 Gratt.) 600 (1851); *Commonwealth v. Clark*, 47 Va. (6 Gratt.) 675 (1849).

³⁸ *Bell v. Commonwealth*, 49 Va. (8 Gratt.) 600 (1851).

³⁹ *Pflaster v. Commonwealth*, 149 Va. 457, 141 S.E. 115 (1928); *Pine v. Commonwealth*, 121 Va. 812, 93 S.E. 652 (1917); *Sprouse v. Commonwealth*, 81 Va. 374

indictment will not be quashed for the omission of words of mere form or for the insertion of surplusage.¹⁷

11.06 *Motion to Amend an Indictment*

Amendments of indictments are covered by three sections of the Code,¹ whose effect is to cut down on unnecessary delay in placing a defendant on trial,² but the distinction between a defective and an invalid indictment remains.³ An indictment for a misdemeanor may be amended, so long as the nature of the offense charged is not changed, at any time before judgment.⁴ Similarly, an indictment for a felony may be amended, so long as the character of the offense is not changed, at any time before⁵ or during the trial.⁶ If amendment is made after the defendant pleads, he must be given an opportunity to plead anew, after having the amended indictment read to him.⁷ If an amendment operates as a surprise to the defendant he is entitled to a continuance upon request.⁸ The Statute of Jeofailes also provides for the amendment of indictments in case of misnomer.⁹

11.07 *Motion for Bill of Particulars*

The purpose of a bill of particulars is set forth in *Livingston v. Commonwealth*¹ in the following language:

“It is true the bill of particulars is not for the purpose of charging the offense. The indictment must do that. The accused

(1886); *Richards v. Commonwealth*, 81 Va. 110 (1885); *Lazier v. Commonwealth*, 51 Va. (10 Gratt.) 708 (1853); *Dowdy v. Commonwealth*, 50 Va. (9 Gratt.) 727 (1852).
¹⁷Va. Code Ann. § 19.1-172 (Repl. Vol. 1960); *Humphreys v. Commonwealth*, 186 Va. 765, 43 S.E.2d 890 (1947); *McCann v. Commonwealth*, 174 Va. 429, 4 S.E.2d 768 (1939); *Young v. Commonwealth*, 155 Va. 1152, 156 S.E. 565 (1931); *Commonwealth v. Woodson*, 36 Va. (9 Leigh) 669 (1839).

¹Va. Code Ann. §§ 19.1-175 -177 (Repl. Vol. 1960).

²Va. Code of 1919, § 4877, Revisor's Note.

³*Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1959).

⁴Va. Code Ann. § 19.1-175 (Repl. Vol. 1960).

⁵Va. Code Ann. § 19.1-176 (Rep. Vol. 1960). Before this section was adopted there was no way to amend an indictment to remedy defects so as to meet the requirement of § 8 of the Virginia Constitution of informing the accused of the nature of accusation. *Woods v. Commonwealth*, 140 Va. 491, 124 S.E. 458 (1924).

⁶Va. Code Ann. § 19.1-177 (Repl. Vol. 1960). *Livingston v. Commonwealth*, 184 Va. 830, 36 S.E.2d 561 (1946); *Brookman v. Commonwealth*, 151 Va. 522, 145 S.E. 358 (1928); *Owsley v. Cunningham*, 190 F. Supp. 608 (E.D. Va. 1961).

⁷Va. Code Ann. § 19.1-177 (Repl. Vol. 1960).

⁸Va. Code Ann. §§ 19.1-175 -177 (Repl. Vol. 1960).

⁹Va. Code Ann. § 19.1-172 (Repl. Vol. 1960).

¹184 Va. 830, 36 S.E.2d 561 (1946).

cannot be tried upon a bill of particulars alone. However, the bill of particulars and the indictment must be read together. The function of the bill of particulars is to supply additional information concerning an accusation. The decisive consideration in each case is whether the matter claimed to be left out of the indictment has resulted in depriving an accused of a substantial right and subjects him to the danger of being tried upon a charge for which he has not been indicted.²

Although the indictment may be good against a demurrer, it may not provide the defendant with the information necessary for him to make a defense,³ and so it is necessary to a fair and orderly trial.⁴ However, a bill of particulars cannot correct an invalid indictment.⁵

A motion for a bill of particulars must be made before the defendant pleads to the merits.⁶ The bill must particularize the charges which the prosecution expects to support with evidence.⁷ It is insufficient if it merely repeats the charge as set forth in the indictment.⁸ A bill may be amended by the court.⁹ The exercise of the trial court's discretion in denying the motion will be upheld unless there is an "affirmative showing that defendant was prejudiced by the failure of the court to require a bill of particulars."¹⁰

Since the defendant may secure additional information by seeking a bill of particulars, the statutory form of indictment for murder and manslaughter, which lays the charge in very general terms, has been upheld.¹¹ Under the Virginia statutory scheme which makes all forms of theft and receiving stolen goods indictable as larceny, the defendant is entitled to a statement in writing from the the Commonwealth's Attorney specifying the statute on which he intends to

²Id. at 837, 36 S.E.2d at 565.

³Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10 (1932); Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917).

⁴Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10 (1932); Wilkerson v. Commonwealth, 122 Va. 920, 95 S.E. 388 (1918); Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917).

⁵Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917); Wilkerson v. Commonwealth, 122 Va. 920, 95 S.E. 388 (1918); Note, 3 Virginia L. Reg (N.S.) 953 (1918).

⁶Boyd v. Commonwealth, 156 Va. 934, 157 S.E. 546 (1931).

⁷Casper v. City of Danville, 160 Va. 929, 169 S.E. 734 (1933).

⁸Casper v. City of Danville, 160 Va. 929, 169 S.E. 734 (1933); Hudgins v. Commonwealth, 142 Va. 628, 128 S.E. 565 (1925); Webster v. Commonwealth, 141 Va. 589, 127 S.E. 377 (1925).

⁹Jennings v. Commonwealth, 133 Va. 726, 112 S.E. 602 (1922).

¹⁰Ward v. Commonwealth, 205 Va. at 569, 138 S.E.2d at 297 (1964). See also Riner v. Commonwealth, 145 Va. 901, 134 S.E. 542 (1926); Allen v. Commonwealth, 122 Va. 834, 94 S.E. 783 (1918); Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917).

¹¹Hurd v. Commonwealth, 159 Va. 880, 165 S.E. 536 (1932).

rely for conviction.¹² If the defendant fails to make the request the Commonwealth's Attorney may ask for a conviction under either statute.¹³

11.08 *Motion to Suppress Evidence*

There is as yet no Virginia statutory and case law on this motion. Until the United States Supreme Court decision in *Mapp v. Ohio*¹ Virginia had been following the state rule under which even illegally seized evidence was admissible in evidence.² So far the exclusionary rule has been given effect by motions to exclude illegally seized evidence at the trial rather than by a motion to suppress evidence prior to trial.³

11.09 *Motion for Change of Venue*

Section 19.1-224 of the Code authorizes the court to order a change of venue upon motion of either the accused or the Commonwealth. The motion may be made in the absence of the accused by a petition signed and sworn to by him, which petition may be acted upon by the court in vacation.¹ The burden is on the defendant to show to the court's satisfaction that good cause exists for changing the venue.² An accused's fears and belief alone are insufficient, but the facts must be established by independent and disinterested evidence.³ The court's denial of a motion for change of venue will not be

¹²Va. Code Ann. § 18.1-109 (Repl. Vol. 1960).

¹³*Hutchinson v. Commonwealth*, 133 Va. 710, 112 S.E. 624 (1922).

¹367 U.S. 643 (1961).

²*Hall v. Commonwealth*, 138 Va. 727, 121 S.E. 154 (1924); *Casey v. Commonwealth*, 138 Va. 714, 121 S.E. 513 (1924).

³See *Clinton v. Commonwealth*, 204 Va. 275, 130 S.E.2d 437 (1963), rev'd 377 U.S. 158 (1964); *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962), cert. denied 372 U.S. 946 (1963).

¹Va. Code Ann. § 19.1-224 (Repl. Vol. 1960).

²*Farrow v. Commonwealth*, 197 Va. 353, 80 S.E.2d 312 (1955); *Maxwell v. Commonwealth*, 169 Va. 886, 193 S.E. 587 (1937); *Evans v. Commonwealth*, 161 Va. 992, 170 S.E. 756 (1933); *Webb v. Commonwealth*, 154 Va. 866, 152 S.E. 366 (1930); *Wood v. Commonwealth*, 146 Va. 296, 135 S.E. 895 (1926); *Parsons v. Commonwealth*, 138 Va. 764, 121 S.E. 68 (1924); *Rudd v. Commonwealth*, 132 Va. 783, 111 S.E. 270 (1922); *Thompson v. Commonwealth*, 131 Va. 847, 109 S.E. 447 (1921).

³*Slayton v. Commonwealth*, 185 Va. 371, 38 S.E.2d 485 (1946); *Evans v. Commonwealth*, 161 Va. 992, 170 S.E. 756 (1933); *Rudd v. Commonwealth*, 132 Va. 783, 111 S.E. 270 (1922); *Thompson v. Commonwealth*, 131 Va. 847, 109 S.E. 447 (1921); *Bowles v. Commonwealth*, 103 Va. 816, 48 S.E. 527 (1904); *Wormeley v. Commonwealth*, 51 Va. (10 Gratt.) 658 (1853).

disturbed on appeal except for a clear abuse of discretion.⁴ In one instance there is a right to change of venue. This is when the mayor of a city or sheriff of a county has called upon the Governor for military force to protect the accused from violence. The court is then required to order a change of venue at once, upon petition, signed and sworn to by the accused.⁵

A defendant may seek a change of venue because of difficulty in obtaining an impartial jury or because of local prejudice. When the allegation is that an impartial jury cannot be secured, the defendant must first take advantage of section 19.1-212 and move to obtain jurors from another county or city.⁶ If an impartial jury is obtained by this means, it is clear that a change of venue was unnecessary.⁷ However, if the defendant seeks a change of venue because of local prejudice, it is not then necessary to move first to obtain jurors from another county.⁸

If the motion for change of venue is granted the court may admit the defendant to bail, to appear on a certain day before the court to which the case is removed, or if not, remand him to custody and order his removal to the jail of the court where the case is to be tried.⁹

⁴Farrow v. Commonwealth, 197 Va. 353, 89 S.E.2d 312 (1955); Slayton v. Commonwealth, 185 Va. 371, 38 S.E.2d 485 (1946); Maxwell v. Commonwealth, 169 Va. 886, 193 S.E. 507 (1937); Evans v. Commonwealth, 161 Va. 992, 170 S.E. 756 (1933); Webb v. Commonwealth, 154 Va. 866, 152 S.E. 366 (1930); Parsons v. Commonwealth, 138 Va. 764, 121 S.E. 68 (1924); Rudd v. Commonwealth, 132 Va. 783, 111 S.E. 270 (1922); Looney v. Commonwealth, 115 Va. 921, 78 S.E. 625 (1913).

⁵Va. Code Ann. § 19.1-224 (Repl. Vol. 1960).

⁶Rudd v. Commonwealth, 132 Va. 783, 111 S.E. 270 (1922); Looney v. Commonwealth, 115 Va. 921, 78 S.E. 625 (1913); Jones v. Commonwealth, 111 Va. 862, 69 S.E. 953 (1911); Waller v. Commonwealth, 84 Va. 492, 5 S.E. 364 (1880); Joyce v. Commonwealth, 78 Va. 287 (1884); Wright v. Commonwealth, 74 Va. (33 Gratt.) 880 (1880).

⁷Slayton v. Commonwealth, 185 Va. 371, 38 S.E.2d 485 (1946); Maxwell v. Commonwealth, 169 Va. 886, 193 S.E. 507 (1937); Webb v. Commonwealth, 154 Va. 866, 152 S.E. 366 (1930); Wood v. Commonwealth, 146 Va. 296, 135 S.E. 895 (1926); Parsons v. Commonwealth, 138 Va. 764, 121 S.E. 68 (1923); Taylor v. Commonwealth, 122 Va. 886, 94 S.E. 795 (1918); Looney v. Commonwealth, 115 Va. 921, 78 S.E. 625 (1913); Bowles v. Commonwealth, 103 Va. 816, 48 S.E. 527 (1904); Joyce v. Commonwealth, 78 Va. 287 (1884); Wright v. Commonwealth, 74 Va. (33 Gratt.) 880 (1880).

⁸Jones v. Commonwealth, 111 Va. 862, 69 S.E. 953 (1911); Burton v. Commonwealth, 107 Va. 931, 60 S.E. 55 (1908); Uzzle v. Commonwealth, 107 Va. 919, 60 S.E. 52 (1908).

The fact that influential citizens have raised a fund by private subscription and then employed counsel to aid in the prosecution of the accused has been held not a ground for a change of venue. Rudd v. Commonwealth, 132 Va. 783, 111 S.E. 270 (1922); Wormeley v. Commonwealth, 51 Va. (10 Gratt.) 658 (1853).

⁹Va. Code Ann. § 19.1-225 (Repl. Vol. 1960).

11.10 *Motion to Waive Trial by Jury*

Trial by jury may be waived in both felony¹ and misdemeanor cases.² When the jury is waived, the court shall try the case.³ Upon a plea of not guilty, with accused's consent after advice of counsel and the consent of the Commonwealth's Attorney and the court, the jury trial will be waived. A minor has the same right to waive jury trial as an adult.⁴

12:00 PLEAS

12.01 *General*

An accused may enter two types of pleas: dilatory and in bar.¹ A dilatory plea is a delaying tactic not going to the merits, which plea, if sustained, disposes of the present charges but is not a bar to later prosecution for the same offense.² Dilatory pleas are of two kinds: plea to the jurisdiction³ and plea in abatement.⁴ In Virginia, all dilatory pleas, including a plea to the jurisdiction, are referred to as pleas in abatement. A plea in bar goes to the merits of the case; and if sustained disposes of the case finally.⁵ By entering the plea, a defendant waives all dilatory pleas.⁶ He undertakes by the production of evidence to establish that the charge cannot be maintained.⁷

Pleas in bar may be filed at the same time as pleas in abatement "or within a reasonable time thereafter; but the issues on the pleas in abatement shall be first tried."⁸ This changes the common law rule that dilatory pleas must precede pleas in bar.⁹ All pleas, both in bar and in abatement, must show matter which if confessed by demurrer or found by the jury will give the judgment prayed by the plea.¹⁰

¹Va. Code Ann. § 19.1-192 (Repl. Vol. 1960).

²Va. Code Ann. § 19.1-193 (Repl. Vol. 1960).

³*Mickens v. Commonwealth*, 178 Va. 273, 16 S.E.2d 641 (1941); *Boaze v. Commonwealth*, 165 Va. 786, 183 S.E. 263 (1936).

⁴*Mickens v. Commonwealth*, 178 Va. 273, 16 S.E.2d 641 (1941).

⁵Lee, *Criminal Trial in the Virginias* § 75 (1940).

⁶*Ibid.*

⁷A motion to quash the indictment or a demurrer may serve the same purpose. *Id.* at § 77

⁸*Id.* at § 75.

⁹*Ibid.*

¹⁰*Curtis v. Commonwealth*, 87 Va. 589, 13 S.E. 73 (1891); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890).

¹¹*Tilley v. Commonwealth*, 89 Va. 136, 15 S.E. 526, 531 (1892).

¹²Va. Code Ann. § 19.1-242 (Repl. Vol. 1960).

¹³The statute became effective in 1919. See the Revisor's Note to Va. Code § 6107.

¹⁴*Tilley v. Commonwealth*, 89 Va. 136, 15 S.E. 526 (1892); *Smith v. Commonwealth*, 85 Va. 924, 9 S.E. 148 (1889) (a plea presenting in different language an issue

A plea in felony cases is mandatory.¹¹ The accused must enter it personally, and the record must so show.¹² The court enters a plea of not guilty when one charged with a felony refuses to plead.¹³ A plea is not necessary in misdemeanor cases,¹⁴ but if the accused is present when his case is called, he must plead or waive the right.¹⁵ The court enters a plea of not guilty when one charged with a misdemeanor does not appear and plead.¹⁶

The withdrawal of a plea already entered is within the discretion of the court and may be allowed if it does not violate any positive rule of law or established practice.¹⁷ It is rarely awarded to allow the substitution of a dilatory plea.¹⁸ When a motion for withdrawal is refused, such action will not be reversed on appellate review unless there has been an abuse of discretion.¹⁹

12.02 *Plea in abatement*

A plea in abatement is a dilatory plea which is made on account of defects apparent on the face of the record or for defects based on matter extrinsic to the record. It is a dilatory plea and not favored, but when sustained the prosecution abates, although without barring a subsequent prosecution.¹ The plea must be made before or at the time of pleading to the merits,² although the court may permit

already presented in another plea is rightly rejected); *Moran v. Commonwealth*, 36 Va. (9 Leigh) 651 (1839) (if averments are omitted which are necessary to show the matter of the plea, the omission is fatal).

¹¹*Roach v. Commonwealth*, 157 Va. 954, 162 S.E. 50 (1932).

¹²*Sperry v. Commonwealth*, 36 Va. (9 Leigh) 623 (1838).

¹³Va. Code Ann. § 19.1-240 (Repl. Vol. 1960); *Whitehead v. Commonwealth*, 60 Va. (19 Gratt.) 640 (1879).

¹⁴Va. Code Ann. § 19.1-184 (Repl. Vol. 1960); *Royals v. City of Hampton*, 201 Va. 552, 111 S.E.2d 795 (1960); *Foy v. Commonwealth*, 132 Va. 671, 111 S.E. 269 (1922); *Bare v. Commonwealth*, 122 Va. 783, 94 S.E. 168 (1917).

¹⁵*Royals v. City of Hampton*, 201 Va. 552, 111 S.E.2d 795 (1960); *Bare v. Commonwealth*, 122 Va. 783, 94 S.E. 168 (1917).

¹⁶Va. Code Ann. § 19.1-184 (Repl. Vol. 1960). See § 12.11, *infra*, as to when the court may enter judgment as if the accused had confessed his guilt.

¹⁷*Bailey v. Commonwealth*, 193 Va. 814, 71 S.E.2d 368 (1952); *Parris v. Commonwealth*, 189 Va. 321, 52 S.E.2d 872 (1949); *Reed v. Commonwealth*, 98 Va. 817, 36 S.E. 399 (1900); *Watson v. Commonwealth*, 87 Va. 608, 13 S.E. 22 (1891); *Curtis v. Commonwealth*, 87 Va. 589, 13 S.E. 731 (1891); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890); *Commonwealth v. Scott*, 51 Va. (10 Gratt.) 749 (1853).

¹⁸*Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890).

¹⁹See cases cited in note 17 *supra*.

¹*Tilley v. Commonwealth*, 89 Va. 136, 15 S.E. 526 (1892); *Commonwealth v. Long*, 4 Va. (2 Va. Cas.) 318 (1822); *Day v. Commonwealth*, 45 Va. (2 Gratt.) 562 (1845).

²*Bailey v. Commonwealth*, 193 Va. 814, 71 S.E.2d 368, cert. denied, 344 U.S. 886 (1952); *Reed v. Commonwealth*, 98 Va. 817, 36 S.E. 399 (1900); *Taylor v. Com-*

withdrawal of a plea in bar in order to permit the defendant to enter a plea in abatement.³ The plea must be in writing and under oath.⁴

A plea in abatement may be used to raise questions of venue,⁵ or the organization of the grand jury or qualifications of the grand jurors.⁶ A plea in abatement is no longer available to challenge the indictment on the ground of misnomer.⁷

Rule 1:8 provides that "In criminal cases questions of venue must be raised in the trial court and before verdict in cases tried by a jury and before judgment in cases tried by the court sitting without a jury."⁸ While this Rule appears to extend the time for raising questions of venue, it has so far only been applied to bar raising a venue question for the first time in the Supreme Court of Appeals.⁹

12.03 *Plea of Guilty*

Under section 19.1-192 of the Code a plea of guilty of a felony must be tendered in person after being advised by counsel.¹ However, the requirement is statutory and may be waived.² In the case of a misdemeanor the plea of guilty may be tendered by the accused in person or by counsel.³ Before accepting a plea of guilty, the court should be sure that the accused is competent and aware of the subsequent effect

monwealth, 90 Va. 109, 17 S.E. 812 (1893); *Curtis v. Commonwealth*, 87 Va. 589, 13 S.E. 73 (1891); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890).

²*Reed v. Commonwealth*, 98 Va. 817, 36 S.E. 399 (1900); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890).

³*Commonwealth v. Sayers*, 35 Va. (8 Leigh) 723 (1837).

⁴*Randall v. Commonwealth*, 183 Va. 182, 31 S.E.2d 571 (1944); *Farewell v. Commonwealth*, 167 Va. 475, 189 S.E. 321 (1937); *Bausell v. Commonwealth*, 165 Va. 669, 181 S.E. 453 (1935); *Hicks v. Commonwealth*, 157 Va. 939, 161 S.E. 919 (1932); *Hodge v. City of Winchester*, 153 Va. 904, 150 S.E. 392 (1929). See also Va. Rule 1:8.

⁵*Bailey v. Commonwealth*, 193 Va. 814, 71 S.E.2d 368, cert. denied, 344 U.S. 886 (1952); *McCue v. Commonwealth*, 103 Va. 870, 49 S.E. 623 (1905); *Early v. Commonwealth*, 86 Va. 921, 11 S.E. 795 (1890); *Lawrence v. Commonwealth*, 86 Va. 573, 10 S.E. 840 (1890); *Richardson v. Commonwealth*, 76 Va. 1007 (1882); *Day v. Commonwealth*, 42 Va. (2 Gratt.) 562 (1845); *Moore v. Commonwealth*, 36 Va. (9 Leigh) 639 (1838); *Kerby v. Commonwealth*, 34 Va. (7 Leigh) 747 (1836); *Commonwealth v. Long*, 4 Va. (2 Va. Cas.) 318 (1822); *Commonwealth v. Cherry*, 4 Va. (2 Va. Cas.) 20 (1815).

⁶Va. Code Ann. § 19.1-172 (Repl. Vol. 1960).

⁷Va. Code Ann. Rule 1:8 (Repl. Vol. 1957).

⁸*Hicks v. Commonwealth*, 157 Va. 939, 161 S.E. 919 (1932); *Boyd v. Commonwealth*, 156 Va. 934, 157 S.E. 546 (1931).

⁹Va. Code Ann. § 19.1-192 (Repl. Vol. 1960).

¹Va. Const. art. I, § 8; Va. Code Ann. § 19.1-192 (Repl. Vol. 1960); *Cottrell v. Commonwealth*, 187 Va. 351, 46 S.E.2d 413 (1948); *Gross v. Smyth*, 182 Va. 724, 30 S.E.2d 570 (1944).

²Va. Code Ann. § 19.1-193 (Repl. Vol. 1960).

of such a plea and that it is freely, understandingly, and voluntarily made.⁴ But the court's failure to inquire directly of the defendant, even though he was erroneously advised by counsel, whether he understands the possible consequences of such a plea is not necessarily a fatal error, this depending on the facts of the case.⁵ Rules for felonies and misdemeanors are the same.⁶ The consent of the Commonwealth is not required in either felonies⁷ or misdemeanors.⁸ If the indictment is founded on a violation of the gambling or public revenue laws, or if the accused fails to appear and plead the court may pass judgment as if the defendant had pleaded guilty.⁹

A plea of guilty equals a conviction and subjects the accused to the full legal penalty for the offense, as if tried and convicted.¹⁰ There is no need for proof of guilt.¹¹ All defenses except that no offense is charged are waived.¹² The accused has a right to have punishment fixed by the court, and so the court cannot impanel a jury for this purpose.¹³ Evidence may be introduced to aid the court in determining the sentence to be imposed.¹⁴

A plea of guilty goes to all counts of the indictment, reaching the good ones, if there are both good and bad counts.¹⁵ It goes to the highest degree of the offense charged.¹⁶

⁴Cooper v. Town of Appalachia, 145 Va. 861, 134 S.E. 591 (1926).

⁵McGrady v. Cunningham, 296 F.2d 600 (4th Cir. 1961).

⁶McGrady v. Cunningham, 296 F.2d 600 (4th Cir. 1961) (involved a felony); and Cooper v. Town of Appalachia, 145 Va. 861, 134 S.E. 591 (1926) (involved a misdemeanor).

⁷Va. Const. art. I, § 8; Va. Code Ann. § 19.1-192 (Repl. Vol. 1960); Cottrell v. Commonwealth, 187 Va. 351, 46 S.E.2d 413 (1948); Dixon v. Commonwealth, 161 Va. 1098, 172 S.E. 277 (1934).

⁸Va. Const. art. I, § 8; Va. Code Ann. § 19.1-193 (Repl. Vol. 1960).

⁹Va. Code Ann. § 19.1-184 (Repl. Vol. 1960).

¹⁰Crutchfield v. Commonwealth, 187 Va. 291, 46 S.E.2d 340 (1948); Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941); Granger v. Commonwealth, 78 Va. 212 (1883).

¹¹As regards murder see, Va. Code Ann. § 19.1-250 (Repl. Vol. 1960); Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941).

¹²Crutchfield v. Commonwealth, 187 Va. 291, 46 S.E.2d 340 (1948).

¹³Cottrell v. Commonwealth, 187 Va. 351, 46 S.E.2d 413 (1948); Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941); Dixon v. Commonwealth, 161 Va. 1098, 172 S.E. 277 (1934); Cooper v. Town of Appalachia, 145 Va. 861, 134 S.E. 591 (1926); McGrady v. Cunningham, 296 F.2d 600 (4th Cir. 1961).

¹⁴Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941); Granger v. Commonwealth, 78 Va. 212 (1883).

¹⁵Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941).

¹⁶Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941); Williams v. Commonwealth, 128 Va. 698, 104 S.E. 853 (1920), discussed in Note, 6 Va. L. Reg. (N.S.) 456 (1920); McGrady v. Cunningham, 296 F.2d 600 (4th Cir. 1961).

12.04 *Plea of Nolo Contendere*

This plea is available in Virginia, as at common law, but it will not be accepted except for light misdemeanors.¹ The plea constitutes an admission of guilt for the particular prosecution, but not for any other proceeding growing out of the same incident.

12.05 *Plea of Not Guilty*

A plea of not guilty puts in issue every allegation of the indictment, which includes the defendant's guilt of the offense charged.¹ The defense of insanity at the time of the act may be made under this plea.²

If the defendant refuses to plead, the plea of not guilty is entered for him in all felony cases,³ and in all misdemeanor cases, except for violations of the gambling and public revenue laws in which instances the court may try the defendant as though he had pleaded guilty.⁴ The court in its discretion may permit the withdrawal of the plea of not guilty.⁵

12.06 *Plea of Denial of Speedy Trial*

Every one who has been indicted for a felony and has been held for trial, whether in jail or not, is discharged forever from prosecution for that offense if three regular terms of a circuit court, or four of a hustings or corporation court, pass without trial.¹ The defense is raised by a plea that is analogous to and has the same effect as a plea of former jeopardy.² Proof that accused remained silent or did not demand trial nor object to a motion for a continuance by the

¹Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1932), discussed in Note, 18 Va. L. Rev. 693 (1932).

²Potts v. Commonwealth, 113 Va. 732, 73 S.E. 470 (1912); Thomas v. Commonwealth, 63 Va. (22 Gratt.) 912 (1872).

³MoLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960); Wood v. Commonwealth, 146 Va. 296, 135 S.E. 895 (1926); Stover v. Commonwealth, 92 Va. 780, 22 S.E. 874 (1895); Baccigalupo v. Commonwealth, 74 Va. (33 Gratt.) 807 (1880); Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961).

⁴Va. Code Ann. § 19.1-240 (Repl. Vol. 1960); Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860 (1871).

⁵Va. Code Ann. § 19.1-184 (Repl. Vol. 1960).

⁶Bailey v. Commonwealth, 193 Va. 814, 71 S.E. 368; cert. denied, 344 U.S. 886 (1952); Reed v. Commonwealth, 98 Va. 817, 36 S.E. 399 (1900); Watson v. Commonwealth, 87 Va. 608, 13 S.E. 22 (1891); Curtis v. Commonwealth, 87 Va. 589, 13 S.E. 731 (1891); Early v. Commonwealth, 86 Va. 921, 11 S.E. 795 (1890); Commonwealth v. Scott, 51 Va. (10 Gratt.) 749 (1853).

⁷Va. Code Ann. § 19.1-191 (Repl. Vol. 1960).

⁸Commonwealth v. Davis, 17 Va. L. Reg. 509 (1911).

Commonwealth is not sufficient to overcome his prima facie case under the statute.³

12.07 *Plea of Former Jeopardy*

The Virginia Constitution guarantees that one charged with a crime shall not be put twice in jeopardy for the same offense.¹ The defense is raised by a special plea of former acquittal or conviction,² sworn to,³ in writing.⁴ The defense may be waived, either expressly or impliedly,⁵ and may not be raised for the first time on appeal.⁶ The plea must show in what court the accused was tried, the time, the specific offense charged, the acquittal or conviction, or other circumstances constituting double jeopardy. The accused must definitely and substantially show by the allegations of his plea that there was an identity of the two offenses both in law and in fact, and that he is the same person as was formerly in jeopardy.⁷

A plea of former jeopardy if good in substance, even though informal, will be sustained on demurrer.⁸ However, when the prior indictment was void, no jeopardy ever attached, and so the plea should be overruled.⁹ If the former trial was in another court and

³Howell v. Commonwealth, 186 Va. 894, 45 S.E.2d 165 (1947); Flanary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 (1945).

¹Va. Const. art. I, § 8.

²Royals v. City of Hampton, 201 Va. 552, 111 S.E.2d 795 (1960); Reaves v. Commonwealth, 192 Va. 443, 65 S.E.2d 559 (1951); Driver v. Seay, 183 Va. 273, 32 S.E.2d 87 (1944); Seymour v. Commonwealth, 133 Va. 775, 112 S.E. 806 (1922).

³Sigmon v. Commonwealth, 200 Va. 258, 105 S.E.2d 171 (1958).

⁴Sigmon v. Commonwealth, 200 Va. 258, 105 S.E.2d 171 (1958); Reaves v. Commonwealth, 192 Va. 443, 65 S.E.2d 559 (1951); Driver v. Seay, 183 Va. 273, 32 S.E.2d 87 (1944); Burford v. Commonwealth, 179 Va. 752, 20 S.E.2d 509 (1942); DeBoer v. Commonwealth, 147 Va. 671, 137 S.E. 469 (1927).

⁵Mack v. Commonwealth, 177 Va. 921, 15 S.E.2d 62 (1941); Benton v. Commonwealth, 91 Va. 782, 21 S.E. 495 (1895); Briggs v. Commonwealth, 82 Va. 554 (1886).

⁶Royals v. City of Hampton, 201 Va. 552, 111 S.E.2d 795 (1960); Zimmerman v. Commonwealth, 148 Va. 745, 138 S.E. 569 (1927); Owens v. Commonwealth, 129 Va. 757, 105 S.E. 531 (1921).

⁷Sigmon v. Commonwealth, 200 Va. 258, 105 S.E.2d 171 (1958); Reaves v. Commonwealth, 192 Va. 443, 65 S.E.2d 559 (1951); DeBoer v. Commonwealth, 147 Va. 671, 137 S.E. 469 (1927); Commonwealth v. Allen, 18 Va. L. Reg. 410 (1912); Justice v. Commonwealth, 81 Va. 209, appeal dismissed, 136 U.S. 639 (1885); Commonwealth v. Somerville, 3 Va. (1 Va. Cas.) 164 (1810).

⁸Day v. Commonwealth, 64 Va. (23 Gratt.) 915 (1873).

⁹Dulin v. Lillard, 91 Va. 719, 20 S.E. 821 (1895); Richards v. Commonwealth, 81 Va. 110 (1885); Robinson v. Commonwealth, 73 Va. (32 Gratt.) 866 (1879); Randall v. Commonwealth, 65 Va. (24 Gratt.) 644 (1874).

the plea does not set forth the essential allegations, it should be overruled.¹⁰

Double jeopardy is also covered by statute,¹¹ which involves the same procedures.¹²

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¹⁰*Dykeman v. Commonwealth*, 201 Va. 807, 113 S.E.2d 867 (1960); *Wortham v. Commonwealth*, 26 Va. (5 Rand.) 669 (1827).

¹¹Va. Code Ann. § 19.1-259 (Repl. Vol. 1960).

¹²*Sigmon v. Commonwealth*, 200 Va. 258, 105 S.E.2d 171 (1958).

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