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STATUTORY COMMENT

JURY TRIALS FOR JUVENILE DELINQUENTS IN VIRGINIA

The United States Supreme Court in *In re Gault*[1] held that the Due Process Clause requires the application of "the essentials of due process and fair treatment,"[2] during a juvenile hearing. However, this does not require that a juvenile hearing conform to all the requirements of a criminal trial.[3] Among those essentials of due process and fair treatment which must be accorded juveniles are right to notice of the charges, right to counsel, the privilege against self-incrimination, and a determination based on sworn testimony.[4] It has also recently been held that the quantum of proof required in juvenile proceedings is that of proof beyond a reasonable doubt.[5] The Court has had the question before it of whether a jury trial is an essential of due process to which a juvenile is entitled. The Court, at that time, refused to decide the issue on policy grounds, as the case had arisen prior to the Court's earlier determination that a jury trial was required of states under the fourteenth amendment.[6] However, certiorari has again been granted in a case which raises the jury trial for juveniles issue and which overcomes the earlier obstacle.[7]

In granting juveniles certain rights, the Court rejected the " 'civil' label-of-convenience which has been attached to juvenile proceedings" as a reason for holding the Due Process Clause inapplicable to juvenile proceedings.[8] However, the Court has not rejected the basic premise that juvenile proceedings are civil; it has only stated that such a classification does not obviate the need for due process.[9] Although generally

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[1]387 U.S. 1 (1967).

[2]*Id.* at 30.

[3]*In re* Gault, 387 U.S. 1 (1967); *see* Kent v. United States, 383 U.S. 541 (1966).

[4]*In re* Gault, 387 U.S. 1 (1967); *see* Estes v. Hopp, 73 Wash. 2d 263, 438 P.2d 205 (1968).

[5]*In re* Winship, 90 S. Ct. 1068 (1970).

[6]DeBacker v. Brainard, 396 U.S. 28 (1969). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), the Court had previously decided that a jury trial was a fundamental concept of ordered liberty and thus was required of the states in criminal actions by virtue of the fourteenth amendment. But, in *DeStefano v. Woods*, 392 U.S. 631 (1968), the Court determined that *Duncan* and *Bloom* were to be given prospective ruling only. Since the juvenile delinquency adjudication in *DeBacker* arose prior to *Duncan* and *Bloom*, the holdings in those cases were inapplicable.

[7]*In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), *cert. granted*, 397 U.S. 1036 (1970). Since the adjudication in *In re Burrus* arose subsequent to *Duncan* and *Bloom*, it satisfies the Supreme Court's earlier objection in *DeBacker*.

[8]*In re* Gault, 387 U.S. 1 (1967).

[9]*Compare In re* Winship, 90 S.Ct. 1068 (1970), *with In re Gault*, 387 U.S. 1 (1967).

characterized as civil, juvenile proceedings have occasionally been held to be criminal,[10] quasi-criminal,[11] and sui generis.[12] Because of the various characterizations and treatments given to juvenile proceedings, ascertainment of statutory and constitutional rights of juveniles is difficult. In Virginia the proceeding is expressly stated not to be a criminal one and is apparently treated as a civil proceeding.[13] Such a characterization, not as yet rejected by the United States Supreme Court,[14] is crucial to the issue of a juvenile's right to a jury under the Virginia Constitution.

In Virginia juveniles are granted a jury trial by statute only on appeal, if at all.[15] Neither denying a jury to juveniles nor permitting a jury only on appeal appears to violate the Virginia Constitution. Juvenile proceedings, classified as civil, would fall within the guaranty of Article I, section 11 of the Virginia Constitution.[16] However, article I, section 11 guarantees the right to a jury trial only as it existed at common law at the time of the adoption of the Virginia Constitution.[17] Juveniles were tried as criminals at common law and juvenile delinquency proceedings were unknown. Juvenile proceedings are purely statutory proceedings and were enacted after the adoption of the Virginia Constitution.[18] Therefore, article I, section 11 would not appear to require that juveniles be given a jury trial.[19] It also appears that

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[10]*Cf. In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1968).

[11]*See In re* Winship, 90 S.Ct. 1068, 1070 (1970).

[12]State v. Santana, 444 S.W.2d 614 (Tex. 1969), *vacated*, 397 U.S. 596 (1970).

[13]VA. CODE ANN. § 16.1-179 (Supp. 1970) provides:

> Except as otherwise provided, no adjudication or judgment upon the status of any child under the provisions of this law shall operate to impose any of the disabilities ordinarily imposed by conviction for a crime, nor shall any such child be denominated a criminal by reason of any such adjudication, nor shall such adjudication be denominated a conviction.

See Kiracofe v. Commonwealth, 198 Va. 833, 97 S.E.2d 14 (1957); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

[14]*See* Shone v. State, 237 A.2d 412 (Me. 1968) (noting that the United States Supreme Court had not rejected the civil characterization of juvenile proceedings).

[15]VA. CODE ANN. § 16.1-214 (Supp. 1970).

[16]VA. CONST. art. I, § 11 provides:

> That no person shall be deprived of his life, liberty or property without due process of law....
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> That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. . . .

[17]Bowman v. State Entomologist, 128 Va. 351, 105 S.E. 141 (1920).

[18]Ch. 350 § 8 [1914] Va. Acts 700. *See* Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967), *cert. denied*, 392 U.S. 945 (1968).

[19]*See* Ragsdale v. City of Danville, 116 Va. 484, 82 S.E. 77 (1914). *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *Ex parte* Sharp, 15 Idaho 120, 96 P. 563 (1908); Pugh v. Bowden, 54 Fla. 302, 45 So. 499 (1907).

the legislature may have made juvenile proceedings cases in equity.[20] If juvnile proceedings are equitable, article I, section 11 would clearly not require jury trials for juveniles since the guaranty of this article is inapplicable to equity proceedings.[21]

However, the Virginia Supreme Court of Appeals may have modified the constitutional result where juvenile proceedings are treated as equitable or as coming within the guaranty of Article I, section 11. In *Mickens v. Commonwealth*[22] it was held that the juvenile courts were the "other inferior tribunals" referred to in article I, section 8 of the Virginia Constitution.[23] Such a holding would bring juvenile proceedings within the jury provision of article I, section 8 rather than article I, section 11. However, the case was on appeal from a conviction in the circuit court of an aggravated felony. The juvenile court had not adjudicated the juvenile a delinquent, but merely certified him to the circuit court as capable of standing trial as an adult.[24] Thus the court's statement concering the status of juvenile courts was dicta and arguably resulted from a failure to note the civil-criminal distinction. On the other hand, the court may have intended to hold that manifestly a juvenile proceeding was criminal. If that was the case the court was ostensibly relegating a juvenile commitment of delinquency to that class of common law offenses termed petty crimes which were triable without a jury in the first instance.[25] However, petty crimes are triable by a jury on appeal. If *Mickens* were to be strictly followed so as to bring juvenile courts under article I, section 8, juveniles would be entitled to a jury trial. It would be permissable to allow the jury trial for the first time on appeal.[26]

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[20]*See* VA. CODE ANN. § 16.1-214 (Supp. 1970).

[21]W. S. Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S.E. 15 (1921).

[22]178 Va. 273, 16 S.E.2d 641, *cert. denied*, 314 U.S. 690 (1941).

[23]VA. CONST. art. I, § 8 provides in part:

> Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal and a trial by jury in some court of record having original criminal jurisdiction.

[24]VA. CODE ANN. § 16.1-176 (Supp. 1970) provides that the juvenile court must certify a juvenile as capable of standing trial as an adult before a circuit court may proceed against him as a criminal.

[25]*See generally* Callan v. Wilson, 127 U.S. 540 (1888); Brown v. Epps, 91 Va. 726, 21 S.E. 119 (1895).

[26]*Compare* Capital Traction Co. v. Hof, 174 U.S. 1 (1899), *and* Bowman v. State Entomologist, 128 Va. 351, 105 S.E. 141 (1920), *with* Callan v. Wilson, 127 U.S. 540 (1888), *and* Brown v. Epps, 91 Va. 726, 21 S.E. 119 (1895). The Virginia Supreme Court of Appeals has held that a jury need not be accorded in the first instance in a criminal proceeding. Gaskill v. Commonwealth, 206 Va. 486, 144 S.E.2d 293 (1965). However, the decision was rendered before *Duncan v. Louisiana*, 391 U.S.

If juveniles are given a jury trial it is pursuant to VA. CODE ANN. Section 16.1-214 (Supp. 1970) which provides:

> From any final order or judgment of the juvenile court affecting the rights or interests of any person under the age of eighteen years coming within its jurisdiction, an appeal may be taken within ten days by any person aggrieved to the circuit, corporation, or hustings court having equity jurisdiction of such city or county....
>
> Proceedings in juvenile cases in such courts shall conform to the equity practice where evidence is taken ore tenus; provided, however, *that an issue out of chancery may be had as a matter of right upon the request of either party*. . . .[27]

Whether section 16.1-214 provides for jury trials for juveniles is unclear. Under Virginia's first juvenile code enacted in 1914, a jury trial was provided for on appeal. Appeals from juvenile courts were taken in the same manner as appeals from any final order of a police justice or justice of the peace.[28] Appeals in such courts were had as a matter of right to a court with original common law jurisdiction,[29] where a jury trial could be had on request.[30] In 1922 these provisions were changed, and it was provided that juvenile appeals were to be taken in the manner now provided for in section 16.1-214.[31] Appeals pursuant to section 16.1-214 are taken into equity where a jury is generally not provided.[32] By so providing, the legislature may have intended to deprive juveniles of their previously enjoyed right to a jury trial. Conversely, the legislature may have wanted to retain jury trials for juve-

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146 (1968), which held that jury trials in criminal cases were required of the states by virtue of the fourteenth amendment. The court in *Gaskill* discussed the problem in relation to *Palko v. Connecticut*, 302 U.S. 319 (1937), which held that jury trials were not a prerequisite to the rendition of justice and thus not required of the states by the Due Process Clause. Presumably *Duncan* incorported the *Callan* holding to the effect that a jury must be granted in the first instance in criminal proceedings, and therefore overturned *Gaskill*. If the United States Supreme Court in *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *cert. granted*, 397 U.S. 1036 (1970), holds that essentials of due process require that a juvenile be given a jury trial, *Callan* may again be incorporated to require such a trial in the first instance. In view of the fact that juvenile commitments are for an indeterminate period, the petty-criminal classification of delinquency might not operate to allow a jury only on appeal. *See* Mickens v. Commonwealth, 178 Va. 273, 16 S.E.2d 641, *cert. denied*, 314 U.S. 690 (1941).

[27]Emphasis added.

[28]Ch. 350, § 8 [1914] Va. Acts 700.

[29]Ch. 142, § 12(1), [1914] Va. Acts 232.

[30]Ch. 100, §§ 15-18, [1872-1873] Va. Acts 83-84.

[31]Ch. 481, § 1920 [1922] Va. Acts 829.

[32]*See, e.g.*, Katchen v. Landy, 382 U.S. 323 (1966).

niles on appeal by providing that an issue out of chancery was a matter of right, while preserving the confidentiality of the proceeding.[33]

The construction of "issue out of chancery as a matter of right" determines whether the right to a jury was revoked or preserved. Issue out of chancery as a matter of right is a new procedure not previously provided for in equity courts. Traditionally an issue out of chancery was granted, not as a matter of right, but in the discretion of the chancellor.[34] The purpose of an issue out of chancery was to satisfy the chancellor's conscience on any doubtful issue of fact, by having a jury decide upon the issue.[35] Where the chancellor was in doubt as to the issue of fact, originally he framed the issue and sent it out to a common law court for trial.[36] The common law court through judicial comity certified the jury verdict back to the chancellor. In such cases the jury's verdict, though usually followed,[37] was advisory only and not binding

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[33]In construing a statutory mandate, the primary object is to ascertain the legislative intent. Watkins v. Hall, 161 Va. 924, 172 S.E. 445 (1934); Fairbanks, Morse & Co. v. Town of Cape Charles, 144 Va. 56, 131 S.E. 437 (1926). Where the legislative intent is unclear, resort must be had to rules of statutory construction in interpreting the statute. Under the rules of construction it would seem that the legislature's intent was to preserve a jury trial on appeal. Revisors of statutes are presumed not to change the law, if the language which they use fairly admits of a construction which makes it consistent with the former statutes. Keister's Adm'r v. Keister's Ex'rs., 123 Va. 157, 96 S.E. 315 (1918).

[34]*See, e.g.*, Stevens v. Duckett, 107 Va. 17, 57 S.E. 601 (1907); Hogan v. Leeper, 37 Okla. 655, 133 P. 190 (1913).

[35]Catron v. Norton Hardware Co., 123 Va. 380, 96 S.E. 853 (1918); Carter v. Carter, 82 Va. 624 (1886); Crebs v. Jones, 79 Va. 381 (1884). The court may direct an issue on a single fact or all the matters in dispute, and though it is improper to submit an issue of law, submission of a mixed question of law and fact is permissable. *See* Kohn v. McNulta, 147 U.S. 238 (1893). A juvenile hearing is not strictly an equitable proceeding in that it is usually based upon the violation of a criminal statute and proceedings must satisfy some of the criminal due process requirements. Issues out of chancery are appropriate in all legal causes of action. Fischer v. Carrol, 46 N.C. 27 (1853). Thus, an issue out of chancery would seem to be proper in a juvenile proceeding.

[36]E. MEADE, LILE'S EQUITY PLEADING AND PRACTICE, § 254 (3d ed. 1952) (hereinafter cited as E. MEADE). In Virginia the same court exercises both law and equity jurisdiction and therefore the issues are tried *before the chancellor himself*. It is immaterial whether the chancellor is sitting on the law or chancery side of the court.

[37]The right to a jury trial is jealously guarded and there is a general belief that the best way to ascertain facts is through a jury trial. *See* Baylis v. Traveller's Ins. Co., 113 U.S. 316 (1885); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967) [hereinafter cited as THE PRESIDENT'S COMMISSION]. The Virginia Supreme Court of Appeals has held that the chancellor should abide by the verdict unless good cause appears to the contrary, and where the chancellor has found contrary to the verdict the question on appeal is whether the evidence preponderates in favor of the jury's or the chancellor's verdict. De Jarnette v. Thomas M. Brooks Lumber Co., 199 Va. 18, 97 S.E.2d 750 (1957); Bunkley v. Commonwealth, 130 Va.

on the chancellor.[38] When the legislature provided that either party could have an issue out of chancery as a matter of right, it enacted an ambiguous, seemingly contradictory procedure. An issue out of chancery was directed only in the discretion of the chancellor, and under section 16.1-214 the chancellor's discretion is no longer the sole determining factor as to when an issue will be directed out of chancery. The procedure in section 16.1-214 is, therefore, somewhat analogous to issue on a plea,[39] in that both may be had as a matter of right. Issue on a plea is a procedure similar to issue out of chancery except that the chancellor is directed by statute to submit the issue to a jury.[40] Issue on a plea is available in a more limited situation than issue out of chancery,[41] and when the issue is submitted, the verdict of the jury is binding on the chancellor.[42]

By providing for "issue out of chancery" and providing for it "as a matter of right" it seems that section 16.1-214 has combined characteristics of issue out of chancery and issue on a plea. The situations in which an issue may be submitted to a jury are expanded by this combination to a larger number than would be available under either procedure alone. Since the phrase "issue out of chancery" was specifically used in section 16.1-214, impliedly an issue need not meet the strict requirements of issue on a plea[43] to be submitted to a jury. This would allow the submission of an issue in any case where the facts were doubtful. However, providing that the issue is a matter of right expands the

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55, 108 S.E. 1 (1921). On the other hand, the chancellor cannot rubber stamp the jury's verdict. A decree in equity results from the chancellor's discretion, and therefore the chancellor must decide the case for himself though aided by the jury verdict. Basey v. Gallagher, 87 U.S. (20 Wall.) 670 (1874). *See* Catron v. Norton Hardware Co., 123 Va. 380, 96 S.E. 853 (1918).

[38]Jury verdicts on issues out of chancery are advisory only and serve merely to satisfy the conscience of the chancellor. Fitchette v. Cape Charles Bank, Inc., 146 Va. 715, 133 S.E. 492 (1926); Hull v. Watts, 95 Va. 10, 27 S.E. 829 (1897). The chancellor need not formally set aside the jury's verdict, but may disregard it and enter a non-conforming verdict. Idaho & Oregon Land Improvement Co. v. Bradbury, 132 U.S. 509 (1889). He also need not grant a new issue on the basis of errors committed on the trial of the issue. Since the ultimate decree rests with the chancellor, he may enter a verdict in accord with the jury determination if he feels the result would or should be the same. Watt v. Starke, 101 U.S. 247 (1880).

[39]Defense by plea is used in equity when the defendant desires to present a *single state of facts* as a defense to the plaintiff's suit. Illustrations of the use of a plea are: the statute of limitations, *res judicata*, and usury. E. MEADE, § 199. Where the plaintiff takes issue on the plea rather than amending the bill to avoid it, either party is entitled to have the issue determined by a jury. E. MEADE, § 206.

[40]VA. CODE ANN. § 8-213 (Repl. Vol. 1957).

[41]*See* E. MEADE, § 199; note 40 *supra*.

[42]*See, e.g.*, Phillips v. Wells, 147 Va. 1030, 133 S.E. 581 (1926); Towson v. Towson, 126 Va. 640, 102 S.E. 48 (1920).

[43]*See* E. MEADE, § 199.

coverage of section 16.1-214 even further. The one previous requirement to obtain an issue out of chancery—that the case be doubtful—is eliminated where a statute provides for direction of an issue as a matter of right.[44] In acting according to the statutory mandate[45] a chancellor must evidently submit to the jury an issue of fact when either party so requests.[46]

The extent to which the jury trial provided for in section 16.1-214 accords to juveniles those rights customary in criminal jury trial depends on the way in which issues may be framed for the jury. An issue out of chancery must be submitted in a form similar to a special interrogatory, requiring either an affirmative or negative answer and precluding a general verdict.[47] Since the jury determination in Section 16.1-214 is in the nature of a special verdict, the juvenile is not granted

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[44]Beverly v. Rhodes, 86 Va. 415, 10 S.E. 572 (1889). *See* Keagy v. Trout, 85 Va. 390, 7 S.E. 329 (1888); Moseley v. Brown, 76 Va. 419 (1882).

[45]*Cf.* Fitchette v. Cape Charles Bank, Inc., 146 Va. 715, 133 S.E. 492 (1926).

[46]Under traditional equity principles, a chancellor could send an issue out of chancery on every doubtful issue of fact. *See* Jones v. Buckingham Slate Co., 116 Va. 120, 81 S.E. 28 (1914) (which along with *Carter v. Jeffries*, 110 Va. 735, 67 S.E. 284 (1910), gives examples of the form of an issue). It is unclear whether or not § 16.1-214 limits the right to an issue out of chancery to a single issue of fact by providing that a party may have "an" issue, and if so limited, how broad an issue of fact it may be.

[47]*Compare* Doss v. Tyack, 55 U.S. (14 How.) 189 (1852); *with* Hulley v. Chedic, 22 Nev. 127, 36 P. 783 (1894), *and* Scarbrough v. Isham, 29 Tenn. App. 216, 196 S.W.2d 73 (1946). Since under § 16.1-214 only those issues requested to be directed out of chancery have to be submitted, the issues need not encompass all material issues as for a special verdict. *See* United States v. Esnault-Pelterie, 299 U.S. 201 (1936). However, the issue must be so framed as to embrace the contemplated object. That is, the issue must be stated so that the jury will have to decide on all the facts necessary to a determination on the issue directed out of chancery. Carter v. Campbell, 3 Va. (Gilm.) 159 (1820); Braxton v. Willing, Morris & Co., 8 Va. (4 Call) 288 (1795).

Since a jury does not decide issues of law but only issues of fact, an issue out of chancery is analogous to a special verdict in a proceeding at law. Were jury trials held to be mandatory for juveniles under federal due process or section 8 of the Virginia Constitution, the statute would not appear to be invalid for the reason that it provides for a special as opposed to a general verdict. Special verdicts are used in some state criminal cases, and they were not unknown in criminal cases at common law. *Compare* United States v. Noble, 155 F.2d 315 (3d Cir. 1946), *with* State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964). The constitutional right to a jury has also been held to be the right to have a jury decide issues of fact only. *In re* Martin, 16 F. Cas. 881 (No. 9154) (C.C.S.D. N.Y. 18—).

Even though a special verdict is not constitutionally objectionable, the mere fact that a chancery court may on occassion summon a jury to try an issue of fact is not the equivalent of trial by jury. Cates v. Allen, 149 U.S. 451 (1893). Whether providing that the chancellor must submit the issue to the jury, as under § 16.1-214, is equivalent to a jury trial is arguable.

a jury trial in the same sense as in a criminal trial[48] where the jury applies the law to the facts in arriving at its verdict and also sets the length of confinement.[49] In precluding the jury from deciding questions of law,[50] the submission of an issue to the jury of whether or not a juvenile is "delinquent" is prohibited, because an adjudication of delinquency involves a mixed question of law and fact. It would also be improper to frame the issue in terms of guilt or innocence, because juvenile proceedings cannot be for the trial and punishment of crimes.[51] However, where the juvenile is within the court's jurisdiction for the violation of a statute or ordinance, the issue would properly be phrased in terms of whether the juvenile committed each of the acts necessary to constitute a violation of the statute.[52] The framing of issues of fact for the jury would certainly be more difficult where the juvenile is before the court as being neglected or dependent.[53]

Although the jury trial provided by section 16.1-214 is not strictly like that in a criminal case, it appears that under this equity procedure the juvenile is entitled to have the jury's determination of the facts given conclusive effect.[54] Traditionally when the issue out of chancery

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[48]*Cf.* United States v. Noble, 155 F.2d 315 (3d Cir. 1946); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

[49]VA. CODE ANN. § 16.1-178 (Supp. 1970) provides that a commitment to the State Board of Welfare and Institutions is indeterminate in length.

[50]It is improper to submit a question of law to the jury in issue out of chancery. *See* Apache State Bank v. Daniels, 32 Okla. 121, 121 P. 237 (1911).

[51]Mickens v. Commonwealth, 178 Va. 273, 16 S.E.2d 641, *cert. denied*, 314 U.S. 690 (1941).

[52]Traditionally an issue out of chancery was directed in the chancellor's discretion, either on his own motion or on the motion of one of the parties. Stevens v. Duckett, 107 Va. 17, 57 S.E. 601 (1907); Hogan v. Leeper, 37 Okla. 655, 133 P. 190 (1913). Presumably the chancellor still has final control over the form and wording used in an issue out of chancery pursuant to § 16.1-214. *See* Jones v. Buckingham Slate Co., 116 Va. 120, 81 S.E. 28 (1914).

[53]VA. CODE ANN. § 16.1-158(1) (Supp. 1970) provides that the juvenile court has jurisdiction over the custody of a child where he is abandoned, unsupported, without parental care, or is engaged in conduct injurious to his welfare. It would seem that these conditions would be especially hard to frame as factual issues because of looseness of the statutory definitions. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 38 (1967) (hereinafter cited as THE PRESIDENT'S COMMISSION, TASK FORCE REPORT).

[54]Not only would the jury's determination appear to give conclusive effect on the particular fact submitted to the jury, but it would appear to be conclusive in regard to the nature of the proceeding. The chancellor, unlike the juvenile court judge, is not in a position where he can commit a juvenile as being dependent or neglected even though a determination has been made that the juvenile has not violated a statute or ordinance. This is because on appeal the social report required in VA. CODE ANN. § 16.1-164 for the juvenile court is "made available only to the court and the attorney for the defendant *after the guilt or innocence of the*

was directed in the discretion of the chancellor, the jury verdict was purely advisory.[55] However, where the chancellor has been directed by statute to submit an issue to a jury, as in section 16.1-214, it is generally binding on the chancellor.[56] Since section 16.1-214 provides that an issue out of chancery is granted as a matter of right, by analogy the chancellor would treat the verdict as binding.[57] Otherwise, the chancellor could do after a jury verdict what the legislature instructed him not to do before direction of the issue. The legislature instructed that where either party demanded it, the chancellor was not to decide the issue according to his own conscience but submit the issue to a jury. By disregarding the jury verdict the chancellor would be going against what might be the legislature's intent of having the issues of fact decided by a jury.[58] On the other hand, the legislature specifically used "issue out of chancery." Thus the legislature arguably desired that the chancellor make the ultimate decision according to his own conscience after having been advised by a jury.

Section 16.1-214 also poses problems in that the equity procedure involved must be adapted in order to accord juveniles the other delin-

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accused has been determined." VA. CODE ANN. § 16.1-214 (Supp. 1970) (emphasis added).

This provision requires differentiation between the adjudicatory and dispositional stages of the hearing and therefore provides for a bifurcated system on appeal. Such a system has been continuously recommended and should be retained in any statutory revision. *See* THE PRESIDENT'S COMMISSION, TASK FORCE REPORT 35.

[55]Fitchette v. Cape Charles Bank, Inc., 146 Va. 715, 133 S.E. 492 (1926); Hull v. Watts, 95 Va. 10, 27 S.E. 829 (1897).

[56]For example, the verdict of a jury on an issue on a plea is binding on the chancellor to the same extent a jury verdict is binding on the court in any legal cause of action. Towson v. Towson, 126 Va. 640, 102 S.E. 48 (1920). This is because the chancellor must act in obedience to the statutory mandate and not in exercising any of the ordinary equity powers. The legislative mandate qualifies the chancellor's ordinary power to decide the case strictly according to his own conscience. Fitchette v. Cape Charles Bank, Inc., 146 Va. 715, 133 S.E. 492 (1926). This same reasoning has also been used to require the chancellor to follow the jury's verdict on an issue *devisavit vel non*—where the equity probate court certifies the issue to a jury of whether the testator executed the will in question. *Compare* Hartman v. Strickler, 82 Va. 225 (1886), *with* McGlothlin v. Keen, 140 Va. 84, 124 S.E. 451 (1924). The result is also similar in equity proceedings to quiet title. *See* Bath Hardwood Lumber Co. v. Back Creek Mountain Corp., 140 Va. 280, 125 S.E. 213 (1924); VA. CODE ANN. § 55-153 (Repl. Vol. 1969).

[57]The chancellor would still be able to set aside for good cause the verdict of the jury on an issue out of chancery and direct a new issue. *See* Meade v. Meade, 111 Va. 451, 69 S.E. 330 (1910); Repass v. Richmond, 99 Va. 508, 39 S.E. 160 (1901); Pleasants, Shore & Co. v. Ross, 1 Va. (1 Wash.) 197 (1793).

[58]Treating the verdict as binding would be consistent with principles of statutory construction in that it would give meaning to "as a matter of right." Courts are bound, if possible, to give effect to every sentence, clause, or word contained in a statute. King v. Empire Collieries Co., 148 Va. 585, 139 S.E. 478 (1927).

eated due process rights.[59] For instance, the quantum of proof for appeals must be altered from the traditional equitable standard of preponderance of the evidence.[60] In 1946 the Virignia Supreme Court of Appeals held that the adjudication of delinquency was too serious a reflection upon character to be allowed except where "proven by evidence which leaves no reasonable doubt."[61] The United States Supreme Court has also recently held in accord with the Virginia Court that adjudications in juvenile courts must be based on a quantum of proof beyond a reasonable doubt.[62] Thus where an issue out of chancery is submitted to a jury, the jury must find that the facts involved exist beyond a reasonable doubt. Though a departure from traditional equity procedure, requiring a juvenile to be committed on the same degree of proof required in a criminal proceeding would seem to be a desirable result. This would be especially true when the juvenile is adjudged delinquent on the basis of an act which would be criminal if committed by an adult.[63]

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[59]Essentials of due process and fair treatment require that juveniles be accorded the right to notice of the charges, right to counsel, privilege against self-incrimination, a determination based on sworn testimony, and a quantum of proof of beyond a reasonable doubt. *See In re* Gault, 387 U.S. 1 (1967); *In re* Winship, 90 S.Ct. 1068 (1970).

[60]Proof beyond a reasonable doubt is the standard required in juvenile proceedings. *In re* Winship, 90 S. Ct. 1068 (1970); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946); § 16.1-214, which does not specifically require that the equitable standard be used, must be held to allow the beyond a reasonable doubt standard to be used. Otherwise the statute would be invalid.

[61]Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946). *See also In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954). In his dissent Justice Musmanno stated that:

> Even when the ill-starred child becomes an old man the record will be there to haunt, plague and torment him. It will be an ominous shadow following his tottering steps, it will stand by his bed at night and it will hover over him when he dozes fitfully in the dusk of his remaining day.

Id. at 529 (dissenting opinion).

[62]*In re* Winship, 90 S. Ct. 1068 (1970). The Court took note of the Virginia Supreme Court of Appeals' decision in *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946).

[63]The Supreme Court of Illinois in *In re Urbasek*, 38 Ill.2d 535, 232 N.E.2d 716 (1968), held that the reasonable doubt standard is required where the juvenile is committed for acts which, if committed by an adult, would be criminal. However, only the preponderance of the evidence standard was required in the truly civil proceeding where the juvenile was adjudged dependent or neglected. The United States Supreme Court, while not specifically acknowledging its acquiscence in the differentiation between quasi-criminal and truly civil cases, has been careful to point out that its decisions were involving quasi-criminal proceedings. *See In re* Gault, 387 U.S. 1, 13 (1967); *In re* Winship, 90 S. Ct. 1068, 1070 (1970).

Many other problems arise in regard to handling a juvenile proceeding on appeal according to the procedure provided for in section 16.1-214. It is unclear from the wording of the statute how the trial on appeal is initiated, and whether the juvenile's answer is evidence in his favor.[64] It does appear, however, that on appeal the proceeding is a trial de novo.[65] This places the juvenile in an advantageous position as far as pre-trial discovery is concerned.[66] In addition to what was obtained in the original hearing, the juvenile may bring a cross-bill to obtain facts from the Commonwealth's attorney which would aid in his defense.[67] On the other hand, a juvenile is protected from unlimited discovery by virtue of *In re Gault*.[68]

Though section 16.1-214 seemingly grants a jury trial on issues of fact, much of the procedure involved is ambiguous. The traditional equity concepts and procedure must be altered in their application to juvenile proceedings. Resolution of these problems is needed and could be had by eliminating equity procedure in juvenile hearings alto-

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[64]Traditionally in equity, a defendant's answer was evidence in his favor which must be overcome by the testimony of two witnesses, or one witness with corroborating circumstances. *See, e.g.*, Thornton v. Gordon, 41 Va. (2 Rob.) 719 (1844). The plaintiff could not deprive the defendant of his right to have his answer considered as evidence on his behalf. *See* Carle v. Corhan, 127 Va. 223, 103 SE. 699 (1920); Jones v. Abraham, 75 Va. 466 (1881). *See also* Powell v. Manson, 63 Va. (22 Gratt.) 177 (1872). This equity rule has now been changed by statute and an answer has evidentiary value only when an answer under oath is demanded. VA. CODE ANN. § 8-213 (Repl. Vol. 1957); *see generally* Wilson v. Wilson, 136 Va. 643, 118 S.E. 270 (1923). Thus, in a juvenile appeal, a demand for an answer under oath would generally not be made. Otherwise, the truth of the petition would have to be proven in a specific way—by the testimony of two witnesses, or one with corroborating circumstances.

[65]*See* Dickerson v. Commonwealth, 162 Va. 787, 173 S.E. 543 (1934). A trial de novo requires that the court hear the evidence as if it were exercising original jurisdiction and make a new determination of guilt or innocence. *See* Gravely v. Deeds, 185 Va. 662, 40 S.E.2d 175 (1946); Malouf v. City of Roanoke, 177 Va. 846, 13 S.E.2d 319 (1941); Thomas Gemmell, Inc. v. Svea Fire & Life Ins. Co., 166 Va. 95, 184 S.E. 457 (1936).

[66]The hearing in the juvenile court would then be similar to a preliminary hearing in a criminal case. VA. CODE ANN. § 19.1-163. (Repl. Vol. 1969) provides that where an accused has been arrested before being indicted, he has the right to a preliminary hearing. Though not its principal purpose, such a hearing may serve as a vehicle of pre-trial discovery. *See* United States v. Chase, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967).

[67]*See* Crockett v. Woods, 97 Va. 391, 34 S.E. 96 (1899); Scott v. Rowland, 82 Va. 484, 4 S.E. 595 (1887); Ragland v. Broadnax, 70 Va. (29 Gratt.) 401 (1877).

[68]387 U.S. 1 (1967). The United States Supreme Court in *Gault* held that a juvenile is entitled to the right against self-incrimination. Limited discovery is allowed, however. *See* WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 255 (1969).

gether.[69] The legislature also needs to specifically state whether or not a juvenile is entitled to a jury trial. This first requires that a basic value or policy judgment be made as to whether a juvenile should be given the right to a jury trial.[70] Most states do not provide for jury trials for juveniles, either in the juvenile courts or on appeal,[71] and there are valid considerations to support this judgment. A jury trial would bring a good deal more formality into the proceeding without providing a better fact-finding process.[72] Unequal and disparate decisions are invited where the jury decides under the loose statutory formulae, and attorneys react with more staging, effect and emotion.[73] Conversely there are other considerations which militate against denying a jury trial to juveniles. Informal procedures may themselves be an obstacle to effective treatment of the delinquent as they engender a feeling of injustice.[74] Also, efforts to help must be based on an accurate determination of the facts and a judicial trial is the best method for determination of facts that our system has devised.[75] However, once this value judgment concerning juvenile jury trials is made, section 16.1-214 should be amended to resolve all ambiguity.

JAMES A. PHILPOTT, JR.

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[69]Juveniles within the court's jurisdiction as being dependent or neglected might still be retained in equity proceedings. *See* VA. CODE ANN. § 16.1-158(1) (Supp. 1970); *In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1968). The question in such cases is not a factual determination as to whether a juvenile has committed a quasi-criminal act. It is primarily a discretional determination of whose custody the child should be in for his own best interest.

[70]Whether or not the legislature may make the policy judgment depends on the outcome of *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *cert. granted*, 397 U.S. 1036 (1970).

[71]*See, e.g.*, CAL. WELF. & INST'NS CODE §§ 680, 800 (West 1966); ILL. REV. STAT. Ch. 37, §§ 701-4, 704-8 (Supp. 1970); N.Y. CODE CRIM. PROC. §§ 913-1, 913-4, 519 (McKinney 1958); N.C. GEN. STAT. §§ 7A-285, 7A-289 (1969); OHIO REV. CODE ANN. §§ 2151.35, 2151.52 (Baldwin 1968).

[72]THE PRESIDENT'S COMMISSION, TASK FORCE REPORT 38.

[73]*Id.*

[74]THE PRESIDENT'S COMMISSION 85.

[75]*Id.*