April 1977

Survey of Developments in West Virginia Law: 1976

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SURVEY OF DEVELOPMENTS IN WEST VIRGINIA LAW: 1976-1977

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ADMINISTRATIVE LAW

I. DISMISSAL FROM CIVIL SERVICE

In Thurmond v. Steele, 1 the court dealt with two issues arising out of the dismissal by the Department of Motor Vehicles of an employee covered by civil service. The employee had been arrested for driving while intoxicated. He was driving his personal automobile on personal business at the time of the arrest. Part of the employee's duties included hearings on license revocations and administrative decisions with driver's suspension and license revocation.

The first issue the court decided was whether an employee under civil service could be dismissed for activities outside the scope of his employment. The Civil Service Commission believed that an employee under civil service could only be dismissed when convicted of a crime involving moral turpitude. 2 However, the court found that if a state employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority, and bear a substantial relationship to the efficient performance of the employee's duties, dis-

2 Id. at 212.
disciplinary action can be taken regardless of the outcome of any criminal charges. Since the Department of Motor Vehicles had offered to introduce evidence to show the impairment of his ability to perform his duties, the case was remanded to the Civil Service Commission for further proceedings.

Second, the court held that in an employee dismissal case before the Civil Service Commission, although the burden of proof is still on the employee to show that his dismissal was improper, the employing authority must first present evidence justifying its action. The court decided this issue because the Civil Service Commission had indicated that it would require the employee to go first in the presenting of evidence.

3 The court in reaching this decision relied on Foster v. Department of Pub. Welfare, 159 So. 2d 515 (La. App. 1964); and Baron v. Commonwealth, State Civil Serv. Comm'n, 8 Pa. 6, 301 A.2d 427 (1973).

4 W. Va. Code Ann. § 29-6-13 (Cum. Supp. 1976), changes the burden of proof to the employing authority in all cases before the Civil Service Commission. Before, the burden of proof in an employee dismissal case was on the employee to show that he had been wrongfully dismissed. Now, the burden of proof is on the employing authority to prove that the dismissal was proper.

CONSTITUTIONAL LAW

I. ATTACHMENT

Although the trend in recent years has been to invalidate most summary prejudgment creditor's remedies as violative of the constitutionally required due process of law, the West Virginia Supreme Court of Appeals, in Persinger v. Edwin Associates, Inc., upheld the West Virginia attachment statute. The facts of Persinger reveal that the plaintiff filed an affidavit with the clerk of the Kanawha County Circuit Court alleging that he had a claim against the defendant. The affidavit showed the amount of the claim, its nature, and the grounds for the claim. The plaintiff asserted that the defendant was removing its property from the state and/or converting it into cash in order to avoid service of process or execution and to defraud its creditors. The defendant, Edwin Associates, Inc., moved to quash the writ of attachment, claiming that the affidavit supporting the writ was insufficient, and contained false assertions and grounds and that the statute itself was unconstitutional, violating the due process clause of the fourteenth amendment to the United States Constitution. The Kanawha County Circuit Court held the statute unconstitutional.

On appeal, the West Virginia Supreme Court of Appeals first addressed the question of the sufficiency of the affidavit seeking the writ of attachment. After examining the requirements of the statutes regarding the necessity of alleging certain specific statutory grounds of attachment and the material facts which give rise to those grounds, the court held that the affidavit in question was indeed sufficient to support a writ of attachment.

Turning to the constitutional issue, the court distinguished

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* W. VA. CODE ANN. §§ 38-7-1 to -3 (1966).
* The grounds . . . are the following: (a) That the defendant . . . is a foreign corporation . . . or (b) has left or is about to leave the State, with intent to defraud his creditors; or . . . (d) is removing . . . his property . . . out of this State, so that process of execution . . . will be unavailing; or (e) is converting . . . his property . . . into money or securities, with intent to defraud his creditors.
* "[T]he affiant shall also state in his affidavit the material facts relied upon by him to show the existence of the grounds . . . ." W. VA. CODE ANN. § 38-7-3 (1966).
* 230 S.E.2d at 464.
the facts and statutes involved in Persinger from those involved in a string of recent United States Supreme Court decisions. This line of cases had held that certain types of prejudgment remedies (similar to attachment) were unconstitutional if, prior to any deprivation of a significant property right, the debtor was not given some form of assurance that the deprivation was legitimate as defined by the due process clause.\(^{11}\)

The West Virginia court viewed the leading case of Sniadach v. Family Finance Corp.,\(^{12}\) which held a Wisconsin attachment statute unconstitutional because it did not provide for pre-seizure notice and opportunity to be heard, as having an unclear impact.\(^{13}\) Fuentes v. Shevin,\(^{14}\) in which certain replevin statutes were struck down for lack of compliance with Sniadach in not providing a pre-seizure hearing, was viewed by the West Virginia court as suggesting that prejudgment remedies would be constitutional if the creditor could establish the validity of his claim through a hearing prior to seizure.\(^{15}\) Both decisions were viewed by the court as somewhat suspect because they were decided by a United States Supreme Court which had two vacancies.\(^{16}\)

Two later United States Supreme Court decisions, rendered by a nine man court, were also used by the West Virginia court in ruling upon the constitutionality of the statute in question in Persinger. In Mitchell v. W. T. Grant Co.,\(^{17}\) the Louisiana sequestration statute was upheld, despite constitutional challenges, because the creditor, in order to qualify for the writ, had to assert material facts entitling him to the relief. The Court in Mitchell also stressed the fact that a judge had been the presiding officer at the sequestration proceeding.\(^{18}\) However, in North Georgia Finishing, Inc. v. Di-Chem, Inc.,\(^{19}\) the same Court struck down a Georgia garnishment procedure because the statute fatally lacked re-


\(^{12}\) 395 U.S. 337 (1968).

\(^{13}\) 230 S.E.2d at 462.


\(^{15}\) 230 S.E.2d at 462.

\(^{16}\) Id.

\(^{17}\) 416 U.S. 600 (1973).

\(^{18}\) Id. at 616.

\(^{19}\) 419 U.S. 601 (1975).
requirements for an immediate hearing and judicial participation in the process.

The West Virginia Supreme Court of Appeals upheld the statutory attachment scheme because a defendant could obtain an immediate hearing, including a jury trial upon the question of the sufficiency of the affidavit, on request. The statute was viewed as holding out special protection for the debtor by its bonding provisions. The failure to have a judge preside over the attachment was not seen by the court as depriving the defendant of due process: the clerk as an officer of the court was deemed to have the power to issue the writ.

Although the West Virginia Supreme Court of Appeals upheld the constitutionality of West Virginia's attachment procedure, it is difficult to understand the reasoning behind the decision in light of the United States Supreme Court decisions.

As previously noted, in *Sniadach v. Family Finance Corp.*, the United States Supreme Court held the Wisconsin garnishment procedure unconstitutional. The statutory scheme allowed the clerk of any court of record to issue a summons at the request of the creditor which garnished one-half of the wages of the debtor. This procedure was deemed to violate due process because there was no provision for a pre-seizure hearing or for notice of any kind to the debtor that his property was no longer to be in his possession. Garnishment of a laborer's wages was viewed by the Court as being potentially disastrous to a family perhaps already struggling with insufficient financial resources. Thus, the Court viewed not only the statutory procedure as unconstitutional, but also saw the effects of that procedure as reprehensible. In a concurring opinion, Mr. Justice Harlan stated what has become the foundation thesis for the constitutional protection of "the new property": "I think that due process is afforded only by the kinds of 'notice' and

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22 230 S.E.2d at 464.
24 That statute read in part: "When wages . . . are the subject of garnishment action, the garnishee shall pay over to the principal defendant . . . a subsistence allowance, out of the wages . . . then owing . . . ." Wis. Stat. § 267.18(2)(a) (1966).
25 395 U.S. at 339.
'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use.”

Three years later in *Fuentes v. Shevin*, the Court dealt with a constitutional challenge to the Florida and Pennsylvania replevin statutes. Again, the statutes allowed the summary repossession of the debtor's chattels without requiring the creditor to afford any pre-seizure notice and hearing. The procedures sanctioned by the states were found to violate the requirements of due process in that those requirements were viewed by the Supreme Court as including the right to receive notice and defend in a meaningful manner: "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.”

Even a temporary non-final deprivation was held to be a deprivation of a property right protected by the fourteenth amendment, because the property interest entitled the debtor to the use and continued possession of the goods. This basic property right was held not to be limited to the "necessities of life", which was the argument of the lower court in an attempt to distinguish *Sniadach*. The Court in *Fuentes* commented in dictum that a summary seizure could be valid for due process purposes in order to protect some extraordinary governmental function or a vital interest of the public at large.

The Louisiana sequestration process upheld by the United States Supreme Court in *Mitchell v. W. T. Grant Co.*, was similar to those procedures struck down in *Fuentes* and *Sniadach*, except for the fact that a judge presided over the entire proceeding. The different result in *Mitchell* can perhaps be attributed to the greater probability of fairness which the Court perceived in the required presence of a judge and to the conservative majority's focus upon the rights of the creditor. The *Mitchell* Court saw a very real dan-

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27 395 U.S. at 343 (Harlan, J., concurring).
30 407 U.S. at 81.
31 *Id.* at 85-86.
32 *Id.* at 88-90.
33 *Id.* at 90-91.
ger in pre-seizure notice because it would give the debtor an opportunity to "hide" the goods, and the Court accordingly required a hearing, not before possession was disturbed, but only before the final taking of the property.

The principles first enumerated in Fuentes and Sniadach were reiterated in North Georgia Finishing Inc. v. Di-Chem, Inc.35 This time, it was a Georgia garnishment statute which violated the requirements of due process.36 Rather than overruling Mitchell, the Court distinguished that case as being based upon the special features of the Louisiana statute, including the requirement that a judge preside over the issuance of the writ.37

If Mitchell had been decided differently, the West Virginia attachment statute would clearly be unconstitutional. Fuentes, Sniadach, and Di-Chem all invalidate statutory schemes virtually identical to the West Virginia procedure because none of them offered the debtor his constitutional right to appear and defend against the claim pressed against him. The West Virginia process does not offer such an opportunity.38

Mitchell, however, injected some uncertainty into the picture. The Mitchell Court approved a scheme which did not require that pre-seizure notice be given to the debtor, laying great stress on the fact that a judge was involved in the process. The West Virginia attachment statute provides neither for notice nor for judicial involvement in the process.39 The West Virginia court chose to ignore the United States Supreme Court's emphasis on the use of a judge, noting that a clerk is an officer of the court and that neutral officers other than judges have been approved by the United States Supreme Court as presiding officers in other types of hearings. Those

37 419 U.S. at 607.
38 The West Virginia distress statute was held unconstitutional by the West Virginia Supreme Court of Appeals in State ex rel. Payne v. Walden, 190 S.E.2d 770 (W. Va. 1972). Since the statute permitted a tenant's goods to be levied upon without notice, it was held to violate due process requirements. The court found that the actual effect of the statute was to keep the poor out of the courts. The court in Persinger distinguished Payne by noting that the attachment statute allowed for an immediate hearing after seizure, whereas the distress statute had no provision for a hearing until after the tenant posted double bond, breached the terms of that bond, and the landlord brought suit.
cases which approved the use of neutral officers other than judges as hearing officers are easily distinguishable, however, because they deal with what are essentially administrative proceedings. An attachment hearing is a legal proceeding. It is difficult, perhaps impossible, for a clerk with no legal training to ascertain that the material facts alleged in an affidavit do indeed give rise to the statutory grounds leading to the issuance of a writ of attachment. For these reasons, it may be very possible that the West Virginia scheme is fatally defective because it lacks both the judicial participation and the requirements of notice mandated by the United States Supreme Court.

II. Rape Statute—Constitutionality

The constitutionality of the former West Virginia rape statute was upheld by the West Virginia Supreme Court in the consolidated appeals of State ex rel. Rasnake v. Narick and Schnell v. Narick. The appellants were indicted in Marshall County on counts of forcible rape. In their constitutional challenge, petitioners asserted that the punitive provisions of the amended statute unreasonably burdened their right to a trial by jury by encouraging a guilty plea in order to avoid a potentially harsher jury verdict.

As authority for their positions, appellants relied upon United States v. Jackson, in which the United States Supreme Court invalidated a portion of the Federal Kidnapping Act, which provided for imposition of the death penalty on a defendant who exercised his right to a jury trial but had no provision for imposing the death penalty on one who waived a jury trial or chose to plead guilty. The Supreme Court held that this was an impermissible burden on the constitutionally guaranteed right to a jury trial.

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40 The court cited Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972). These cases relied upon by the court to support the position that the use of a neutral officer, other than a judge, as the presiding officer at a hearing will meet due process requirements involved parole hearings, which are administrative in nature. There is no fundamental right to parole, but one's right to be free from governmental interference with his property is protected by the fifth and fourteenth amendments. Thus, the need for fairness and precision in the attachment process is greater.

43 390 U.S. 570 (1967).
finding that the increased risk of a jury imposing the death penalty needlessly encouraged a defendant to waive his rights.\textsuperscript{45}

The Nevada Supreme Court, in \textit{Spillers v. State},\textsuperscript{48} invalidated that state's rape statute, which had punitive provisions similar to those contained in the Federal Kidnapping Act. Under the Nevada statute, the judge could impose a prison sentence on the defendant if he waived a jury trial or pleaded guilty, but a jury could impose the death sentence.\textsuperscript{47} Since the right to a trial by jury is a fundamental one,\textsuperscript{48} and the statute's provisions were viewed as coercing a guilty plea,\textsuperscript{49} the statute was held unconstitutional.

The West Virginia Supreme Court of Appeals held that the punishment and sentencing provisions of the West Virginia statute differed from the Nevada and federal statutes which had been declared unconstitutional. The amended statutes provided that if a defendant is found guilty by a jury, the maximum sentence, currently life imprisonment, would be imposed unless mercy is recommended, in which case the penalty was imprisonment for ten to twenty years. If the accused waived his right to a jury trial or if he pleaded guilty, the trial judge had the same option.\textsuperscript{50} The court found that this scheme did not unconstitutionally encourage or coerce a waiver of the right to a jury trial.\textsuperscript{51}

The petitioners contended that, although the statutes did not vest unequal discretion in the judge and jury in imposing sentence, there was a subtle compulsion in the plea bargaining process to plead guilty and thus enhance the chances of obtaining a mitigated sentence. They also argued that the lack of any standards to guide the jury in determining what specific sentence to impose upon a defendant was unconstitutional because of the likelihood that any evidence presented on the issue of mitigation would tend to prejudice the jury on the issue of guilt.\textsuperscript{52}

As precedent for denying this challenge, the majority cited

\begin{itemize}
\item[44] 390 U.S. at 582-83.
\item[45] 390 U.S. at 582-83.
\item[46] 84 Nev. 2d 23, 343 P.2d 18 (1968).
\item[48] U.S. CONST. amend. VI.
\item[49] 84 Nev. 2d at 30, 343 P.2d at 22.
\item[51] 227 S.E.2d at 205.
\item[52] Id.
\end{itemize}
McGautha v. California,\(^4\) in which the issue was whether a statute which provided no specific standards in determining a sentence was void. The Court held that it was impossible to set up any standard in a criminal statute that could be expressed in broad and fair language and provide specific guidelines to aid the jury in determining sentence.\(^5\)

As to the issue of a subtle compulsion to plead guilty in order to bargain for a mitigated sentence, the West Virginia court noted with approval the holding of the Supreme Judicial Court of Massachusetts in Commonwealth v. Morrow.\(^6\) In that case, it was held that a plea of guilty is not invalidated by the fifth amendment even if it is motivated by a defendant's desire to accept a lesser penalty.\(^6\)

The West Virginia court also noted that the requirements of due process and equal protection in a criminal case include the right for a defendant to be tried as are others charged with the same offense and that a state has great latitude in setting up the criminal procedure it wishes to follow.\(^7\) The court cited a Pennsylvania case in support of the proposition that a statute does not deny equal protection simply because it provides for an indeterminate sentence.\(^8\)

Justice Neely and Justice Wilson disagreed with the majority's holding in the Rasnake and Schnelle appeals. The dissent focused upon the practical difficulties of pleading innocence and presenting evidence to prove that innocence, while at the same time showing evidence of mitigation in the commission of the crime which might tend to influence the jury in setting sentence. As a remedy, they advocated a bifurcated trial with separate hearings determining guilt and sentence.\(^9\)

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\(^5\) Id. at 208.
\(^7\) 296 N.E.2d at 474, citing Brady v. United States, 397 U.S. 742, 751 (1969).
\(^8\) Lynch v. United States, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

\(^{10}\) 227 S.E.2d at 209-10.
III. **Separation of Church and State**

*Board of Church Extension v. Eads*[^60] dealt with, at base, a simple property issue greatly complicated by the constitutional guarantees of the separation of church and state. The issue to be decided was whether the events leading to the operation of a reverter clause in a deed had occurred.

In 1950, the citizens of the town of Gilboa organized a Church of God. The property on which the church building was constructed was conveyed to the local congregation with a provision in the deed providing that the Gilboa Church of God was to continue to enjoy the benefits of the property so long as it maintained doctrinal unity with the General Ministerial Assembly of the Church of God, and that if ever the local congregation did not maintain fellowship and doctrinal unity, the property was to vest in the Board of Church Extension and Home Missions of the Church of God[^61].

The Executive Committee of the West Virginia Ministerial Assembly made the determination that a break of doctrinal unity had occurred. The Executive Council of the General Ministerial Assembly directed the sale of the property, and plaintiff corporation brought suit in West Virginia to aid in the sale, based on the alleged break of doctrinal unity and the consequent operation of the reverter clause. The defendants asserted that plaintiff corporation was an incorporated church which, by statute, was prohibited from bringing suit in West Virginia[^62]. They also contended that since the General Ministerial Assembly had made no determination of a break in doctrinal unity between the General Ministerial Assembly and the local congregation, the reverter clause had not yet become operative[^63].

The court emphasized in its opinion that the question of doctrinal unity was not one that could be properly decided by a state court[^64]. The court first had to decide whether the church structure involved was hierarchical or congregational. Justice Neely, in writ-

[^61]: Id. at 913.
[^63]: 230 S.E. 2d at 919.
[^64]: Id. at 914.
ing for the majority of a divided court, noted that hierarchical churches, those with organized by-laws and pyramiding levels of authority, have a long tradition of canon law and courts should, and pursuant to the first amendment, must, respect the final adjudications of hierarchical church tribunals, provided the adjudication was not procured by fraud. Congregational churches, he wrote, are without such central internal authority, and consequently civil courts have been unable to rely upon canon law or any final adjudication of a higher tribunal in deciding controversies involving these churches. Therefore, in determining a controversy involving a congregational church as a litigant, a civil court must restrict itself to applying a completely neutral principle of law and may not look toward the accomplishment of any particular result.

The court then decided, without giving the basis for the decision, that the Church of God was a congregational church and therefore the court was not bound by the decision of the West Virginia Executive Council, nor by that of the National Executive Council, that the Gilboa Church of God had fallen out of doctrinal unity and fellowship.

The majority held that the reverter clause was plain and unambiguous, reasoning that since the clause called for the opinion of the General Ministerial Assembly and the entire General Ministerial Assembly did not render such an opinion, the reverter clause was inoperative and the national church organization had no right to the property.

In a curious display of judicial technique which perhaps rendered the earlier segment of the opinion meaningless, the court dismissed the appeal on its merits, holding that the plaintiff had no standing to bring suit. By virtue of the applicable statute at the time the suit was instituted, reasoned the court, no church could qualify to do business in West Virginia, no organization could bring suit without qualifying to do business in West Virginia, and a plea of abatement was valid against any such corporation.

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45 230 S.E.2d at 919.
46 Id. at 919-20.
47 Id. at 920-21.
which attempted to sue in West Virginia. The majority characterized the Board of Extension as a church, barred from bringing suit, rather than as an auxiliary organization which could bring suit.\textsuperscript{71}

Justice Flowers and Justice Berry dissented vehemently from this opinion. Sharply criticized by the dissent was the majority's reversal of the finding of facts of the lower court without a showing that the finding was clearly wrong.\textsuperscript{72} The dissent also noted that recent West Virginia and United States Supreme Court cases have decreed that religious bodies may decide matters of church government, policy, and administration.\textsuperscript{73} The majority was also criticized for classifying the Board of Church Extension as a church in corporate form, prohibited from doing business in West Virginia. The statute was amended, after the lower court decision but prior to the decision by the Supreme Court of Appeals, so that maintenance of suit is no longer conditioned upon a prior finding that the party is doing business in West Virginia.\textsuperscript{74} The dissenters argued that the court should apply the law in effect at the time of its decision.\textsuperscript{75}

IV. Succession by Governor

In \textit{State ex rel. Maloney v. McCartney},\textsuperscript{76} the West Virginia Supreme Court of Appeals upheld the constitutionality of West Virginia's governors succession amendment,\textsuperscript{77} interpreted it as being constitutionally applicable to the then sitting governor, and issued a writ of mandamus instructing the Secretary of State to refrain from certifying the incumbent governor as a Republican candidate for the gubernatorial nomination in the 1976 primary election. The court's opinion can be divided into two areas: the constitutionality of the amendment under the United States Constitution, and application of the amendment.

Respondent, Governor Arch A. Moore, attacked the West Virginia governors succession amendment as violative of the four-

\begin{footnotesize}
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\item 71 230 S.E.2d at 920, \textit{citing} Powell v. Dawson, 45 W. Va. 780, 32 S.E. 213 (1899).
\item 73 230 S.E.2d at 922, \textit{citing} Serbian Orthodox Diocese v. Milivojevich, 423 U.S. 911 (1976).
\item 76 223 S.E.2d 607 (W. Va.), \textit{cert. denied}, 425 U.S. 927 (1976).
\end{footnotes}
\end{footnotesize}
teenth amendment to the United States Constitution in that it denied equal protection to those persons who would be inclined to vote for Moore if given the opportunity. A lack of applicable authority for their respective stances plagued both the majority and dissenting opinions on this question. Justice Neely, writing for the majority, spoke in terms of differentiating voting restrictions which work only to disenfranchise a group of citizens from those which accomplish a "valid public purpose" and only incidently disenfranchise voters. The "valid public purpose" rationale is a vague standard which was met, the majority declared, by the West Virginia governors succession amendment.

The dissent, however, proposed an equally vague "compelling state interest" standard, which they felt was not met by the succession amendment. Neither opinion cited any controlling authority on point, probably as a result of the fact that although over twenty state constitutions restrict the ability of an incumbent governor to succeed himself, litigation as to the constitutionality of such a restriction has only arisen under one such provision. Although the majority alluded to the twenty-second amendment to the United States Constitution, which limits any one candidate to two terms as President, as supportive of its position, the validity of that amendment is not determinative of the validity of a similar state provision under the fourteenth amendment.

The majority opinion, however, did not rest upon the validity of the twenty-second amendment, but upon the meeting of the standards of equal protection by the governors succession amendment.

The majority cited Maddox v. Forston, a Georgia case, as authority for the proposition that restrictions upon succession of incumbents is universally held to serve a rational public policy. The court then went on to define the state interest in such a provision and presented an historical dissertation in the process. Basically, the court viewed the restriction as necessary to prevent entrenchment of one man or machine in a political system, thereby

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78 223 S.E.2d at 611.
79 Id. at 620.
80 Id. at 611.
82 223 S.E.2d at 611.
afflicting the health of the state governmental system. The dissent did not attack this assertion of a state interest.

Both opinions discussed a series of cases in which provisions limiting the right to vote and the right to candidacy were found unconstitutional. The majority distinguished each on its facts and found no sufficient state interest in either situation. Because such state interest was found in the case before it, the court declared the succession amendment to be in compliance with the United States Constitution. The dissenters cited substantially the same cases and analogized them to the case at bar as encompassing the same right to vote, but they failed to compare the lack of a sufficient state interest found in the cited cases to any such lack in the Maloney case. The dissent seemed intent on proving that any unconstitutionality affected the actual voters rather than the one ineligible candidate.

In one case cited by the dissent, Williams v. Rhodes, the United States Supreme Court held that an Ohio restriction on a party's qualifying for ballot position was unconstitutional. The dissenters in Maloney presented selected portions of that opinion as upholding the inviolate right to vote but ignored the express finding in that case of a lack of a state interest which would have legitimatized such a provision. The Court in Williams noted that "[i]n determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classi-

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83 Id. at 611-12.
84 It is arguable that the reason for such a rule has evaporated and therefore the rule should do likewise. With modern communication devices, a more educated electorate, and modern protective provisions such as civil service, the likelihood of political entrenchment is decreasing, especially in a relatively small voting area such as West Virginia.
86 223 S.E.2d at 612-13.
87 Id. at 619-21.
88 Maddox v. Forston, supra n. 114, had a novel approach to this issue. The court in that case found that the constitutional right to vote encompassed only the right to vote for eligible candidates, and therefore, the state succession provision only had to meet a valid interest standard in determining eligibility.
89 393 U.S. 23 (1968).
"The State here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote . . . ." 91

The dissent also argued that any state interest in support of the Amendment should be determined by reference to the state legislature.92 Anyone familiar with the West Virginia legislative process is aware of the problems in determining the intent behind any legislation: there is no recorded legislative history. What seems to underlie the dissent's argument is the unstated issue of burden of proof in determining a legitimate state interest. Both sides threw around vague principles of inherent validity and inherent right to vote, but neither mentioned the question of who must prove state interest. The majority noted that it was incumbent upon the court to "support every provision of the Constitution of the State of West Virginia"93 and impliedly found constitutionally sufficient state interest behind the Amendment, via the aforementioned survey of the reason for the rule. Perhaps the dissent's best attack would have been to point out the lack of a proven state interest to legitimate disenfranchisement.94

While the constitutionality issue was perhaps the controlling factor in the case, the validity of the succession amendment and its application to Governor Moore was also discussed. Respondent Moore argued that a discrepancy between the House and Senate journals as to the substance of the Amendment rendered the adoption of the Amendment void, but the dissent and majority wisely agreed that since it was clearly intended that the same provision be adopted and presented to the voters for ratification, any ruling which upheld Moore's contention would place every act of the Legislature "at the mercy of secretaries, typesetters, and proof readers."95

Application of the Amendment to respondent Moore was discussed, perhaps unnecessarily, by both the majority and dissent in

90 Id. at 30.
91 Id. at 31.
92 223 S.E.2d at 620.
93 Id. at 612.
94 It must be noted that no actual representative of the State of West Virginia was a party in this action to protect the State's interest. Therefore, perhaps it was proper for the Court to adopt such a protective approach to the case.
95 223 S.E.2d at 615.
a trade-off of constitutional construction maxims. The dissent argued interpretation of the Amendment in favor of eligibility; the majority found no ambiguity in the wording of the Amendment which would require judicial construction in the first place. In light of the fact that the third sentence of the Amendment makes express provision for respondent Moore’s situation, the latter viewpoint appears the more reasonable.

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98 Id. at 621-22.
99 Id. at 613.
96 W. VA. CONST. art. VII, § 4. None of the executive officers mentioned in this article shall hold any other office during the term of his service. A person who has been elected or who has served as governor during all or any part of two consecutive terms shall be ineligible for the office of governor during any part of the term immediately following the second of the two consecutive terms. The person holding the office of governor when this section is ratified shall not be prevented from holding the office of governor during the term immediately following the term he is then serving. (Emphasis supplied.)
CONTRACTS

I. LABOR AND MATERIAL EXPENSES

In Southern Erectors, Inc. v. Olga Coal Co., a subcontractor sought to enforce a materialman's lien against the owner of improved property. The owner filed a third party complaint against the principal contractor, claiming that by the terms of their agreement the contractor had, in effect, agreed to indemnify the owner against any such demands. The owner, in its third party complaint, sought to be allowed a set-off against the remainder of its obligation to the contractor for any amount it might be required to pay to release the lien.

The court noted that "where a contractor obligates itself to furnish labor and materials, . . . in the absence of particular language in the contract making the owner responsible for payment of these labor and materials, the compensation of laborers and materialmen must be borne by such contractor and not by the owner." Having found that the contractor had agreed to provide all labor and materials at a specified price, the court ruled that the owner was entitled to a set-off against his obligation to the contractor for all expenses incurred by reason of the contractor's failure to perform in accordance with their agreement.

II. OPTION TO PURCHASE STOCK

In Quinn v. Beverages of West Virginia, Inc., the plaintiff alleged the existence of an oral contract for employment which included an option to purchase shares of stock in the employing defendant corporation. The defendant asserted that the stock option provision of the alleged contract was "a contract for the sale of securities" and was therefore unenforceable due to noncompli-

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100 Id. at 52.
101 The principal contract between the owner and the contractor was contained in two documents; a quotation from the contractor and a purchase order from the owner. The contractor's quotation promised to provide all labor and material, and further noted that "the prices quoted are firm prices upon acceptance of the proposal." In response, the owner sent a purchase order which specified with greater particularity the services the contractor was to provide. It was in accordance with these terms that the contractor proceeded to perform the contract. Id.
102 Id. at 53.
ance with the writing requirement of the Statute of Frauds relating to security purchases. The West Virginia Supreme Court of Appeals agreed with the defendant.

In dealing with the question of whether an option to purchase corporate stock is a "contract for the sale of securities" as contemplated by the Statute of Frauds, the court first noted that such an option "has been designated as an offer which is in itself a contract." As additional support for its finding, the court analogized an option to purchase corporate stock with an option to purchase real estate. Upon authority from other jurisdictions holding that an option to purchase real estate is a unilateral contract of sale subject to the writing requirement the court concluded that "an option for the sale of . . . corporate stocks . . . creates a contract of sale and is subject to the requirements of the Statute of Frauds."

III. Surety Liability Under Contract Bond

In Cecil I. Walker Machinery Co. v. Stauben, Inc., the West Virginia Supreme Court of Appeals dealt with the liability of a surety under a contract bond. Pursuant to statutory requirements, a contract bond was given by a contractor to secure its performance of a State Road Commission highway project. At the culmination of the contractor's work on the project, a bulldozer owned by the contractor and used on the bonded job was sent to the plaintiff's shop for repairs. Upon completion of the repair work, the bulldozer was transported by the contractor to a new job site. Thereafter, the plaintiff instituted an action against the contractor

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105 The trial court had held that the stock option provision was unenforceable for noncompliance with the Statute of Frauds. In addition, the trial court ruled that since a portion of the alleged contract was within the Statute of Frauds, the entire alleged contract was within the Statute and was, therefore, unenforceable. The Supreme Court of Appeals, however, held that, based on a consideration of the intention of the parties, the option to purchase stock was severable from the remainder of the oral contract for employment. 224 S.E.2d at 901.
106 Id. at 897, citing Restatement (First) of Contracts § 46 (1932).
108 224 S.E.2d at 898.
and the bonding company seeking to recover for the repairs made to the bulldozer. The lower court granted judgment to the plaintiff against the contractor, but denied any recovery from the surety. The Supreme Court of Appeals affirmed the lower court’s ruling denying recovery from the bonding company.

The court noted initially that although the obligations of a bond are generally construed most strongly against the bonding company, the liability of a surety under a statutorily required contract bond has its limits. Upon an examination of several authorities, the court found those limits to be that “[a statutory contract bond] would not be construed to expose the bonding company to liability for repairs of a major nature which added substantially to the value of the equipment, or to repairs or replacements which would not be substantially consumed on the contract involved, or to repairs or replacements which could not be reasonably expected to be used on or consumed in the performance of the job covered by the contract.” Applying these limitations to the facts of the instant case, the court concluded that the bonding company was not liable for the repairs to the bulldozer.

IV. UNCONSCIONABILITY

In Ashland Oil, Inc. v. Donahue, the court, in a case of first impression, dealt with the sufficiency of the defense of unconscionability in an action on a contract. The plaintiff oil company and the defendant were parties to a lease agreement and a dealer contract whereby the defendant was to distribute the plaintiff’s petroleum products at a gasoline service station leased from the plaintiff. Several years after the relationship began the plaintiff at-

111 230 S.E.2d at 820.
112 Id. at 821.
113 Id.
114 First, the court determined that the repairs substantially increased the value of a part of the contractor’s regular equipment. The amount owed for the repairs was $8,299.19, and the increase in the market value of the bulldozer after the repairs was estimated to be between $5,000 and $13,000. Second, it was found that the plaintiff could not reasonably believe that the repairs were necessitated by use of the bulldozer on the bonded project alone, because the plaintiff knew the bulldozer was well used. Finally, the court stated that the repairs were made at a time when the plaintiff could not reasonably believe the bulldozer would be further used on the bonded project because the contractor had finished his work on that project when the repairs were made. Id. at 820.
tempted to terminate the two agreements. The defendant refused to vacate the leased premises and the plaintiff brought an action in unlawful detainer to recover possession. In his defense, the defendant asserted that the lease agreement and the dealer contract contained an implied covenant on the part of the plaintiff not to terminate the relationship without good cause, that the plaintiff made representations that the agreement would not be canceled without good cause, that the defendant had substantially performed his obligations under the agreement, and that the cancellation term in the dealer contract was void as against public policy. The defendant also asserted that the two agreements were part of an integrated business relationship and should be construed together rather than as separate documents. The plaintiff contended that its action was based solely upon the lease agreement which was clear and unambiguous, and not subject to interpretation or variance by parol evidence.

The termination provision of the lease agreement allowed either party to terminate the lease upon ten days' written notice. The lease agreement also contained an automatic year-to-year renewal upon the failure of either party to terminate. The dealer contract provided that either party could avoid a similar automatic one year renewal of its obligations by giving notice of termination not less than sixty days prior to the expiration of any yearly period. However, the plaintiff alone was given the additional right to terminate the dealer contract upon ten days' written notice when in its sole judgment the dealer indulged in practices tending to impair the quality, good name, or reputation of the plaintiff's products.

The circuit court granted the plaintiff's motion to strike certain of the defendant's defenses, and granted immediate possession of the premises to the plaintiff. On its own motion, the circuit court certified the question of the legal sufficiency of the defenses to the Supreme Court of Appeals. The Supreme Court of Appeals reversed, finding the defenses legally sufficient, and remanded the case to the circuit court for further proceedings.

The court initially found that the dealer contract and the lease agreement should be construed together and considered as forming one transaction. The court based its determination on the ident-

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16 Id. at 437-38.
ity of parties and subject matter, in addition to the fact that the relationship between the documents was clearly apparent.\textsuperscript{117}

The court next turned its attention to the ten-day cancellation clause possessed only by Ashland,\textsuperscript{118} and stated that

In this case, considering the dealer contract and the lease agreement as a part of an integrated business relationship, the termination provisions are indeed incapable of being reconciled in such a manner as to be clearly expressive of an intention which can be said to have been within the reasonable contemplation of the contracting parties.\textsuperscript{119}

Therefore, the court held "that the ten-day cancellation clause contained in the dealer agreement, and available only to Ashland, was and is unconscionable on its face."\textsuperscript{120} The effect of the holding of unconscionability on the instant contract was left for the trial court to determine in accordance with the remedies and guidelines established by the Uniform Commercial Code.\textsuperscript{121}

As to the defenses regarding the issue of termination, the court found that they were proper in a case where the termination provisions of an agreement had been found unconscionable.\textsuperscript{122} The court noted that parol evidence could be received by the trial court to explain or supplement the writing where, due to a holding of unconscionability of termination provisions, the intention of the parties in regard to the issue of termination was ambiguous and vague.\textsuperscript{123}

\textsuperscript{117} Id. at 437.
\textsuperscript{118} Id. at 438.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 440.
\textsuperscript{122} 223 S.E.2d at 440-41.
CRIMINAL LAW AND PROCEDURE\textsuperscript{124}

Numerous criminal cases were decided by the Supreme Court of Appeals in 1976. The court continued its liberal approach in protecting the rights of the criminal defendant; however, very little new law was written.

I. CRIMINAL APPOINTMENTS

Much publicity heralded \textit{State ex rel. Partain v. Oakley},\textsuperscript{125} the most significant 1976 decision for practitioners of criminal law in West Virginia. In \textit{Partain} the Supreme Court of Appeals declared that the criminal appointment system needed restructuring. The specific holding, however, was the denial of a writ of prohibition to attorney George Partain. Partain had sought the writ to prevent his appointment by the judge to defend Sam Lambert, a man charged with a misdemeanor, but the writ was denied because Partain had failed to join and serve process upon Lambert.\textsuperscript{126} After disposing of the case in this manner, the court proceeded to consider Partain's substantive claim that he was denied due process of law under the appointment system because he was required to provide his services without just compensation, and because his appointed criminal load substantially impaired his private practice.\textsuperscript{127} Noting that the weight of authority holds that an appointed lawyer is due just compensation, the court indicated that the West Virginia criminal appointment procedure is not, in and of itself, unconstitutional, but where an attorney's appointed load is so large as to occupy a substantial amount of his time and thereby impair his earning ability, or where out-of-pocket expenses asso-


One other important criminal procedure case, \textit{State ex rel. Rasnaake v. Narick}, 227 S.E.2d 203 (W. Va. 1976), is discussed in the constitutional law section of this survey.

\textsuperscript{125} 227 S.E.2d 314 (W. Va. 1976).

\textsuperscript{126} "[A]ny person whose rights may be affected by the issuance of a writ by this Court must be made a party and must be given notice . . . ." \textit{Id.} at 317, \textit{citing Kump v. McDonald}, 64 W. Va. 323, 61 S.E. 909 (1908).

\textsuperscript{127} 227 S.E.2d at 318.
associated with appointed cases serve to reduce the attorney's net income "to a substantial and deleterious degree, the requirements [of accepting appointed cases] must be considered confiscatory and unconstitutional."128

A foreshadowing of the Partain decision occurred in Carter v. Bordenkircher,129 a habeas corpus petition decided three days earlier. In Carter the central issue was whether the petitioner had received effective assistance of counsel. The court found that counsel's defense of Carter had been adequate. Following the trial of the case the original defense counsel became ill. Delays ensued and finally a new attorney was appointed to argue post trial matters. Carter was sentenced to a term of ten years. After sentencing, his new attorney filed notice of intent to appeal. Believing that he had fulfilled his role, the attorney did not pursue the appeal any further and the appeal period lapsed with the appeal still not perfected. The court remedied this situation by directing that Carter be re-sentenced at which time counsel could be appointed, and a timely appeal could then be perfected,130 but the court ventured beyond the immediate solution to Carter's problem and established a new rule which will obviously serve to better protect the criminal defendant's rights. The court mandated that the same attorney who tries a case should also be appointed to prosecute the appeal, unless good cause be shown to the trial court why he should not be appointed.131

The Supreme Court of Appeals offered a due process issue by mentioning that Carter had "not raise[d] the question of whether the method of appointing counsel is so defective as to deny him due process of law."132 In this regard the court proffered one solution to the appointment problem by suggesting a public defender system.133 The West Virginia legislature apparently will not embrace that particular solution.134

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128 Id. at 319.
129 Id. at 716.
130 Id. at 717.
131 Id. at 716. In Partain the attorney asserted that his due process rights were being violated. Seemingly, the defendant's attack upon the criminal appointment system would be stronger than the attorney's attack, presuming that the defendant could show some correlation between the amount of compensation paid to the attorney and the quality of the representation received.
132 Id.
133 Id.
134 As this survey goes to press the legislature appears ready to enact a bill
SURVEY OF DEVELOPMENTS

The overall thrust of Partain and Carter is that the court is likely to declare that the failure to provide appointed attorneys with just compensation is a violation of due process. The problem with the present appointment scheme is that it provides unreasonably low compensation to appointed attorneys while appointed cases frequently demand substantial amounts of time and effort by counsel. The Partain decision cites several reasons why the current appointment system is inadequate. First, a rise in crime has increased appointed workloads. Second, representation has been extended to lineups, interrogations, preliminary hearings, and parole and probation revocation hearings. Third, lawyers are more frequently being appointed in juvenile and competency, and in appeals and habeus corpus petitions. Fourth, the complexity of the criminal law is increasing. And fifth, as the criminal law becomes more complex, attorneys who do not specialize in criminal law will have greater difficulty meeting the strict standard of performance required to protect the defendant's due process rights.

In Partain the court recognized the current problems of the criminal appointment system, but refused to grant any relief until July 1, 1977. The postponement of relief was designed to allow the West Virginia legislature time to restructure the appointment system.

II. DEFENSE OF ENTRAPMENT

Two entrapment cases were decided during 1976. The first, State v. Basham, does not in any way change previous West Virginia law. The decision simply repeats the standard definitions of entrapment. Although the entrapment claim in Basham was

which maintains an appointment system for indigent defendants, but substantially increases the compensation to the appointed attorney. The new formula would allow both an hourly fee and expenses, up to a maximum amount for each.

135 W. Va. Code Ann. § 62-3-1 (1977 Replacement Volume) provides in part: [T]he court shall, by order entered of record allow an attorney so appointed a fee not to exceed one hundred dollars in any misdemeanor case, and a fee of not to exceed two hundred dollars in any felony case.


136 See note 11, supra.


138 "Entrapment may be defined as the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting criminal prosecution against him." State v. Jarvis, 105 W. Va. 499, 500, 143 S.E. 235, 236 (1928). It is
not particularly strong, the Supreme Court of Appeals reversed Basham’s conviction for receiving stolen goods. The defendant had claimed that while he had bought the goods knowing them to be stolen, he did so pursuant to an agreement with a police officer. The officer denied that arrangement, but Basham’s evidence tended to show a lack of guilty intent upon his part. The Court held:

[I]nasmuch as the defenses of entrapment and lack of criminal intent are so inextricably interwoven in the circumstances of the present case, the court is of the opinion that a definitive treatment of the issues by instruction was obligatory.111

The second entrapment case, State v. Knight,112 makes a distinctively new contribution to West Virginia law. Phrased by the court the issue was:

whether a defendant who does not affirmatively present evidence of entrapment but relies on a denial of the commission of the offense may also avail himself of the defense of entrapment based upon the State’s evidence alone.113

To this question the court responded affirmatively. However, the use of the entrapment defense in this manner is limited to the situation where the state’s case in chief injects evidence of entrapment into the case.114

In Knight the court discussed the “objective” and “subjective” tests for entrapment. An “objective” test would be applied by the trial court while a “subjective” test would be applied by the jury. While noting that many courts have treated the tests as mutually exclusive and adopted either one test or the other as applicable to all entrapment situations,115 the Supreme Court of Appeals refused to adopt either test as applicable in all instances. Instead the court determined that “the better rule is one which


111 223 S.E.2d at 59.
113 Id. at 734.
114 Id., citing United States v. Newcomb, 488 F.2d 190 (5th Cir. 1974).
115 The federal courts have generally adopted the “subjective” test which allows the jury to test the validity of the defense. See United States v. Russell, 411 U.S. 423 (1973). However, the West Virginia court cited decisions from Iowa, Indiana, Virginia, Alaska and California that adopted the “objective” test. State v. Basham, 230 S.E.2d 732, 736 (1976).
approves both tests but applies them in a manner consistent with
the evidence.”146 Therefore, if sufficient evidence is available to
enable the trial court to find entrapment as a matter of law, then
the trial judge should decide the issue.147 Otherwise the issue
should be submitted to the jury if it has properly been raised by
the defendant or injected into the case by the state’s evidence.

III. Defense of Insanity

During 1976 the court decided three cases involving the issue
of insanity. In State v. Myers148 and State v. Pendry,149 discussed
in the CRIMINAL LAW AND PROCEDURE section under
PRESUMPTIONS, each defendant had asserted that he was not legally
sane at the time of the commission of the crime. In State v.
Milam,150 the defendant further claimed that he was not legally
competent to stand trial. All three cases resulted in murder convic-
tions, and in each instance the judgment was reversed and a new
trial was ordered. While the insanity issues were not identical in
all three cases, the cumulative effect of the three decisions is to
refine and clarify the meaning of State v. Grimm,151 a 1973 West
Virginia case that adopted an approach to insanity based upon the

A review of the Grimm decision is important to more fully
understand Myers, Pendry and Milam. Grimm dispensed with the
so-called “M’Naughten rule” which had previously been adhered
to in West Virginia. The “M’Naughten rule,” stated in the nega-
tive, required that the defendant must not have known the differ-
ence between right and wrong at the time the crime was com-
mitted. Only then could the defendant be found legally insane.152 The

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146 230 S.E.2d at 737.
147 [If the evidence establishes, to such an extent that the minds
of reasonable men could not differ, that the officer or agent conceived
the plan and procured or directed its execution in such an unconscionable
way that he could only be said to have created a crime for the purpose
of making an arrest and obtaining a conviction, then the question is one for
the court to resolve without the necessity of submitting the matter to the
jury.
Id. at 737.
152 Id. at 644.
court found the “M’Naughten rule” to be outdated and considered three newer definitions of insanity. Rejected were the “Durham rule” and the “irresistible impulse” test. Adopted by the tribunal was an approach based on § 4.01 of the Model Penal Code. That section reads:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.
(2) As used in this article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Besides adopting this modern approach to the definition of insanity, the court also held that the trial court properly refused an instruction informing the jurors that if a verdict of not guilty by reason of insanity were returned, “the judge would inquire into the defendant’s mental condition and take appropriate action.” This holding was modified in Milam and will be discussed below.

The first of the three insanity cases decided by the Supreme Court of Appeals in 1976 was State v. Myers. Neither this decision nor the two that followed altered the requirement that the defendant prove his insanity by a preponderance of the evidence. This standard is well established in West Virginia, and has not been affected by the new constitutional standards for presumptions announced in Pendry. Another major issue in Myers was to what extent a psychiatrist may utilize hospital records of the defendant when explaining to the jury the basis of his professional opinion as to the mental competency of the defendant. The recur-

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123 Under the “Durham rule,” “an accused is not criminally responsible for a crime if his unlawful act was the product of a mental disease or a mental defect.” Id. at 645, citing Durham v. United States, 214 F.2d 882 (1954).
124 “The doctrine of irresistible impulse does not preclude the mental capacity of a defendant to know right from wrong, but advances the theory that the mind of a defendant is so diseased that he has no freedom of will and that his powers of self-control and choice have been destroyed by disease.” State v. Painter, 135 W. Va. 106, 125, 63 S.E.2d 86, 97 (1950).
127 Id. at 645.
ring problem here is that the doctor frequently relies upon records which have been kept by other people. Many times such records predate the time that the psychiatrist first examines the patient. The court had no difficulty in holding that the utilization of reasonably authenticated records may be revealed to the jury when first, the records were kept in the "regular course of professional care or treatment" of the accused, and second, the records were in fact used by the psychiatrist in arriving at his opinion. The Supreme Court of Appeals again encountered this issue and reached the same result in State v. Pendry and State v. Milam.

One final issue involved in insanity defenses must be considered. As stated above, in Grimm the court declared that the jury need not be instructed as to what the disposition of the defendant would be if he were found not guilty by reason of insanity. The court reasoned that informing the jury about this matter would be advising the jury of a form of punishment to be imposed upon the defendant, and punishment is a matter for the court to consider. However, the issue arose again in State v. Myers. There the court held that it was error for the trial judge not to declare a mistrial if confined to "Weston Hospital or the Veterans' Hospital." Finally, in State v. Milam, the court decided to qualify the position taken in Grimm. The jury in Milam had retired for fifteen minutes when the foreman sought the advice of the court.

We was wanting to know what the sentence would be. We don't want to send him to the pen, in other words. We was wanting something like a sanitarium.

Without further explanation the court reread to the entire jury the instruction relating to the possible verdicts. An hour later the jury returned a verdict of first-degree murder with a recommendation of mercy. The Supreme Court of Appeals, citing other jurisdictions that allow such an instruction when the defendant requests,

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122 S.E.2d at 304.
123 222 S.E.2d 300 (W. Va. 1976).
124 Id. at 305.
126 Id. at 438.
stated that an instruction informing the jury of the disposition of
the defendant upon a verdict of not guilty by reason of insanity
might be favorably received by the court when the evidence of a
case warranted. The clear implication is that the evidence in
Milam would warrant such an instruction. The instruction must
be carefully drawn and accurately specify the procedure estab-
lished in West Virginia Code Ann. § 27-6A-3 and §§ 27-5-1 et seq.,
governing the disposition of the defendant who is found not guilty
by reason of insanity.

IV. Prejudicial Publicity During Trial

State v. Williams reveals a situation involving prejudicial
publicity during trial. Williams was on trial for possession of LSD
with intent to sell. Jury deliberations lasted from one evening into
the next day, but the jury was not sequestered overnight. Before
dismissing the jury for the evening, the judge gave the traditional
instructions prohibiting the jurors from discussing the case with
anybody and cautioning against reading any news articles or lis-
tening to any news report concerning the case. Still the jury fore-
man read a newspaper account about a man who was arrested
when leaving the courthouse after court adjourned for the day. The
arrested man was also charged with possession of LSD. During
deliberations on the second day, the foreman informed the other
jurors of the contents of the newspaper article. Following a verdict
of guilty the defense attorney requested that the judge question the
jury concerning the newspaper article. This was done and it was
discovered that the foreman had mentioned the article to the other
jurors. The court then asked each juror whether his knowledge of
the article had influenced him in arriving at his verdict. Each juror
responded in the negative. After asking the jury one more question
at defendant’s request, the court refused to go further and ask the
jurors if they were aware that the arrested man had been seated
in the courtroom with the defendant’s wife. Satisfied with the
results of his inquiry the judge let the guilty verdict stand.

168 Milam, an elderly man, had been institutionalized between 1967 and 1970.
One psychiatrist described the defendant as “quite disorganized” and declared that
his thought process was “disconnected and disorganized.” Even the doctor who
declared that Milam was fit for trial stated that the defendant’s memory was
Although the trial judge was careful to protect the defendant's rights, the Supreme Court of Appeals reversed, finding that the judge had not been careful enough. The court indicated that the trial court is obligated to conduct an inquiry if there is any possibility of prejudice to the defendant,\(^ {170}\) and the defendant need not show "actual" prejudice, but only the probability of prejudice.\(^ {171}\) If the court determines that there is a possibility of prejudice, he must then question the jurors to determine whether a new trial should be granted. To this point the trial judge in *Williams* had correctly proceeded. However, the juror's personal opinion as to whether or not he was influenced by exposure to the news article should not be taken as conclusive,\(^ {172}\) and here the trial judge committed error. Stating that each case must turn upon its individual circumstances, the court in *Williams* determined that a set of cumulative factors required reversal.

**V. Presumptions**

*State v. Pendry*\(^ {173}\) was perhaps the most important criminal procedure case decided by the West Virginia Supreme Court of Appeals during 1976. Besides dealing with issues concerning *voir dire*\(^ {174}\) and the defense of insanity, the *Pendry* decision places new restrictions upon the use of instructions by the criminal trial court which allow the jury to accept presumptions or draw inferences from the evidence produced at trial. Since the origins of West Virginia jurisprudence, all murders have been presumed to be murder in the second degree and in order to raise the offense to murder in the first degree, the burden of proof has been on the State, while the burden to reduce the offense to manslaughter has been on the defendant. Instructions stating this legal formula have

\(^{170}\) *Id.* at 746.


\(^{174}\) The defense counsel had challenged four jurors for cause, asserting bias. The trial judge had refused the challenge and had expressed doubt as to the propriety of separately questioning jurors. The appellate court indicated that the judge's refusal of counsel's request for separate questioning was not itself reversible error. However, the Court proceeded to interpret *W. Va. Code Ann.* § 56-6-12 (1966) to allow a "trial judge, in his discretion, . . . the authority to utilize any procedure, including examination of a prospective juror out of the presence of other jurors, if he believes that the impartiality of the jury may be better determined in that manner." 227 S.E.2d at 216.
long been used in West Virginia and approved by the Supreme Court of Appeals. However, in Pendry, the court declared that:

the State is not entitled to an instruction which requires a jury to accept as proved beyond a reasonable doubt any element of the criminal offense charged, and this concept embraces presumptions (more properly inferences) as to which the jury may be instructed; and a defendant in a criminal case cannot be required to present evidence either in terms of going forward with the evidence or in terms of bearing the burden of persuasion in connection with any material element of the crime charged.175

Readily admitting that "[t]here is no highway by which any of us can safely walk through" the subject of presumptions,176 the court moved ahead with its assessment of the effect upon West Virginia law of the United States Supreme Court decision in Mullaney v. Wilbur.177 Mullaney held "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."178 From this holding the West Virginia court decided, as noted above, that murder could no longer be presumed to be murder in the second degree, and that the jury could no longer be instructed that it is permissible to infer malice from the deliberate use of a deadly weapon. Nor may a defendant be required to bear the burden of persuasion or to introduce evidence to rebut a presumption that he intended the consequences that resulted from the use of a deadly weapon.179 The Supreme Court of Appeals openly confessed in Pendry that it could not in that case "undertake to discern the full impact of Mullaney upon all statutes, instructions and presumptions previously accepted as accurate statements of the law govern-

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175 Id. at 220.
178 Id. at 704.
179 227 S.E.2d at 223.
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ing criminal cases in this State.”180 But the court has made a profound beginning at this task. The tribunal has declared that due process requires the State to prove beyond a reasonable doubt and without the help of inferences or presumptions, all elements of a crime, and that a criminal defendant cannot be compelled to introduce evidence or carry the burden of persuasion to disprove any element of the crime.

VI. RESTRICTIONS ON PROBATION

Among the criminal procedure cases decided by the Supreme Court of Appeals last year, Louk v. Haynes181 presents the most interesting factual situation. The petitioner, Howard Louk, had entered a plea of guilty to the charge of marijuana possession with intent to sell. A young man, apparently of college age, Louk appeared for sentencing on March 31, 1975. The court inquired of the petitioner whether he was willing to abide by certain terms of probation, including attending church every Sunday, abstaining from "drinking" and "boozing", working two jobs a day commencing the next day, observing a 10:00 p.m. curfew, . . . staying away from college campuses and girls' dormitories, getting a haircut, and becoming a "16-hour-a-day" working man for the next five years.182

Louk agreed to these conditions and went to get his haircut. The judge had requested that he return to court and show compliance with that particular condition. The next day, accompanied by his father and with a haircut, Howard Louk returned to the circuit court. The petitioner informed the trial judge that he had one job in his father's restaurant and a second job with a building contractor. The judge, however, felt that "working on a farm or cutting timber was the proper work for someone who needed 'behavior modification'."183 So the judge suggested that Louk contact a Mr. Isner, who later hired the young man and provided him with housing on the farm.

On April 4, 1975, a final order establishing the terms of the probation was entered. Somewhat less stringent than the condi-

180 Id. at 220.
182 Id. at 784.
183 Id. at 785.
tions offered by the judge on March 31, the order required Louk to be of good behavior, avoid injurious habits, comply with the regulations of the Department of Probation, work satisfactorily at gainful employment, and observe an 11:00 p.m. curfew. After defense counsel had signed and approved this order, a final condition was manually interlined into the order. By this final condition Mr. Isner was designated a "volunteer probation officer". Also, "while it is not evident from the order or the record . . . it is apparent that the judge made employment and residence on the Isner farm conditions of probation."

On the Isner farm, Louk was given adequate but substandard housing. Besides working for Isner at very low wages, the petitioner apparently rendered services beneficial to Judge Triplett, who leased a piece of property adjacent to Isner's farm. After working on the Isner farm for two months, Louk became dissatisfied and returned to his parents' home. The next morning he voluntarily surrendered to his probation officer, was arrested and incarcerated. Although Louk was orally informed of the charges against him, a written copy of the charges was not provided to him or his attorney before the revocation hearing. At that hearing on July 15, 1975, the petitioner's probation was revoked and his one to five year sentence was executed. One of the stated violations of probation was Louk's refusal to work for Mr. Isner on his farm.

The state confessed error and the revocation was rescinded. The Supreme Court of Appeals found that the condition requiring Louk to work on the Isner farm was tantamount to "involuntary servitude", a violation of the petitioner's procedural due process right, and therefore void. Also, the Supreme Court of Appeals again took the opportunity to express the procedures the state is constitutionally obligated to follow in parole and probation revocations. Morrissey v. Brewer, and Gagnon v. Scarpelli, are the

184 Id. at 785.
185 Id. at 790.
186 A convicted offender may be confined in the penitentiary or, in certain circumstances as provided by statute, to other county or state penal or rehabilitative institutions, but the confinement authority of the trial judge is limited to such facilities.
187 Id. at 789.
188 In 1974, revocation procedures were considered in light of two U.S. Supreme Court cases, Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973). In a very confusing and divided opinion, the West Virginia court
two most recent United States Supreme Court decisions dealing with probation and parole revocations. Probation and parole revocations are constitutionally indistinguishable when determining what due process must be afforded the person who risks the loss of his liberty. The effect of *Morrissey* and *Gagnon* upon revocation proceedings is to require that the probationer or parolee be provided with (1) a preliminary hearing before an independent officer to determine whether there is probable cause to believe that the arrested person violated the terms of his probation or parole, and (2) a final revocation hearing wherein the State is required to a) provide the probationer or parolee with written notice of the charges against him, b) disclose the evidence the State has against him, c) allow the probationer or parolee an opportunity to be heard, and d) allow him the right to confront witnesses and cross-examine them to the extent that it is reasonably possible to do so. The final revocation hearing must also be held before a neutral officer who must make a written statement of his findings. In *Louk* the state had failed first, to provide the petitioner with a preliminary hearing, and second, to present to him a written notice of the charges against him.

rejected the prisoner’s claim that he had been denied due process of law because counsel was not appointed to represent him at the revocation hearing, but the court upheld his assertion that the failure to appoint an attorney had denied him equal protection. See *Dobbs v. Wallace*, 201 S.E.2d 914 (W. Va. 1974).

408 U.S. 471 (1972).


The West Virginia court suggests that “the most logical ‘independent officer’ would be a county magistrate.” *Louk v. Haynes*, 223 S.E.2d 780, 789 (1976).


Id. at 790.
DOMESTIC RELATIONS

I. CHILD CUSTODY—PRIOR DECREE BY FOREIGN COURT

In *Adams v. Bowens*, the court considered the jurisdiction of West Virginia courts to determine child custody when a foreign decree awarding custody of the child has previously been entered. A mother obtained a divorce from her husband in Kentucky, and was awarded custody of their child. Several months after the divorce the father was awarded temporary custody by the Kentucky court. The father then petitioned a West Virginia court to give full faith and credit to the Kentucky temporary custody order and award him custody of the child. The mother filed a motion to dismiss, contending that the Kentucky temporary custody order was void because the father, though knowing of her whereabouts, failed to provide her with notice of the custody hearing. The circuit court found as a matter of fact that the mother had not been given notice of the Kentucky custody proceeding, but, nevertheless, held that it was without jurisdiction to determine the question of custody. The Supreme Court of Appeals reversed the judgment and remanded the case to the circuit court with directions that it take jurisdiction of the controversy.

Initially, the court observed that the circuit court was granted jurisdiction of the subject matter in controversy by the West Virginia Constitution. Additionally, it was found that the circuit court had jurisdiction over the parties to the proceeding, as the mother, the father, and the child were all before the court. The

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194 The custody decree of the divorce court granted certain visitation privileges to the father. In accord with those privileges and one month after the divorce, the father took his son for a weekend. However, the father failed to return the boy, and refused to permit the mother to see the child or know of his whereabouts for a period of four months. The mother learned that the child was at a certain doctor’s office, and on that occasion regained physical custody of the child. By that time she had remarried and become a resident of West Virginia. Apparently, it was sometime before the mother regained custody of the child that the father petitioned the Kentucky court for custody of his son.


196 230 S.E.2d at 484. The court based jurisdiction on “the physical presence of the child together with jurisdiction over the parties.” Id. However, the court indicated that the physical presence of the child alone is all that is required for jurisdiction in custody proceedings in West Virginia, stating that:

[T]here are respectable authorities which support the view that the child’s physical presence within a state is sufficient to give that state’s
court decided that the only other rationale indicated by the circuit court's ruling for its refusal to take jurisdiction of the case was its apparent conclusion that the question of custody, having been determined by the Kentucky court, was res judicata and could only be changed by the Kentucky courts. The Supreme Court of Appeals pointed out that the matter was not res judicata, restating the well established rule in West Virginia that:

[a] foreign decree or order awarding the custody of a minor child in a divorce suit is not res judicata in a subsequent proceeding in this State, involving the custody of the infant, where there has been such change in the conditions since the rendition of the foreign judgment as to render its modification desirable for the welfare and protection of the child.

Noting that a change in condition had been alleged, and that the circuit court had jurisdiction over the parties and the subject matter, the court ordered the circuit court to take jurisdiction and determine the matter of custody.

II. NOTICE OF ADOPTION TO PUTATIVE FATHER

In Matter of Daft's Adoption, the court evaluated the constitutional sufficiency of notice of adoption proceedings by publication to the putative father of an illegitimate child. A married couple had petitioned the circuit court for adoption of an illegitimate child, and had attached to their petition the duly acknowledged written consent of the child's mother to the adoption. The child's putative father was found to be a non-resident of the State of West Virginia, and a fugitive from justice whose whereabouts were unknown. In an effort to notify the putative father of the adoption proceedings, the petitioners placed a notice of the pending proceeding in a local newspaper for two successive weeks, and posted courts jurisdiction to determine and award custody. . . . We subscribe to this principle . . . . Id.

The court noted that:

[although it was not expressly stated by the [circuit] court, it appears that its holding was premised on the proposition that the question of custody, having been determined by the Circuit Court of Boyd County, Kentucky, was res judicata and that any change of custody must be tried and determined by that court.

Id.


a copy of the notice at the county courthouse. Nevertheless, the circuit court refused the petition for adoption, ruling that the petitioners had provided inadequate notice to the child's natural father.

The Supreme Court of Appeals reversed, holding that the good faith efforts of the petitioners in attempting to notify the natural father of the illegitimate child of the proceedings was "... reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." The court noted that although the statute in effect at the time the petition for adoption was filed did not require that a putative father receive any notice of proceedings concerning the adoption of his illegitimate child, the reasoning of Stanley v. Illinois and Hammack v. Wise made it necessary that the putative father be given notice and an opportunity to be heard. Realizing that no particular form of notice had been fashioned for appraising the natural father of the pending adoption proceedings by the relevant case law, the court applied generally recognized principles for evaluating the constitutional adequacy of the notice provided in a particular situation. Acknowledging the absence of any adequate alternatives under the circumstances, the court found the published notice employed by the petitioners to be constitutionally sufficient to notify the putative father of the adoption proceedings.

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21 Id. at 475.
22 405 U.S. 645 (1972). The Stanley Court struck down an Illinois statute which declared illegitimate children to be wards of the state upon the death of their unwed mother without affording the putative father an opportunity to be heard in respect to his fitness for custody. However, the rationale of Stanley, that putative fathers have constitutionally protected interests in their illegitimate children, was believed to apply with equal scope to adoption proceedings involving illegitimate children. This belief was reinforced by the Supreme Court's decision in Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972), vacating and remanding an adoption case involving a putative father who had received no notice of the adoption proceedings concerning his illegitimate child for reconsideration in light of the Stanley decision.
23 211 S.E.2d 118 (W. Va. 1975) (right of putative father of an illegitimate child, as opposed to maternal grandmother, to custody of the child).
24 230 S.E.2d at 475-76 (W. Va. 1976).
25 Id. at 476.
Prior to the court's decision in Matter of Daft's Adoption, but subsequent to the filing of the adoption petition in the circuit court, the West Virginia Legislature amended the West Virginia Code to define a "determined father" and to provide a requirement of and a method for notifying determined fathers of illegitimate children of any adoption proceedings concerning their illegitimate children.\(^{206}\) Previously, in the case of a proceeding for the adoption of an illegitimate child, the Code required only that the petition for adoption be accompanied by the duly acknowledged written consent of the mother of such child.\(^{207}\) The applicable statute now requires that a determined father, as defined in the amended provision,\(^{208}\) as well as the mother should be given notification of any adoption proceeding concerning his illegitimate child.\(^{209}\) Unless either the mother or the determined father has abandoned the child or is insane, the consent of both parents is now required to accompany the petition for adoption of an illegitimate. However, if either the mother or the determined father has abandoned the child or is insane, only the consent of the other parent is required, but the abandoning parent must be given notice of the pending proceeding. If the determined father is a resident of the state, the alleged abandoning parent must be personally served. However, if after due diligence personal service cannot be obtained on the abandoning parent, or if the determined father is a non-resident of the state, notice will be sufficient if sent by registered mail to the last known address of the alleged abandoning parent, such notice being effective upon mailing.


\(^{207}\) W. VA. CODE ANN. § 48-4-1 (1976 Replacement Volume) provided in pertinent part:

(a) ... Consent to the adoption of a minor child shall be required and obtained as follows:

... .

(2) In the case of an illegitimate child sought to be adopted, the written consent, duly acknowledged, of the mother of such illegitimate child sought to be adopted must be obtained and presented with the petition.

\(^{208}\) W. VA. CODE ANN. § 48-4-1(a) (Cum. Supp. 1976) provides that:

As used in this article, the term "determined father" means any person who:

(1) Has been found guilty under the provisions of article seven [§ 48-7-1 et seq.], chapter forty-eight of this Code; or

(2) Has acknowledged his parental status by contributing to the child's support, by living with the mother, at the time of conception, or by admitting paternity by any means.

Despite the recent statutory amendment discussed above, it cannot yet be said that the question of when the natural father of an illegitimate child is entitled to notice of adoption proceedings has been completely answered. The effective ability of the statute to control the possible situations involving fathers of illegitimates will depend primarily upon how narrowly or widely the Supreme Court of Appeals decides to apply the reasoning of Stanley v. Illinois to adoption proceedings. Unfortunately, the Daft decision does not indicate a great deal about the scope of application the court is likely to give Stanley. However, the court apparently assumed in Daft that the petitioners were constitutionally required to provide some sort of notice to the illegitimate's putative father of the pending adoption proceedings.\(^{210}\) It does not appear from the statement of facts whether the putative father there involved would have satisfied the statutory definition of a determined father. If he did not, it seems arguable that the court has already recognized that there are natural fathers of illegitimate children who, although not meeting the statutory definition of a determined father, are constitutionally entitled to receive notice of adoption proceedings. Should that be the case, it remains to be seen what factors will distinguish the undetermined putative father who is entitled to notice from the undetermined father who has no protected interest in his illegitimate child and is therefore not entitled to notice.

On the other hand, Stanley could be interpreted as not requiring notice to any putative father who does not meet the statutory definition of a determined father. Other courts which have considered Stanley's impact on adoption proceedings have limited its scope by interpreting the decision to require notice to the putative father only when the factual circumstances are similar to those in Stanley.\(^{211}\) Additionally, most courts which have considered statutes similar in effect to the statute under consideration in Daft and which have declared them to be insufficient have been presented with circumstances similar to those found in Stanley.\(^{212}\) By requir-

\(^{210}\) Otherwise, the court's decision that the notice employed by the petitioners was constitutionally adequate would have been unnecessary.

\(^{211}\) See, e.g., Dep't of Health and Rehabilitative Services v. Herzog, 317 So. 2d 865 (Fla. App. 1975). In Stanley, the putative father had lived with the mother and his illegitimate children intermittently for many years.

\(^{212}\) See Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974) (Oregon statute); Adoption of Walker, 360 A.2d 603 (Pa. 1976).
ing that the putative father support the child or in some other way have his paternity established before he is accorded the statutory rights of a determined father, the statute follows this somewhat narrower reading of Stanley by recognizing a constitutional interest of putative fathers in their illegitimate children only under circumstances similar to those in Stanley, and requiring that only those fathers be given notice and an opportunity to be heard in adoption proceedings.
EVIDENCE

I. AUTHENTICITY OF WRITINGS

In Casto v. Martin,\(^{213}\) the court dealt with whether a writing was properly admitted into evidence. The executrix of an estate brought an action to collect on a note. During the trial an unsigned and wholly typewritten memorandum, purportedly from the defendant to the deceased, was admitted into evidence through the testimony of the deceased’s accountant. The accountant had received the memo and an unsigned note from the deceased in order to determine if the sale of stock qualified for capital gains treatment.

The primary evidentiary principle discussed by the court in its opinion was that the party attempting to admit the letter must show the authenticity or genuineness of the letter.\(^{214}\) While the most common way to show authenticity or genuineness is through handwriting, it may also be shown through direct or circumstantial evidence.\(^{215}\) This indirect or circumstantial method of demonstrating authenticity has generally relied on factors in addition to the contents of the letter.\(^{216}\) However, in Casto the court relied on the principle that when the contents of a writing reveal a knowledge or other trait peculiarly referable to only one person, the contents of the writing alone may be sufficient to establish authenticity. The Casto court found that while the memorandum was unsigned and wholly typewritten, the contents of the memorandum disclosed details of a very complicated business transaction which could have been known only by the defendant; thus, the contents of the letter alone were sufficient to show genuineness.\(^{217}\)

\(^{213}\) 230 S.E.2d 722 (W. Va. 1976). This case also is reported in the CONTRACTS section of this Survey.

\(^{214}\) Id. at 726-28.


\(^{216}\) In Maynard v. Bailey, 85 W. Va. 679, 102 S.E. 480 (1920), the court looked at all the circumstances surrounding the writing, including the type of stationary, the return address, and the format of the letter, before determining admissibility. In State v. Huffman, 141 W. Va. 55, 87 S.E.2d 541 (1955), the court relied on the extraneous factor that the letter could not have passed between any parties except the purported writer and the person to whom it was delivered.

\(^{217}\) 230 S.E.2d at 727. The court relied on United States v. Sutton, 426 F.2d 1202 (D.C. Cir. 1969) for this principle. However, the court had previously recognized this principle in State v. Huffman, 141 W. Va. 55, 87 S.E.2d 541 (1955), though it was not necessary to apply it in that case.
The court in *Casto*, and in the other cases dealing with the proof of authenticity through indirect or circumstantial evidence, stressed that the purported author did not deny or attempt to discredit the writing. However, if the matter is really within the exclusive knowledge of the purported author, this denial of the writing should not determine the genuineness or authenticity issue of the admission of the writing into evidence, but should be left to the jury to decide the weight to be given to the writing.

Since the court held that the memo was authenticated by its contents, the court found that the trial court had not abused its discretion in admitting the memo.

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218 230 S.E.2d at 727.
INSURANCE

I. CONTRACT AMBIGUITIES

The task of the court in Prete v. Merchants Property Insurance Co.,220 was to interpret the language of an insurance contract to decide whether the plaintiffs' building materials were insured by the defendant at the time of their destruction by fire. The clause in question insured construction materials, equipment, and supplies "all while in or on the described buildings, structures or temporary structures, or in the open (including within vehicles) on the described premises or within 100 feet thereof."221 The ambiguity arose with regard to materials stored in a building within one hundred feet of the insured premises. Were the materials insured or did the materials "within 100 feet" also have to be "in the open?"

The defendant successfully contended in the circuit court that the language intended coverage of 1) materials in the described buildings and 2) materials in the open on the premises or within 100 feet thereof; this would preclude recovery for the destroyed materials in a building eighty-two feet from the insured premises. On the other hand, the plaintiff maintained that all construction materials were insured under the policy, whether 1) in the described buildings, or 2) in the open on the described premises, or 3) within 100 feet of the premises, either inside or outside of a building.

The West Virginia Supreme Court of Appeals found that the policy provision was ambiguous and applied the "guiding principle of construction in cases of insurance contracts," which is to construe the language liberally in favor of the insured.222 Therefore, coverage under the clause was held to extend to any location within 100 feet of the premises.

220 223 S.E.2d 441 (W. Va. 1976).
221 Id. at 443.
LOCAL GOVERNMENT

I. APPOINTMENT OF CITY OFFICIALS

Robb v. Zegeer involved a dispute between two elected officials of the City of South Charleston, the mayor and the municipal court judge, as to which had the authority to appoint a deputy municipal court clerk. The court held that the city charter provision granting express power to the municipal judge to appoint a clerk of the municipal court "reasonably implies" the power to select a deputy clerk. In so construing the charter, the court reasoned that it was proper to apply rules governing constitutional construction such as determining the intent of the framers, and that this result was consistent with the intention of the framers of the city charter.

II. MUNICIPAL LIABILITY AND MUNICIPAL NOTICE STATUTES

Simmons v. City of Bluefield was a personal injury action brought against the city of Bluefield by the guardian of an infant burned by a fire under the control of a city playground supervisor. On appeal, the court agreed with the trial court's finding of negligence and liability on the part of the city, and, the court also clarified several points urged as error by the defendant, two of which concern local government.

First, a city ordinance making it unlawful to start a fire anywhere in the city without properly safeguarding it to prevent injury to any person was held admissible as evidence. Although a prima facie case of negligence is created by violation of a municipal ordinance, it is up to the jury to decide whether there was in fact a violation and whether such violation was the proximate cause of the injury.

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223 The following case involving local government issues was not reported: In re City of Charleston, 226 S.E.2d 900 (W. Va. 1976).
225 SOUTH CHARLESTON, W. VA., CHARTER art. VII, § 7.3, provides in part: "The Municipal Judge may appoint a clerk of the Municipal Court who shall serve at the will and pleasure of the Municipal Judge and shall receive such compensation as may be determined by the Council."
226 224 S.E.2d at 904.
227 Id. at 904.
228 225 S.E.2d 202 (W. Va. 1976). This case is also discussed in the section entitled TORTS.
Secondly, a West Virginia statute provides that preceding a suit against a city, there must be provided to that city a written verified statement of the nature of the claim and its occurrence.228 The court held that written notice to the proper city authority, although not technically verified, constituted substantial compliance with the statute if it afforded the city ample time to investigate the claim and formulate a defense.229

III. ASSESSMENT OF UTILITY PROPERTY

Petition of Hull230 involved the determination of the proper authority to assess a generating plant under construction and belonging to a public service corporation. The assessor of Grant County, where the plant was located, entered the facility on his land books. In response to a protest by the company, the assessor certified the question of his authority to the State Tax Commissioner, who indicated that the authority to assess was exclusively with the Board of Public Works. Upon petition by the assessor, the Grant County Circuit Court ruled that, contrary to the Commissioner's instructions, the plant belonged on the county land books.

The authority to assess the "actual value of all property" of public service corporations is specifically granted by statute to the Board of Public Works.231 However, another statute provides that "all real estate not used or occupied for purposes immediately connected with the property" may be assessed by the proper county authorities.232 The construction of the generating plant was not sufficiently finished for it to be used; therefore, under state law, it was personal property.233 Yet, another statute specifically grants power to the Board of Public Works to assess as personal property the materials in construction work.234

The court held that the statutes dealing with assessments must be construed together and that personal property of a public service corporation is assessable only by the Board of Public

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228 W. VA. CODE ANN. § 8-12-20 (1977 Replacement Volume).
229 225 S.E.2d at 208, citing Higginbotham v. City of Charleston, 204 S.E.2d 1 (W. Va. 1974).
WORKS. Since the statute makes particular reference to real estate conditionally assessable by county authorities, the court concluded that personal property was not intended to be so assessed. Therefore, the ruling of the circuit court was reversed.\(^{237}\)

### III. LOCAL OPTION ELECTIONS ON DOG RACING

The only substantial question presented to the Court in Tri-State Greyhound Racing, Inc. v. Johnson,\(^{238}\) was the proper interpretation of a local option election provision of the West Virginia Racing Statute.\(^{239}\) In order for a county to hold a local option election on the question of a proposed dog or horse racetrack, a petition signed by at least fifteen per cent of the "qualified voters" in the county must be filed with the county commission. The issue was the meaning of "qualified voters"—those actually voting or those registered to vote. Since literally construing the words would require challenging every registered voter to determine whether his franchise was legitimate in that county, the court held that the legislative intent was to require a petition by fifteen per cent of those persons who actually voted in the last election.\(^{240}\) The rule of construction used was that statutes should be construed to give effect to discerned legislative intent, which in this case was to permit communities to express their preference regarding racing in an election if a reasonable number of people requested a vote on the issue.\(^{241}\)

### IV. MAXIMUM AGE RESTRICTIONS ON EMPLOYMENT

In Arritt v. Grisell,\(^{242}\) plaintiff, whose application for the position of police officer in Moundsville was denied because he was over thirty-five years of age, sought a mandatory injunction compelling defendants to hire him and pay damages. He alleged violations of the Age Discrimination in Employment Act of 1967\(^{243}\) (the ADEA) and of the Civil Rights Act,\(^{244}\) in the statutory age limits on hiring of municipal police officers in West Virginia.\(^{245}\)

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\(^{237}\) 222 S.E.2d at 816.
\(^{238}\) 230 S.E.2d 837 (W. Va. 1976).
\(^{240}\) 230 S.E.2d at 839.
\(^{241}\) 230 S.E.2d at 840.
Defendants contended that the job of police officer was covered by a provision found in the ADEA which allowed age restrictions where necessary to the normal operation of a particular business. Evidence of the necessity of an age limitation on this particular job was presented in the form of an affidavit by the Moundsville Chief of Police detailing the requirements of the job and the physical skills which the affiant believed decline with age. Although plaintiff contended that the evidence was insufficient to sustain defendant's burden of proving the defense, the court, relying on an analogous case, found that "a minimal increase in risk of harm to others is all that need be shown to justify the maximum hiring age requirement here in issue." Therefore, the claim based on ADEA failed.

The second count of the complaint was that plaintiff was deprived of his right of equal protection of the law as guaranteed by the fourteenth amendment. A recent United States Supreme Court case controlled the outcome of this issue. In Massachusetts Board of Retirement v. Murgia, the plaintiff, an officer of the state police, made a § 1983 challenge to the statute requiring his retirement at age fifty. Simply stated, the United States Supreme Court found that the legislative classification required only examination on a rational basis standard, which was easily satisfied by the

247 Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974). In this case the bona fide occupational qualification defense was successfully asserted regarding the job of an inter-city bus driver. The reasoning was that the health and well-being of passengers and other city motorists depended on the physical ability of the driver to respond to the demands of his job.
249 96 S. Ct. 2562 (1976).
250 San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). This case reaffirmed the principle that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right, such as the right to vote, travel or speak freely, or operates to the peculiar disadvantage of a suspect class. A suspect class is one burdened with disabilities and with a history of unequal treatment. 411 U.S. at 28. Since mandatory retirement at age fifty from the Massachusetts State Police involves neither situation, it is unnecessary to subject the legislative resolution to that degree of critical examination that equal protection cases have called "strict judicial scrutiny." The relatively relaxed standard of requiring a rational basis for the classification is appropriate.

Justice Marshall dissented in Murgia, being of the opinion that the right to work is a fundamental right and that older workers are subjected to repeated and arbitrary discrimination in employment.
need of the public for police in optimal physical condition. Therefore the reasoning in Murgia applied equally to a hiring age maximum of thirty-five, and plaintiff's claim for relief based on § 1983 was also rejected.
PRACTICE AND PROCEDURE\textsuperscript{251}

I. Instructions

In Burdette v. Maust Coal & Coke Corp.,\textsuperscript{252} the court dealt with the issue of inconsistent instructions. The defendant provided an instruction about concurrent negligence that set up standards different from those offered by plaintiff's instruction. The trial court gave both instructions. The West Virginia Supreme Court of Appeals, following an earlier West Virginia decision,\textsuperscript{253} held it error "to give inconsistent instructions even if one of them states the law correctly, in as much as the jury, in such circumstances, is confronted with the task of determining which principal of law to follow, and in as much as it is impossible for a court later to determine upon what legal principle the verdict is founded."\textsuperscript{254}

Also in Burdette, a new trial was granted for all of the parties in a situation involving multiple parties defendant. The court found error in an instruction given by the trial court at the urging of only one defendant. The court held that since the instruction dealt with a theory of recovery used by the plaintiff against all of the defendants, the plaintiff's case against the other defendants was prejudiced by the giving of the instruction. Therefore, in the interest of justice, a new trial was required as to all of the defendants since the rights involved in the case were so intermingled.\textsuperscript{255}

\textsuperscript{251} A case dealing with procedural issues that was not reported in this article is: Hylton v. Provident Life & Accident Ins. Co., 225 S.E.2d 453 (W. Va. 1976) (trial chancellors finding of facts).

\textsuperscript{252} 222 S.E.2d 293 (W. Va. 1976). This case is also reported in the TORTS section of the Survey.

\textsuperscript{253} State Road Comm'n v. Darrah, 151 W. Va. 509, 153 S.E.2d 408 (1967). In Darrah the court also distinguished an inconsistent instruction from an incomplete instruction. An incomplete instruction, as long as it is not binding, may be completed by another instruction while inconsistent instructions once given cannot be corrected by another instruction.

\textsuperscript{254} 222 S.E.2d at 296.

\textsuperscript{255} Id. at 299, citing Kord's Ambulance Serv., Inc. v. White, 14 Ariz. App. 294, 482 P.2d 903 (1971). In Kord's there was a complicated fact situation. An ambulance was forced to swerve into oncoming traffic to avoid an automobile which entered a left turn bay in front of the ambulance. The trial court directed a verdict for one of the parties. When this directed verdict was overturned a new trial was ordered for all the parties since there may have been overlapping liabilities in a complicated case.

The decision in Burdette is consistent with this rule. While the trial court in Burdette was overturned on the basis that an erroneous (inconsistent) instruction
This case poses an interesting question as to what a co-defendant should do when another co-defendant requests a wrong instruction on a theory applicable to both defendants. Following Burdette, if he cannot convince the co-defendant to withdraw the instruction, then he should object to the giving of the instruction. However, if the instruction is given over his objection, it is doubtful that the objection will prevent a new trial from being awarded if the court finds that the giving of the instruction is reversible error.

II. RULE 12

In Toler v. Shelton, the plaintiff moved, pursuant to Rule 12(f) of the West Virginia Rules of Civil Procedure, to strike as insufficient some of the defenses asserted by State Farm Insurance, a co-defendant. In support of his motion to strike, the plaintiff filed affidavits and exhibits to show in what way the defenses were insufficient. The trial court sustained the motion to strike and entered an order striking the defenses challenged. On joint motion of the parties the trial court certified seven questions to the West Virginia Supreme Court of Appeals relating to the defenses asserted by the defendant.

The certified questions were not properly before the court for two reasons. First, the court, following earlier decisions, held that because there had been substantial factual inquiry concerning the defenses, certification was not possible because the function of certification is "to examine the facial sufficiency of a pleading" independent of underlying facts.

Second, the court found that when factual material accompanies a motion to strike under Rule 12(f), the motion may be considered a motion for partial summary judgment. Since this was a motion for partial summary judgment, certification was not available under the statute because the motion for partial summary judgment was not denied. The court recognized in Toler that some

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was given, in Burdette, as in Kord's, there was also the possibility of overlapping liabilities and the case involved numerous defendants that could be found jointly or severally liable.


223 S.E.2d at 432.

Id. at 433.

authority had held that matters outside the pleadings could not be introduced to support a motion to strike under Rule 12(f). However, the court seemed to follow a line of decisions that turn a motion to strike under Rule 12(f) into a motion for partial summary judgment under Rule 56 when factual matter is presented in support of the motion. This is similar to the provisions of the West Virginia Rules of Civil Procedure that turn a motion to dismiss on the pleadings under Rule 12(c) into a motion for summary judgment under Rule 56 when matters outside the pleadings accompany the motion.

III. RULE 14 IMPLEADER

Southern Erectors, Inc. v. Olga Coal Co., involved a suit by a subcontractor to enforce a mechanic’s lien against the property owner. The property owner impleaded the contractor as a third-party defendant under Rule 14. The issue was whether the third-party defendant had standing to appeal the ruling of the trial court on defenses he asserted on behalf of the third-party plaintiff (or the original defendant).

The power of a third-party defendant to assert the defenses available to a third-party plaintiff stems from Rule 14 of the West Virginia Rules of Civil Procedure. This provision is contained within the rules to protect a third-party defendant when a third-party plaintiff fails to assert a proper defense. The court, noting that the third-party defendant’s liability arises from an adjudication against the third-party plaintiff, held that a third-party defendant had standing to appeal the ruling of the trial court on defenses asserted by the third-party defendant on behalf of the third-party plaintiff under Rule 14.

261 223 S.E.2d at 433, citing, e.g., 5 C. Wright & A. Miller Federal Practice and Procedure § 1380 (1969).
263 223 S.E.2d 46 (W. Va. 1976). This case is also reported in this section under Rule 56, and also under the heading PROPERTY.
265 223 S.E.2d at 49.
266 Id. at 50. Any other decision by the court would be totally unfair. In third-party cases, many times the original defendant will have no interest in appealing decisions on his defenses because he will not be paying any part of the judgment because the third-party defendant is liable to him. This would not be true where
IV. Rule 50

In Simmons v. City of Bluefield, the appellee City of Bluefield filed cross-assignments of error dealing with the trial court's failure to direct a verdict in its favor. While the appellee had filed for a directed verdict at the conclusion of the evidence, appellee had not complied with Rule 50(b) of the West Virginia Rules of Civil Procedure, which permits a party to file for a motion notwithstanding the verdict within ten days of entry of judgment. The appellants contended that since the appellee had not complied with the provisions of 50(b), they could not cross-assign as error any matter connected with their motion for a directed verdict.

The court answered this by stating that a motion for a judgment notwithstanding the verdict is not a condition precedent for a cross-assignment of error. However, in the absence of a motion for directed verdict or judgment under Rule 50, "[t]his Court will not direct the entry of judgment for a complaining party." Therefore, the failure to make a motion under Rule 50(b) does not preclude an appeal, but such failure limits the scope of the appeal and the relief which may be granted.

V. Rule 52

Prete v. Merchants Property Insurance Co. of Indiana dealt with the failure of the trial court to follow the provisions of Rule 52(a) of the West Virginia Rules of Civil Procedure. Rule 52(a) provides that in an action tried without a jury, the trial judge must find "the facts specially and state separately his conclusion of law the third-party defendant is liable for only part of the claim, because then the original defendant would be paying part of the judgment against him. Even in this situation, though, it is best to allow the third-party defendant to appeal; otherwise, you run into the question of how much of an interest does a third-party defendant have to have before he can appeal on the basis of defenses of the original defendant.

207 225 S.E.2d 202 (W. Va. 1976). This case is also reported under the heading TORTS.

208 5A Moore, Federal Practice § 50.16 (2d ed. 1975); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2540 (1971).

209 Id.

210 Id. This holding indicates that unless a party on appeal has moved for a judgment notwithstanding the verdict, the court will not enter judgment for that party but will remand the case to the lower court.

211 223 S.E.2d 441 (W. Va. 1976). This case is also reported under the heading of TORTS.
thereon." The trial court had included in its final order the facts and conclusions but had failed to designate them separately. The West Virginia Supreme Court of Appeals held that where there is sufficient information in the record as to the operative facts, the issue could be disposed of on appeal without remanding the case for compliance with Rule 52(a).

This case continues the West Virginia interpretation of Rule 52(a), that despite the mandatory language of the rule that requires a separation of the findings of facts and legal conclusions, the West Virginia Supreme Court of Appeals will not reverse merely because the separation was not made.

VI. RULE 56

A. Affidavits

_Hamon v. Akers_ involved the failure of an opposing party to file affidavits when a motion for summary judgment was made. The appellate court looked at the moving party's affidavit in support of the motion for summary judgment and found it to be convincing in the absence of a counter-affidavit that there were no genuine issues of fact. The summary judgment of the lower court was affirmed. This case reiterates the importance of filing counter-affidavits when affidavits are filed in support of a motion for summary judgment.

B. Third-Party Actions

In _Southern Erectors, Inc. v. Olga Coal Co._, a third-party defendant was joined by the defendant/third-party plaintiff. In the court's order on a motion for summary judgment by the plaintiff against the defendant/third-party plaintiff, the defendant was ordered to pay a sum to the plaintiff and to credit this amount against the sum owed to the third-party defendant. The court found that this order amounted to a summary judgment against the third-party defendant who was not a party to the motion for summary judgment.

Examining whether this was proper, the court held that

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223 W. VA. R. Civ. P. 52(a).
225 223 S.E.2d 46 (W. Va. 1976). This case is also reported in this section under Rule 14, and also in the section entitled TORTS.
"where a court acts with great caution, assuring itself that the parties to be bound by its judgment have had an adequate opportunity to develop all of the probative facts which relate to their respective claims, the court may grant summary judgment sua sponte." The court then found that the probative facts were on record because the rights of the third-party plaintiff and third-party defendant were based on a contract which was before the court.

VII. Supreme Court Rules

In Benson v. Robertson, the respondents to a petition for mandamus failed to file the responsive pleading required under the rules of practice in the West Virginia Supreme Court of Appeals. As a result of this failure to file, the court accepted as true all material and undenied allegations of the petition for mandamus. The court emphasized the risks one takes when, in the original jurisdiction area of the West Virginia Supreme Court of Appeals, one fails to comply with Rule XVIII.

This decision equivocates a failure to respond under Rule XVIII of the Rules of Practice in the West Virginia Supreme Court of Appeals with a failure to respond under Rule 8 of the West Virginia Rules of Civil Procedure. In both instances, the failure to respond is deemed to be an admission.

VIII. Verdict

In King v. Bittinger, the court decided whether a verdict should be overturned because it was inadequate. In an action for

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276 Id. at 51, citing Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Wirtz v. Young Electric Sign Co., 315 F.2d 326 (10th Cir. 1963). Contra, Twin City Fed. Sav. & Loan Ass'n v. Transamerica Ins. Co., 491 F.2d 1122 (8th Cir. 1974). The reason for this split is that some courts require strict adherence to Rule 56 while other courts will allow the judge to enter a summary judgment without a motion if it is clearly and obviously a case for summary judgment.


278 W. Va. Sup. Ct. R. XVIII, § 4, provides in part: "Within ten days after the issuance of a writ or rule, but in any event at least three days before the return day for the writ or rule applied for, the respondent shall file with the clerk of this court a responsive pleading." This case is the first interpretation of this section of the rule.

279 Id. at 460. From this warning given by the court it is essential that the mandate of Rule XVIII be followed in original jurisdiction actions.

damages caused by the defendant's negligence, the jury returned a verdict for plaintiff in the amount of $547.86, the amount of the stipulated medical expenses. There was uncontroverted evidence that the plaintiff missed about fifty days of work which resulted in a loss of earnings of $3009.00. Also, there was evidence that the plaintiff had suffered an injury which resulted in pain and suffering. The plaintiff had moved the trial court for a new trial and the trial court had refused the motion. The denial of the motion for a new trial was then appealed to the West Virginia Supreme Court of Appeals.

The defendant relied on the "perversely stated verdict" rule to justify the action of the trial court in denying the motion for a new trial. The "perversely stated verdict" rule applies if: (1) there is a jury verdict in favor of the plaintiff for a nominal amount and (2) the evidence is so inadequate that if the jury had returned a verdict for the defendant the trial court could not set it aside.281 This verdict is said to be perversely expressed because the jury only finds nominally for the plaintiff while in reality the jury has found for the defendant.

The King court, however, would not apply this rule because the proof of contributory negligence was so weak that the second part of the test for a "perversely stated verdict" was not met. The trial court could in this case have set aside a verdict for the defendant; because here, the record adequately established the liability of the defendant. Since the "perversely stated verdict" rule did not apply, the court relied on Hall v. Groves282 and held that if "a verdict does not include elements of damages which are specifically proved in uncontroverted amounts and a substantial amount as compensation for injuries and the consequent pain and suffering, the verdict is inadequate and will be set aside."283

A second issue in King was whether the new trial should be on all the issues or whether the new trial should just be on the issue of damages. The court listed three conditions for when a new trial could be limited just to a determination of damages. These three conditions are: (1) the issue of damages is separate and distinct from the issue of liability; (2) the liability of the defendant is

283 231 S.E.2d at 243.
definitely established; and (3) the limitation will not operate to the prejudice of the defendant.\textsuperscript{24}\textsuperscript{1} The court seized upon the second condition and held that since it would allow a contributory negligence instruction to go to the jury, the liability of the defendant was not definitely established and thus a new trial on all the issues should be held.

This holding of a new trial on all the issues is hard to justify. In not applying the "perversely expressed verdict" rule the court indicated that the defendant's evidence was so weak that a finding by the jury in favor of the defendant would be set aside. However, when it came to the nature of the new trial the court held that, since it would allow an instruction on contributory negligence, the liability of the defendant was not definitely established. These two positions are inconsistent and would seem to eliminate the possibility of a new trial solely on the issue of damages whenever a new trial is sought because the verdict is inadequate. If the test to determine whether a defendant's liability is definitely established is whether an instruction can be given, a new trial limited to damages would not be possible wherever there is slight evidence to sustain the giving of a defendant's instruction, something that will be present in almost every case.

\textsuperscript{24}\textsuperscript{1} Shields v. Church Bros., Inc., 193 S.E.2d 151 (W. Va. 1972).
PROPERTY

I. Estates

In *Farrar v. Young*, the plaintiff (Young) individually and as administratrix of her deceased father's estate brought suit against her co-administrators (her brothers), in their individual and official capacities, for an accounting and recovery of certain monies paid to her brothers under a lease agreement. The defendants (Farrar) counter-claimed, alleging she had received an advance against her share of the estate and that, in any division of the estate, her share must be decreased accordingly. The defendants also contended that the royalty agreement upon which plaintiff based her claim was invalid and inoperative. The trial court decided: (1) that money was due the estate because of the binding force of the royalty agreement; (2) that plaintiff had received a one thousand dollar advance against her share; (3) that the proceeds in certain joint bank accounts opened by plaintiff and her father be paid into the estate; and (4) that no attorney's fees were to be charged to the estate. The West Virginia Supreme Court of Appeals affirmed in part and reversed in part.

The royalty agreement plaintiff based her claim on was entered into in April of 1965. In that agreement she and her brothers (defendants), in consideration of the conveyance of certain property, agreed to pay their father a royalty payment for the removal of minerals from beneath this land. In May of 1965, the father granted to the defendants the tract of land covered by the royalty agreement. The conveyance was made by general warranty deed and contained no reference to the royalty agreement. The royalty agreement was not recorded before the grant; so as to a bona fide purchaser of the subject land, the agreement would be nullified. However, the grantees had actual notice of the agreement (being parties to it) and the West Virginia Supreme Court of Appeals noted that they could not invoke the provisions of the recording act to protect themselves. Since the agreement was never cancelled or released, the defendants were ordered to pay the estate a portion

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231 "[E]very deed conveying any such estate or term, . . . shall be void, as to . . . subsequent purchasers . . . without notice . . . until and except from the time that it is duly admitted to record in the county wherein the property . . . may be." W. VA. CODE ANN. § 40-1-9 (1966).
The West Virginia Supreme Court of Appeals found that the money in the joint bank accounts was the sole property of the plaintiff. A teller had testified to the competency of the deceased, his intention to create a joint account with the proceeds to go to the survivor, and also that the plaintiff had paid her share into the accounts. Absent fraud or mistake, it is conclusively presumed that the donor-depositor of a joint and survivorship bank account intended a causa mortis gift of the proceeds remaining intact after death to the survivor. The court also noted that since both the plaintiff and the defendants had brought suit, defended and counterclaimed both as administrators and as individuals, those portions of the attorney’s fees properly attributable to capturing assets of the estate could be charged to the estate.

II. MECHANIC’S LIEN

The controversy in Southern Erectors, Inc. v. Olga Coal Co. arose from a series of contracts entered into in order to improve a mine. The Olga Coal Company (Olga) owned and operated a coal tipple on land owned by corporate subsidiaries of the Youngstown Sheet & Tube Company. In 1969 and 1970, Olga contracted with American Air Filter Company (American) to build a dust control on the tipple. American entered into a subcontract with Associated Craftsmen (Associated) for labor and materials. Associated then entered into a subcontract with Southern Erectors for men and materials to be used on the system.

Associated defaulted on its obligation to Southern Erectors. To secure complete payment, Southern Erectors served notice on Olga and filed notice of a mechanic’s lien on the tipple and the land. Olga was permitted to file a third-party complaint against American, in which Olga contended that American had agreed to indemnify Olga against all claims made against Olga by a subcontractor. American denied the existence of this provision. The Circuit Court of McDowell County found that Southern Erector had

230 S.E.2d at 267.
223 S.E.2d 46 (W. Va. 1976).
an enforceable mechanic's lien against Olga and that Olga was entitled to a setoff in the amount of that lien from American. The West Virginia Supreme Court of Appeals affirmed the lower court's decision.

The appellant American challenged the effectiveness of the mechanic's lien. Under the governing provisions of the West Virginia Code, a subcontractor has a claim upon a structure improved by his labor and materials. He must have given notice of his claim within sixty days of contract completion. Notice was served on Olga, but a factual dispute as to the last date of work was dismissed by the court as unimportant. The applicable statutory provision required notice only to the owner of the structure and not to the owner of the property. Proper notice was given.

The lower court granted a summary judgment against American even though Olga had made no such motion. In reviewing statutory authority and case decision applicable to the summary judgment procedure, the court decided that a lower court may grant summary judgment on its own motion if it acts with great caution after hearing all the facts.

The agreement between the parties was set out in a series of documents. American agreed to furnish the improvements. Where a contractor has obligated itself to furnish labor and materials, in the absence of language otherwise stating, compensation is borne by the contractor. The owner was entitled to a setoff for any expenses incurred by reason of the contractor's failure to perform. Olga was entitled to such a setoff to recompense it for the expenses of the lien.

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293 The applicable rule of civil procedure provides that a summary judgment may be rendered if the pleadings, depositions, admissions and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. W. VA. R. Civ. P. 56. The opponent to such a motion may be granted a summary judgment by the court even though he has made no cross motion. Lowenschuss v. Kane, 520 F.2d 255 (2nd Cir. 1975).
III. Negative Easement

In *Bennett v. Charles Corp.*, the plaintiffs attempted to claim the benefits of a negative easement. A negative easement is one in which the owner of the servient (lesser) estate is prohibited from doing something, otherwise lawful, because it will affect the dominant estate.

Factually, the plaintiffs sought to enjoin the defendants, owners of the tract of land, from developing a cemetery within the tract. Plaintiffs owned a home situated within the tract. They contended that the oral promise of the defendants that the land would be developed as a residential area was sufficient to operate as a negative easement and that, in any case, a clause in the will of the original owner forbade the development of a cemetery within the tract.

The first question before the court was whether the circumstances surrounding the sale to the plaintiff created a negative easement upon the property. An easement was defined by the court as a subdivision of real property and, as such, subject to legislative provisions governing estates in land including subject to the requirements of the Statute of Frauds, which mandates that the creation of estates in land be in writing. Only the will of the original owner was regarded as a "writing" sufficient to create an easement.

The court looked to the purpose of the Statute of Frauds, which is the prevention of actual fraud and perjury. Persons are estopped from pleading the Statute of Frauds as a defense only in the limited circumstances of actual fraud on the part of the vendor and/or part performance on the part of the vendee. Fraud was held not to be present in this case, and the alleged oral promise of the defendants-vendors was inoperative as a negative easement.

In determining whether the restrictive clause in the will operated for the plaintiff's benefit, the court held that it was operative only as a personal restriction upon the devisees which conferred no

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227 BLACK'S LAW DICTIONARY 600 (rev. 4th ed. 1968).
rights upon any successor in title. It was noted that it was not for a court of equity to enforce a restriction against subsequent purchasers which was personal to the grantor.\(^{301}\)

IV. Reservations

In the action of West Virginia Department of Highways v. Farmer,\(^ {302}\) the Department of Highways instigated an eminent domain proceeding for sand and gravel contained on land owned by defendants. The owners of nine-tenths of the mineral rights intervened and contended that the reservation of “oil, gas and other minerals” contained in the original deed applied to sand and gravel. They asked for nine-tenths of the award which had been granted to the surface owners.

The issue was whether the reservation had indeed included the sand and gravel. Sand and gravel are normally considered to be minerals.\(^ {303}\) Minerals include every stone and rock deposit regardless of metallic content.\(^ {304}\) The deed language reserved “oil, gas and other minerals.” This language introduced an ambiguity into the deed. Where a deed is unambiguous, there is no need for construction and words are given their usual meaning. Where ambiguous language is injected, construction becomes necessary and circumstances attendant to the making of the deed are to be considered.\(^ {305}\)

When the land was originally sold in 1911 there was no evidence of any prior sale of sand, or evidence that the grantor even knew of the existence of the sand. Therefore, the court held that the sand was not included in the reservation. The words “and other minerals” were construed by the application of the rule of *ejusdem generis*—where general words follow specific words, the general words are limited to the same kind or class as the specific.\(^ {306}\) “And other minerals” included only petroleum minerals, not sand and gravel.

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\(^ {301}\) Cole v. Seamonds, 87 W. Va. 19, 104 S.E. 747 (1920).
\(^ {302}\) 226 S.E.2d 717 (W. Va. 1976).
\(^ {306}\) Bischoff v. Francesca, 133 W. Va. 474, 56 S.E.2d 865 (1949).
V. SUING BENEFICIARY

In *Fitzwater v. Dobson*, 307 an alleged creditor of the decedent’s estate failed to present a timely claim against either the Commissioner of Accounts or decedent’s personal representative. Rather, the alleged creditor instituted an action against the widow in her capacity as a beneficiary of the estate. The West Virginia Supreme Court of Appeals held that the lower court had improperly dismissed as untimely the creditor’s claim.

The plaintiff had been an employee of the decedent and alleged that an agreement had been made that he be paid $1.45 per hour for his services as a television repairman. A subsequent agreement raised his salary to $1.60 per hour. The plaintiff contended, however, that the full amount was never paid though the deceased had reassured the plaintiff of payment. The employment was terminated sometime before the death of the employer.

The Commissioner of Accounts disallowed the claim as being untimely, despite the plaintiff’s contention that he could recover by virtue of a state statute which provides that one alleging a claim not barred by the statute of limitations may bring his action against the legatees jointly or severally within two years of the death, if the claim is not against the Commissioner of Accounts or the personal representative. 308 The West Virginia Supreme Court of Appeals held that the plaintiff’s claim against a beneficiary was timely and should have been allowed.

VI. TRESPASS

In *Bailey v. S. J. Groves & Sons, Co.*, 309 an owner of real estate attempted to recover damages in trespass for flooding caused by defendant’s construction of a state highway. By the terms of defendant’s contract with the state, the construction company was to build (and did build) the highway in accordance with strict specifications established by the Department of Highways. The contractor followed the specifications to the letter and water was forced upon the plaintiff’s land causing substantial damage. In the Circuit Court of Mercer County both parties moved for a summary

judgment, stipulating that there was no question as to any material fact. Summary judgment was granted to the plaintiff with damages in the amount of four thousand dollars. The plaintiff proceeded on the theory of strict liability for trespass without alleging any malicious intent or negligence upon the part of the defendant contractor and without asserting that defendant was engaging in any ultrahazardous activity.

The West Virginia Supreme Court of Appeals held that although strict liability for trespass was the common law rule, that absolute standard was no longer applicable. The tort of trespass now encompasses only intentional or malicious intrusion upon the land of another, or an inadvertent intrusion upon another's property caused by the trespasser's ultrahazardous activity. The court noted that for an independent contractor building a road under a state contract to be liable in trespass for property damage, it must have independently and negligently committed the trespass, unless engaged in an ultrahazardous activity. Therefore, as the contractor in this case committed no independent wrong, it could not be liable in trespass to the plaintiff and the lower ruling was reversed.

VII. Trusts

The question before the court in Rogerson v. Wheeling Dollar Savings & Trust Co., involved the proper time for distribution of the corpus of a trust. Thomas Rogerson died testate in 1952. His will provided that his entire estate be put in trust with distribution of the corpus to come fifteen years after the death of the last life beneficiary. During that time the defendant-trustees were to manage the trust. The last such beneficiary died in 1966, so distribution was to be deferred until 1981. The testator's nephew sought immediate distribution of the principal and accumulated income. The nephew contended that the trust was dry or passive because of the deaths of the life beneficiaries and the dissolution of two businesses which contained most of the trust assets, and whose management was incumbent upon the trustees.

A trust is passive when the active duties imposed on the trustees have been fully performed; at this time, the Statute of Uses executes the trust and converts the beneficiaries' equitable title into legal title. In this case, the trustees had the power to manage, lease, and convey with discretion the trust assets. The companies were dissolved, but only half of the trust assets were the stock of those corporations. The other half of the trust assets were stocks, bonds, and real estate producing rent and income. Thus, the trustees had a continuing duty to manage the remaining assets of the trust.

Another issue involved the proper time for the distribution of the trust income which the trustees had accumulated since the trust's creation. In the absence of a statute, a provision in a will for the accumulation of income within the period of the Rule Against Perpetuities is valid. The decedent's will, however, contained no such provision. Thus, following a Restatement preference against accumulation in the absence of express language, the court held that the trust income accumulated from the date of death of the last life beneficiary should be distributed immediately.

There was also a question as to whom the beneficiaries were. The testator used the words "children and issue." Technically, the term children includes only lineal issue of the first degree. Where another meaning is apparent, though, courts have generally held that the technical meaning will not be applied. With no indication that the testator intended to differentiate among his siblings' issue, the court held that testator had used the words children and issue interchangeably and not technically.

VIII. Way of Necessity

In Berkeley Development Corp. v. Hutzler, one owner of a

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313 222 S.E.2d at 820. The generally accepted reason for the preference against accumulation is the idea that the one who owns the property, though it may be managed by a trustee, should have the benefits and profits of ownership. Restatement of the Law, Property § 440 (1952).
tract sought an injunction prohibiting the owner of an adjacent tract from entering into and interfering with the surface of plaintiff’s tract. The lower court decided that defendant had neither a prescriptive easement nor a way of necessity across plaintiff’s tract, and granted the injunction. The West Virginia Supreme Court of Appeals reversed, finding that the defendant had a prescriptive easement.

The facts revealed that the two tracts had once been held by a common owner. It was stipulated that there were no express easements in either of the parties’ chain of title. A roadway existed over the plaintiff’s property and defendant’s uncontradicted testimony was that the road had been in continuous use for seventy years. Defendant also testified that there was no means of ingress and egress appurtenant to the property other than this roadway extending over plaintiff’s property.

A unanimous court held that the defendant had a way of necessity over the adjoining tract. To have a way of necessity, the tracts at one time must have been held by common owner; the creation of a way of necessity depends upon the need for an easement over the lands of the grantor (or his successors in title) in order for the grantee (or his successors in title) to have a means of ingress and egress to his property and to obtain the full use of his property. A way of necessity having been created by implication, it cannot be extinguished until the necessity ceases, regardless of whether the purchaser of the dominant estate has notice of the way of necessity or not.

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TAXATION

I. STATE INHERITANCE AND TRANSFER TAX

Three sections of Chapter eleven, Article eleven of the West Virginia Code dealing with inheritance and transfer taxes were amended and a new section added by the West Virginia Legislature in 1976.

Section one, which states when the transfer tax is imposed, was amended in two major areas. The first amended area deals with powers of appointment.\(^{321}\) Paragraph (e)\(^{322}\) of the amended section deals with the creation of either a general or special power whereby the person to whom the power is given (hereinafter called the donee) has also been given an estate in the property subject to the power. Previously, if a power coupled with an estate in the property was given, the amount of the property which was subject to the tax was limited to the value of the estate.\(^{323}\) Now, under

\(^{321}\) W. VA. CODE ANN. § 11-11-1 (Cum. Supp. 1976) provides in part:
A tax, payable into the treasury of the State, shall be imposed upon the transfer, in trust, or otherwise of any property, or interest therein, real, personal, or mixed, if such transfer be:

(e) To any person deriving an estate in property coupled with a general or limited power of appointment.

1. *General power.*—Any transfer involving the creation of a general power of appointment shall be treated as transferring to the donee of the power a fee or equivalent interest in the property which is subject to the power.

2. *Limited power.*—Any transfer involving the creation of any other power of appointment shall be treated as transferring to the donee of the power a life estate or term of years in the property which is subject to the power and as transferring remainder or reversionary interests therein to those who would take if the power is not exercised. The portion of tax which is imposed on any person entitled in remainder or reversion shall be payable in the same manner, and within the same time, as if such person's interest had vested in possession. Unless otherwise provided by the decedent, the tax on such temporary interests and on such remainder or reversionary interests shall be payable out of the corpus of the property which is subject to the power.

\(^{322}\) While the language in paragraph (e) is broad enough to cover inter vivos transfers as well as death transfers, the intent of the legislature in the state inheritance and transfer tax is to tax transfers taking place at the decedent's death. Also, there is no gift tax in West Virginia, which is what a reading of this provision as taxing lifetime transfers of powers would entail.

\(^{323}\) W. VA. CODE ANN. § 11-11-1 (1974 Replacement Volume). This means that if the donee received a life estate and a power to appoint, the tax was computed only on the value of his life estate.
amended paragraph (e) of § 11-11-1 the property which is subject to the tax is greatly expanded. If the donee is given an estate in the property coupled with a general power, for purposes of the tax the donee is treated as if he received a fee simple. If the donee derives an estate in the property coupled with a limited power, the donee is treated as if he received a life estate or term of years in the property and the takers in default (those to whom the property goes if the limited power is not exercised) are treated as if they received a remainder or reversionary interest. For the purposes of the tax the remainder or reversionary interest is treated as if it were a vested interest with the portion of tax allocated to it being payable at the same time as the donee’s portion. Since the donee’s portion of the tax is payable immediately, this has the effect of accelerating the tax payable by the takers-in-default. In the limited power situation, subparagraph (e)(2) also provides that the tax is payable out of the corpus of the property subject to the power unless the decedent provides otherwise.

Paragraph (f)\textsuperscript{24} of the amended section deals with the exercise

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\item \textit{Power that remains unexercised at time of death.}\textemdash If at the time of his death a decedent has a general power of appointment with respect to property, the exercise of that power is subject to tax as a transfer of the property from the decedent to the person to whom the property is appointed. The failure of the decedent to exercise a general power of appointment is subject to tax as a transfer of the property from the decedent to the person to whom the property passes by virtue of the nonexercise of the power. For purposes of this paragraph the power of appointment shall be considered to exist on the date of the decedent’s death even though the exercise of that power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent’s death, notice has been given or the power has been exercised.

\item \textit{Exercise or release by decedent of power during his lifetime.}\textemdash The exercise or release by the decedent during his lifetime of a general power of appointment is a transfer subject to tax if the exercise or release is of such a nature that if it were a transfer of property owned by the decedent, such transfer would be subject to tax under this article. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power.
\end{enumerate}
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or nonexercise of a general power of appointment. Subparagraph (f)(1) provides for the exercise or nonexercise of a general power at the time of death of the holder of the power. If a decedent has a general power of appointment at his death and he exercises it, the exercise of the power is deemed a taxable transfer from the decedent to the person to whom the property is appointed. If the decedent has a general power at the time of his death but fails to exercise the power, there is deemed to be a taxable transfer from the decedent to whomever the property passes because of the failure of the decedent to appoint. Subparagraph (f)(1) also provides that the decedent is still considered to have the power at the date of his death even if the exercise of the power is subject to a giving of notice or even though the exercise takes effect only on the expiration of a stated period after its exercise. This measure is designed to prevent loopholes caused by the taxing of powers not exercised at the donee's death.

Subparagraph (f)(2) deals with the exercise or release of a general power during the decedent's lifetime. It provides that an exercise or release of a power during the decedent's lifetime is taxable only if it comes under some other provision of the article which makes it taxable. The main provision to watch for here is gifts in contemplation of death. Subparagraph (f)(2) also provides that a disclaimer or renunciation of a power of appointment is not a release. This means that neither a disclaimer nor a renunciation of a power would be taxable. Subparagraph (f)(3) adopts the same definitions of general power of appointment and lapse of power as the Internal Revenue Code.

(3) Definition.—For purposes of subdivisions (e) and (f), the term “general power of appointment” and the term “lapse of power” shall have the same meaning as when used in section 2041 of the Internal Revenue Code.

W. VA. CODE ANN. § 11-1-1(c) (Cum. Supp. 1976). Since there is no state tax on lifetime transfers, a gift in contemplation of death would be the only section that could apply. If the gift is made within three years of death, it is presumed to be a gift in contemplation of death.

The Internal Revenue Code defines a general power of appointment as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of the estate." INT. REV. CODE OF 1954, § 2041. A few exceptions to this definition are also present in § 2041. This section equates a lapse with a release of a power except to the extent of the greater of (a) $5000 or (b) 5% of the aggregate value of the property subject to the power of appointment. INT. REV. CODE OF 1954, § 2041(b)(2).
The second major area of change in § 11-11-1 was designed to put the state treatment of annuity or investment contracts in line with the federal estate tax provisions as to the type of annuity and investment contracts that are given a tax break. Certain exceptions were added to paragraph (g) to accomplish this objective. There will no longer be a state inheritance tax on any portion of annuity contracts that fall into the five classes defined in § 11-11-1. Before, these annuity contracts had been fully taxable, and remain taxable under the federal estate tax, to the extent of employee contributions. This means that the state inheritance tax is more lenient in regard to these types of annuities than the federal estate tax. It is interesting to note that subsequent to the adoption of this amendment conforming the state treatment of annuity contracts with the federal treatment, Congress passed amendments to the federal treatment of annuities that expanded the number of exemptions. This may mean that another change may be forthcoming in the state's treatment of annuity contracts.

328 W. VA. CODE ANN. § 11-11-1(g) (Cum. Supp. 1976) provides in part:

Notwithstanding anything contained herein to the contrary, there shall be exempt from tax hereunder the proceeds of an annuity or other payment, whether attributable to employer contribution, employee contribution or otherwise, receivable by any beneficiary under:

(1) An employee's trust (or under a contract purchased by an employee's trust) forming part of a pension, stock bonus, or profit-sharing plan, including self-employed plans, which, at the time of the decedent's separation from employment (whether by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of section 401(a) of the Internal Revenue Code;

(2) A retirement annuity contract purchased by an employer (and not by an employee's trust) pursuant to a plan which, at the time of decedent's separation from employment (by death or otherwise), or at the time of termination of the plan if earlier, was a plan described in section 403(a) of the Internal Revenue Code;

(3) A retirement annuity contract purchased for an employee by an employer which is an organization referred to in section 170(b)(1)(A)(ii) or (vi) of the Internal Revenue Code, or which is a religious organization (other than a trust), and which is exempt from tax under section 501(a) of the Internal Revenue Code;

(4) Annuity under the Retired Serviceman's Family Protection Plan or Survivor Benefit Plan pursuant to chapter 73 of Title 10 of the United States Code;

(5) A retirement savings plan for which a deduction has been allowed under section 219 of the Internal Revenue Code.

Changes were also made in § 11-11-4, which lists the exemptions to the state inheritance and transfer taxes. Most of the changes in section four dealt with increases in the amount of the exemptions.330 Only one new exemption was adopted.331 This exemption only applies when the decedent is unmarried. If the decedent is unmarried, property transferred to his brother, sister, half brother, or half sister is entitled to an exemption of ten thousand dollars.

While the changes in section four deal mainly with changes in the amount of exemptions, the changes in section eleven deal with changes in the filing dates.332 The time period for filing a return to get a discount has been shortened from thirteen months to ten months. Also, the time was shortened from fourteen months to eleven months for computing when interest becomes due and when a penalty is added.

The last change in the state and inheritance tax was the addition of § 11-11-28. This section imposes an additional tax on persons who die as residents of West Virginia. The tax is computed by taking the maximum amount of the credit allowable under the federal estate tax for estate, inheritance, legacy, and succession taxes paid to the several states and deducting the amount of those taxes actually paid to the states. The excess, if any, is the additional tax due.333 The purpose of this new section, as stated in subparagraph (a)(2), is to ensure that the state gets the maximum benefit of the credit allowed under the provisions of the federal estate tax. Paragraph (b) of the new section provides for the apportionment of the additional tax in the same manner as the federal estate tax is apportioned.334

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330 The increases in the amount of exemptions were as follows:

(1) An increase from $100, or less, to $200, or less, exemption for aggregate transfers.

(2) A widow's or widower's exemption was increased to $30,000 from $15,000.

(e) The exemption of a mother, father, child, or stepchild was increased from $5,000 to $10,000. The exemption of a grandchild was increased from $2,500 to $5,000.


334 This apportionment is to be done in accordance with W. Va. Code Ann. § 44-2-16(a) (1968), which provides that the apportionment is made on the value of each person's interest.
TORTS

I. DANGEROUS AGENCIES—DUTY OF CARE

_Gault v. Monongahela Power Co._332 was a personal injury suit by a husband and wife seeking recovery of damages for injuries sustained by the husband when he walked into a low-slung, uninsulated, high-voltage power line which was owned and maintained by the defendant over plaintiff's property. Defendant's motion to set aside the jury verdict for plaintiffs was granted, and an appeal was taken. Because the trial court gave no reason for its decision rejecting the jury verdict, the West Virginia Supreme Court of Appeals found it necessary to review all aspects of the case.

Abundant West Virginia authority sets the standard of care required of an electric company maintaining high-voltage wires as a degree of care commensurate with the dangers reasonably foreseeable;336 in handling so dangerous an agency as electricity, a high degree of care is required.337

The court went one step further in citing a Fourth Circuit Court of Appeals decision which mandated a duty of thorough inspection of electrical wires at whatever intervals may be necessary to insure the safe conduct of business.338 Although the court set no maximum time limit between inspections, it indicated that lack of inspection for eight months could result in liability for negligence. Since evidence showed the last close inspection in the instant case to be approximately six years prior to the accident, the court found the defendant's omission to inspect its property to be negligence as a matter of law.

Defendant contended that the inclusion of a specific amount of $200,000 in one of plaintiff's instructions to the jury was reversible error. The court disagreed, citing a recent decision in which such exposition of the _ad damnum_ clause was disapproved but held expressly not to be reversible error.339

335 Dunagan v. Appalachian Power Co., 23 F.2d 395 (4th Cir. 1928).
The defendant also objected to the admission of plaintiff's testimony that, although he had retired and was receiving social security payments, he planned to return to work when able. The court relied on decisions from other states to uphold admission of the testimony on two rationales: first, the plaintiff deserved compensation for loss of his selective right to work,340 and second, a declaration of plaintiff's state of mind was admissible to prove intent.341

II. FUTURE MEDICAL EXPENSES

The central issue on appeal in Simmons v. City of Bluefield342 was whether or not the question of damages for future pain and suffering and future medical expenses from plastic reconstructive surgery should have been submitted to the jury at the trial level. Answering in the affirmative, the court referred to previous holdings that upon proper proof, a party may recover the reasonable cost of anticipated cosmetic plastic surgery.343 Proper proof is evidence that demonstrates with reasonable certainty that such future expenses will be incurred and that they are proximately related to the negligence of the defendant.344 Although the expert testimony at the trial was conflicting as to cost and necessity, the court felt that the evidence was adequate to permit the jury to consider an award for future medical expenses and pain and suffering. The case was remanded for a new trial on the single issue of damages.

Certainly, the better practice would be to withhold any monetary figure from the jury's consideration which might be suggestive of amount of damage not proven in evidence. However, recognizing the proper function of the jury and, also, that damage awards in personal injury actions are necessarily somewhat indeterminate in character and amount, this Court, while not approving exposition of ad damnum clauses to the jury, does not reverse a case for this impropriety alone.

310 223 S.E.2d at 427.
312 225 S.E.2d 202 (W. Va. 1976). The Simmons case is also discussed in the section entitled LOCAL GOVERNMENT.
In *Ellard v. Harvey*, plaintiffs appealed a circuit court judgment in their favor on the grounds that damages awarded for their personal injuries were inadequate, and the West Virginia Supreme Court of Appeals set aside the verdict. The plaintiffs asserted not merely that the amounts awarded were lower than their injuries warranted, but that the low amounts were the result of adverse rulings and instructions to the jury which deprived the claimants of all the elements of damages to which they were entitled.

The first assignment of error raised the issue of the requisite degree of certainty of future medical expenses to allow such evidence to go to the jury. In this jurisdiction, the rule has long been established that "reasonable certainty" of future consequences of the injury is the standard. "Contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery."346

In *Simmons v. City of Bluefield*, the court held that refusal of a trial court to permit the question of future medical expenses to go to the jury was error, when the "reasonably certain" standard was met and the future expenses were proximately related to the negligence of the defendant.347 In *Simmons*, positive expert testimony established the relationship between the condition of the plaintiff and the negligence of the defendant as well as the necessity for future medical care to the requisite degree of certainty. *Simmons* also established an exception, used in the instant case, to the general rule that a new trial, when granted, is awarded for the entire case: a new trial may be limited to the single issue of damages where liability is established.348

A second ground for reversing the judgment below was the failure of the jury to compensate for loss of consortium where such loss and its relationship to defendant's negligence had been clearly shown by testimony of the plaintiffs and their doctor. If a verdict does not include compensation for all elements of damages which are uncontroverted by the evidence, it should be set aside as inadequate.349 The court found this failure of the jury to be a fatal flaw, requiring reversal.

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349 Id. at 209.
Another error was defendant's instruction to the jury that the evidence was insufficient to permit recovery for loss of wages. The evidence was undisputed that his injuries caused the plaintiff to lose several weeks of work and that he was paid his regular salary as he used his accumulated sick leave. Therefore, the issue on this assignment of error was the West Virginia stance on the "collateral source" doctrine. This doctrine, accepted in most jurisdictions, allows one to recover damages for lost wages even though he was paid in accordance with a sick leave policy or similar plan while away from work. The rationale, as stated by the Fourth Circuit Court of Appeals, is that the victim should not lose any benefits of his employment, wages or accumulated sick leave, due to the act of a negligent third party. Since the West Virginia Supreme Court of Appeals has recognized and adopted the collateral source doctrine in another context, the court deemed it appropriate to apply the rule in this case. Therefore, failure of the trial court to allow plaintiff to instruct the jury concerning the allowance of loss of wages was deemed reversible error.

Justices Neely and Wilson joined in a concurring opinion which disagreed with the majority's approval of the traditional rule that a plaintiff's recovery for future medical costs depends on his showing a reasonable certainty that they will occur. They advocated adoption of a rule proposed by Justice Neely which states that a plaintiff may be awarded damages for future medical expenses in proportion to the likelihood of their occurring.

320 Tallant Transfer Co. v. Bingham, 216 F.2d 245 (4th Cir. 1954).
321 In Jones v. Laird Foundation, Inc., 195 S.E.2d 821 (W. Va. 1973), the court stated that workmen's compensation is a collateral source of benefits and is not a proper consideration in mitigation of damages in an action against a third-party tortfeasor.
322 The rule proposed by Justice Neely is described in detail in Jordan v. Bero, 210 S.E.2d 618, 640-41 (W. Va. 1974). Justice Neely points out the vague language of the "reasonable certainty" rule and the problem of its application in certain cases such as brain injuries where the ultimate results are difficult to predict. He suggests approaching the problem as though the possibility of future medical expenses were a separate injury, as large or as small as is the likelihood that they will occur, and money damages should compensate the victim for that injury. The example furnished in Jordan is that a plaintiff who can prove a twenty per cent probability that he will suffer future injuries costing a hundred thousand dollars should be awarded twenty thousand dollars. In keeping with the traditional rule, the probability of future injury, however large or small, must be proved to a reasonable degree of medical certainty. The rule proposed by Justice Neely recognizes that probabilities less than "reasonable certainty" or less than fifty per cent do exist and damages for them could be awarded without becoming speculative.
III. INDEPENDENT CONTRACTOR

Sanders v. Georgia-Pacific Corp.,\(^{353}\) was a personal injury action by a workman injured while loading logs on land belonging to defendant lumber company in coordination with defendant’s alleged independent contractor. A jury verdict against both the lumber company and the contractor was set aside by the circuit court and the plaintiff appealed. The court had to determine “whether, under the evidence, the trial court would have been justified in taking the case from the jury as to Georgia-Pacific’s defenses of independent contractor and no primary negligence.”\(^{354}\)

Sanders’ injury was caused by the negligent placing and/or operation of a crane owned by defendant Georgia-Pacific but placed and operated by defendant Rupert Sturgill, the lumber company’s alleged independent contractor. Once the plaintiff made a prima facie showing of an employer-employee relationship between Sturgill and the defendant, the burden of proving the independent contractor status was on Georgia-Pacific.\(^{355}\) Usually, no single item decides the independent contractor issue, but the general test is whether the one claiming the existence of the relationship either controls or has the right to control the work.\(^{356}\) Although evidence was sharply in conflict, the court held that it was sufficient for the jury to find no such relationship. Therefore, any negligence on the part of Sturgill could be imputed to Georgia-Pacific vicariously.

The court also held that the evidence was sufficient to support a jury finding of the direct negligence of Georgia-Pacific. Since the company owned the premises, it owed to an invitee-workman the duty of providing a safe place to work and the duty of exercising ordinary care for his safety.\(^{357}\) There was evidence from which the jury could have found that Georgia-Pacific knew or should have known of the placement of the crane, and in allowing the negligent placement, failed the continuing duty of care owed to an invitee.

The fact that work conditions may constantly change does not

\(^{353}\) 225 S.E.2d 218 (W. Va. 1976).
\(^{354}\) Id. at 220.
\(^{356}\) 225 S.E.2d at 222.
affect the affirmative duty to provide a safe place to work and to exercise ordinary care. The court specifically disapproved syllabus point two in Chenoweth v. Settle Engineers,258 relied upon by defendant as establishing a less stringent duty to supply a safe place to work. Chenoweth enunciated a general exception to that duty—where the conditions of the place or work are constantly changing. The Sanders court limited the exception to the "rare and unusual instances where it can be shown that the one asserting the defense of independent contractor neither knew nor in the exercise of reasonable care, skill and diligence should have known of such changing conditions."259 Since the trial court clearly acted under some "legal misapprehension,"260 the West Virginia Supreme Court of Appeals reversed and remanded with instructions to enter judgment in favor of the plaintiff.

IV. Libel

The two main issues in Neal v. Huntington Publishing Co.261 were: (1) what elements constitute a cause of action in libel for a public official, and (2) may extrinsic evidence be used to identify the one defamed. The alleged libel of plaintiff occurred in the November 3, 1972, edition of the Huntington Herald-Dispatch, published by defendant, and identifying the plaintiff only as "THE SHERIFF."262 At the time of publication the plaintiff was Sheriff of Cabell County and the Republican nominee for the United States House of Representatives from the Fourth Congressional District of West Virginia. In his complaint he alleged that the words were false, that they damaged his reputation in the community and humiliated him, that they were "recklessly, dishonestly, and maliciously published and circulated" and that they

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258 151 W. Va. 830, 156 S.E.2d 297 (1967). Syllabus point 2 states: The rule that an employer or an independent contractor has a duty to provide a safe place in which to work on the premises of such employer is subject to an exception where the conditions of the place of work are constantly changing.

259 Id. at 830.

260 225 S.E.2d at 222.

261 Id. at 223.


263 "WHY HASN'T THE SHERIFF DENIED ANY OF THE 21 FELONY CHARGES AGAINST HIM?? Is he afraid to stand trial? Is he relying on 'Political Maneuvering' to get him off? Should he be treated different from anyone else charged with a crime?" 223 S.E.2d at 794.
were published with the intent of injuring him in his good character and reputation. 363

The court relied on the elements required in *Sprouse v. Clay Communications, Inc.* to prove libel of a candidate for public office or of a public official: 1) the alleged libelous statements were false or misleading; 2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; 3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, 4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material. 364 The plaintiff's complaint fulfilled these requirements and therefore constituted a valid cause of action in libel. The *Sprouse* "actual malice" requirement to prove libel of a public official was recently reaffirmed by the United States Supreme Court. 365

The defendant publisher asserted that nothing in the publication identified the plaintiff as the person about whom the defamatory words were used, and relied on *Argabright v. Jones* 308 for the proposition that extrinsic evidence may not be used to identify one who has been defamed. Plaintiff relied on the same case, in particular, the words "or ascertainable" 357 to support the theory that extrinsic evidence may be used to identify one libelled, in which case any reader of the newspaper could easily discover that "THE SHERIFF" was Mr. Neal. Agreeing with the plaintiff's position, the Court reversed the circuit court's dismissal and remanded the case for further proceedings.

V. PARENTAL IMMUNITY

The doctrine of parental immunity was limited in West Virginia in the case of *Lee v. Comer.* 366 In *Lee,* the court held that this common law doctrine is no longer applicable in cases where a child

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363 Id. at 795.
366 46 W. Va. 144, 32 S.E. 995 (1899).
367 46 W. Va. at 146, 32 S.E. at 996, *citing* 13 Am. & Eng. Enc. Law 391: "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff."
is injured in an automobile accident as a result of his parent’s negligence.

The historical justification for the creation of the doctrine of parental immunity was the preservation of family relations and domestic tranquillity.369 However, it is highly unlikely that a suit by a minor child against a parent will disrupt family peace where the parent is protected by liability insurance. The court recognized that the basis for the doctrine has largely disappeared due to the prevalence of auto insurance; this is the reason the court advanced for limiting abrogation of the doctrine to cases of automobile accidents.370

Cases from fifteen jurisdictions were cited which now permit suits under these circumstances as evidence of the “landslide trend” toward abandonment of the doctrine.371 The rationale is that where insurance exists, an action against the parent will actually benefit the family relationship instead of disrupting it, and where no insurance is carried, the child probably will not sue. If the child does sue the parent, knowing there is no liability coverage, it is doubtful whether there was any family tranquillity for the courts to preserve. Furthermore, a personal injury action will cause no more bitterness than a property or contract action by a child against his parent, and the latter two actions have traditionally been permitted.372

Having disposed of the domestic relations argument, the court turned to the defendant’s objection that allowing such suits would encourage collusion between children and parents to obtain undeserved compensation from insurance companies. Two theories were held applicable in rejecting this contention: first, upon balancing, the right of the child to be free from personal injury outweighs the danger of possible collusion. Second, one of the functions of our juries and trial courts is to sift out the fraudulent claims from the honest ones.373

Therefore, the parental immunity doctrine is no longer applicable in West Virginia when a parent’s negligent driving causes

369 Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).
370 224 S.E.2d at 723.
371 Id. at 723-24.
373 224 S.E.2d at 724-25.
injury to his child. Cases inconsistent with this position were overruled.\textsuperscript{374}

In concurrence, Justice Neely argued that the court’s limitation of the doctrine should be couched in terms of whether or not the parent is insured, instead of whether or not the accident occurred in an automobile. Eliminating parental immunity “where the real party in interest is an insurance carrier rather than a parent” is consistent with the majority’s reasoning, he argued.\textsuperscript{375}

VI. Safe Place to Work—Standard of Care

\textit{Bates v. Sirk}\textsuperscript{376} was a personal injury action by a race track employee against his employer for negligently failing to provide a safe place to work. Plaintiff was struck by an out-of-control race car as he was performing his duties in the infield of the track. Since defendant-employer was eligible to subscribe to the workmen’s compensation fund but did not do so, he lost his common-law defenses of the fellow-servant rule, assumption of risk, and contributory negligence.\textsuperscript{377}

However, plaintiff still had the burden of making a prima facie showing of negligence on the part of defendant. This was accomplished by plaintiff’s evidence of no guard rail, no protective pit, inadequate lighting, no warning system, and an inadequate number of employees. The defendant’s defense was that he employed the same safety standards as other tracks in the area, and this custom and usage in the business established a standard of care beyond which he need not go. Rejecting this argument, the court defined the standard as reasonable prudence rather than what is usual and ordinary. “What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”\textsuperscript{378} The employer here failed to meet the requisite standard and so was held liable.


\textsuperscript{375} 224 S.E.2d at 725-26.

\textsuperscript{376} 230 S.E.2d 738 (W. Va. 1976).


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WORKMAN'S COMPENSATION

I. SECOND INJURY—SURPLUS FUND

In Mullens v. State Workmen's Compensation Commissioner, the employer of a self-insured employer was granted a life award pursuant to the second injury provision of the Workmen's Compensation Act. The employee's permanent total disability rating was the cumulative result of previous injuries and of the work-related second injury to his back. Although the employee was a self-insurer of first injuries, it had elected to pay into the Compensation Act's surplus fund. In accordance with the provisions of the Act, the employer was required to make payments to the employee only of those benefits relating to the first injury; the remainder of the payments were to be made from the second injury reserve of the surplus fund. When payment of the cash benefits for the excess of the life award over the award for the permanent partial disability caused by the second injury began from the surplus fund, the employer protested his payment of any of the employee's further medical expenses. The commissioner determined that the self-insured employer was responsible for the payment of the injured employee's continuing medical expenses regardless of its participation in the surplus fund. The appeal board ruled that the continuing medical expenses caused by the second injury should be paid by the commissioner from the surplus fund, and that the commissioner had no statutory authority to compel a self-insurer to pay medical bills in excess of $3,000 in a case involving a life award due to a second injury. On appeal by the commissioner, the West Virginia Supreme Court of Appeals agreed with both rulings of the appeal board, holding that "when an employee of a self-insured employer who pays into the surplus fund sustains a second injury, the employer is liable for medical expenses up to $3,000, and that thereafter the surplus fund is chargeable for such medical payments." 33

33 The surplus fund of the West Virginia Workmen's Compensation Act "cover[s] the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for in this chapter." W. VA. CODE ANN. § 23-3-1 (1973 Replacement Volume).
333 223 S.E.2d at 605.
The court initially distinguished its decision in *Smith v. State Workmen's Compensation Commissioner,*\(^{284}\) noting that *Smith* involved a first injury to the employee of a self-insurer. The court then examined the portion of the self-insured employer statute relating to second injuries.\(^{285}\) Significant to its decision that self-insured employers who pay into the surplus fund should have the benefits of the surplus fund in the payment of medical expenses was the inclusion of the word "expenses" in the self-insured employer statute. The court reasoned that for the term to have any efficacy within the scheme of the Workmen's Compensation Act, the only reasonable interpretation of the self-insurer provision was that the inclusion of the word "expenses" in the portion relating to second injuries contemplated medical expenses.\(^{286}\) The court was further persuaded by the fact that self-insured employers paying into the surplus fund pay upon the same basis and in the same percentages as regular subscribers.\(^{287}\) The court noted that because the self-insurer who elects to pay into the surplus fund is charged at the same rate as a regular subscriber, he is also entitled to have the compensation and expenses caused by a second injury paid from the surplus fund to the same extent as a regular subscriber.\(^{288}\) Having found that all participants in the surplus fund were entitled to the same benefits, the court concluded that "[o]ne of those benefits is exoneration from further charges above and beyond the permanent partial disability attributable to a second injury when a combination of injuries warrants a life award."\(^{289}\)

Having held in *Mullens* that the liability of a self-insured employer who pays into the surplus fund for payment of medical expenses upon a second injury to an employee resulting in a life award was limited to the $3,000 maximum medical disbursement then provided for by the Act,\(^{290}\) the question remains how the holding in *Mullens* will apply following the 1976 amendment to the medical payment provision.\(^{291}\) It should be noted that the decision

\(^{284}\) 219 S.E.2d 361 (W. Va. 1975). *Smith* held that a self-insured employer who contributed to the surplus fund was required to pay all medical expenses of a first injury to an employee without benefit of the surplus fund.


\(^{286}\) 223 S.E.2d at 606.

\(^{287}\) W. VA. CODE ANN. § 23-3-1 (1973 Replacement Volume).

\(^{288}\) 223 S.E.2d at 607.

\(^{289}\) Id.

\(^{290}\) W. VA. CODE ANN. § 23-4-3(a) (1973 Replacement Volume).

does not discuss the court’s affirmation of the appeal board’s ruling that the commissioner was not statutorily authorized to direct a self-insurer to pay medical expenses in excess of $3,000 attendant upon a second injury. However, the court’s specific holding\textsuperscript{292} would seem to indicate that the maximum medical disbursement figure contained in the Act marked the point at which the self-insurer who contributed to the surplus fund was entitled to rely on the surplus fund for payment of any medical expenses of a second injury. If the commissioner’s authority to direct the self-insurer to make such medical payments was limited only by the maximum figure contained in the medical payment provision of the Act, it seems possible that the recent amendment to the statute, which limits the commissioner’s ability to make medical disbursements from the compensation fund only to what “may be reasonably required,”\textsuperscript{293} would permit the commissioner to direct a self-insured employer to make payment of medical bills to an indeterminate amount, even in the case of a second injury.

A more reasonable interpretation of Mullens is suggested by reading the decision in its entirety and interpreting the result in light of the court’s reasoning and the purpose of the second injury fund. The recognized purpose of second injury funds is to supplement the regular compensation system with a plan whereby workers who sustain work-related second injuries will receive compensation benefits commensurate with their degree of disability, and which will not reduce the opportunities of these workers to obtain employment.\textsuperscript{294} An interpretation of Mullens that would allow the commissioner to continue to direct an employer to make payments of medical expenses indefinitely would be at odds with that purpose. Additionally, because the statutory limit of $3,000 for medical disbursements has been removed, use of the $3,000 figure to denote the point at which self-insured employers are entitled to the benefits of the second injury reserve of the surplus fund upon a second injury to an employee has no present justification. A reasonable interpretation which would allow consistent application would be that Mullens limits the liability of the self-insured employer to make payments for medical expenses of a second injury which results in a life award to the period during which the em-

\textsuperscript{292} See text accompanying note 5 supra.
\textsuperscript{294} See 2 A. Larson, Workmen’s Compensation § 59.30 (desk ed. 1972).
employer is responsible for the payment of cash benefits for the permanent partial disability caused by the second injury. 395

II. COMPENSATION FOR OCCUPATIONAL INJURIES

The compensation formula of the West Virginia Workmen's Compensation Act requires that employees receive "personal injuries in the course of and resulting from their covered employment"396 before they are entitled to any benefits under the Act. Although not expressly included in the language of the Act, the West Virginia Supreme Court of Appeals has for many years construed the first element of the formula—that the employee have received "personal injuries"—to require proof that the injury was caused by an accident.397 To prove a compensable injury by accident, claimants must show that the disability was attributable to a "definite, isolated, fortuitous occurrence."398 In the typical industrial accident, the definite, isolated, fortuitous event which demonstrates injury by accident is not normally a difficult matter of proof. However, when the injury follows as the consequence of the employee's usual and ordinary duties of employment, or where the injury is superimposed on a preexisting like injury, claimants have encountered difficulties in meeting the standard of recovery established by the court.

In one such case, Pennington v. State Workmen's Compensation Commissioner,399 the claimant, whose duties included patrolling a coal conveyor belt line and cleaning up the spillage of coal, alleged a back injury resulting from shoveling a load of coal onto a conveyor belt. The employer contended that the back ailment occurred while the claimant was engaged in the ordinary duties of his employment and, therefore, did not constitute a personal injury by accident as contemplated by the Workmen's Compensation

395 Presumably, the same result would obtain in the case of a regular subscriber. Because both regular subscribers and self-insured employers are to share in the benefits of the surplus fund to the same extent, and because the 1976 amendment has removed any maximum limit to which a regular subscriber may be charged with medical disbursements, it would seem that the regular subscriber should be charged for the medical expenses of a second injury only until the payment of cash benefits is taken over by the surplus fund.


399 222 S.E.2d 579 (W. Va. 1976).
Act. The court, however, ruled that the act of shoveling coal during which the claimant suffered a sudden pain was a definite, isolated, fortuitous event, and that the evidence of the occurrence of the injury satisfied the requirements of a personal injury within the meaning of the Act.\textsuperscript{402} The court restated the proposition that West Virginia requires proof of injury by accident,\textsuperscript{401} but chose to adopt a more liberal construction of the term accident, noting that "when considering compensability under the compensation law an accident need not be a visible happening; it may be an unusual or unexpected result attending the operation or performance of a usual or necessary event or act."\textsuperscript{402}

The court in Pennington appears to have adopted the position that the personal injury by accident requirement may be satisfied by demonstrating that the performance of a usual or ordinary duty of the employment produced an unexpected result. However, it should be noted that Pennington involved a back injury to a claimant with no prior history of back trouble. The court gave no indication of whether a showing of an unexpected result from the usual duties of employment would satisfy the requirements of the Act where the injury was to a claimant with a preexisting like injury.\textsuperscript{403}

Closely akin to the problem in Pennington, the court was faced, in Lilly v. State Workmen's Compensation Commissioner,\textsuperscript{404} with the question of the compensability of a gradual back injury. The claimant, who had been in the employ of a garment manufacturer for six months prior to her disability claim, alleged back injuries resulting from the duties of her employment. Her job normally required a lifting and twisting motion with bundles of pants weighing up to twenty-five pounds per bundle up to ten times per hour. The claimant could point to no sudden cause or result to satisfy the requirement of an injury by accident attributable to a definite, isolated, fortuitous occurrence. In fact, claimant's testimony clearly indicated that the injury was the gradually developed result of the performance of her usual duties over a protracted period of time. The claim was pursued on the theory that the

\textsuperscript{400} Id. at 581.
\textsuperscript{401} Id.
\textsuperscript{402} Id.
\textsuperscript{403} For a general discussion of the "by accident" requirement, and the accidental-cause versus accidental-result problem, see 1 A. Larson, Workmen's Compensation § 37.00 (desk ed. 1972).
\textsuperscript{404} 225 S.E.2d 214 (W. Va. 1976).
claimant’s injury was an “occupational disease” and, therefore, compensable as a personal injury under the Workmen’s Compensation Act. The court reasoned that a gradually developing bodily impairment satisfied the general definition of a disease. Guided by decisions from other jurisdictions which had determined a back injury to be an occupational disease within the contemplation of compensation law, the court ruled that, based on the evidence presented, the claimant’s gradually received back injury was compensable as an “occupational disease” incurred in the course of and resulting from her employment within the meaning of the Workmen’s Compensation Act.

III. EMPLOYEE IMMUNITY

In *Eisnaugle v. Booth*, an employee sued a co-employee for personal injuries received on the way to work from being struck in the employer’s parking lot by an automobile driven by the co-employee. The co-employee moved for summary judgment, contending that he was immune from personal liability under the Workmen’s Compensation Act’s employee immunity provision “because [the employee’s] injuries were received in the zone of his employment and were compensable under the State Workmen’s Compensation laws.” The plaintiff, however, alleged that the defendant was intoxicated at the time of the accident, and that he

405 W. VA. CODE ANN. § 23-4-1 (Cum. Supp. 1976) provides that “the terms ‘injury’ and ‘personal injury’ shall include occupational pneumoconiosis and any other occupational disease, as hereinafter defined . . .”

406 225 S.E.2d at 217.

407 *Id.*

408 In order for a disease to be considered an “occupational disease” within the scope of the Workmen’s Compensation Act, it is necessary that such disease have occurred in the course of and resulting from the employment. In cases of diseases which are “ordinary diseases of life to which the general public is exposed outside of the employment,” the disease, to be deemed to have arisen in the course of and resulting from the employment, must meet six criteria as set forth in the Act. W. VA. CODE ANN. § 23-4-1 (Cum. Supp. 1976). The court in *Lilly* recognized the necessity of the claimant’s injury fulfilling these criteria but offered no analysis of how the individual criteria applied or were met in this case.


410 W. VA. CODE ANN. § 23-2-6a (1973 Replacement Volume) provides that: The immunity from liability set out in the preceding section [§23-2-6] shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer’s business and does not inflict an injury with deliberate intention.

411 226 S.E.2d at 260.
was, therefore, not immune from civil liability for the personal injuries sustained by the plaintiff. The trial court granted defendant’s motion. The West Virginia Supreme Court of Appeals affirmed the ruling of the trial court, using the findings that the injured employee’s injuries were received in the course of and as a result of his employment, that several cases which involved similar factual circumstances to those in the instant case had all held the co-employee to be immune from a civil action, and that the plaintiff had failed to assert that the injury was inflicted with the deliberate intention which could except the co-employee from the immunity provision.

Exactly how the court concluded from these findings that the employee immunity provision precluded the plaintiff from maintaining a common law action for damages against the co-employee is not clear. The employee immunity statute of the Act extends immunity from liability “to every . . . employee . . . when he is acting in furtherance of the employer’s business.” Unfortunately, the West Virginia Supreme Court of Appeals made no reference to this language.

Language similar in substance to the “acting in furtherance of the employer's business” language of the West Virginia em-

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42 Id. at 260-61. The general rule is that injuries sustained by employees while going to or coming from work are not received within the course of and resulting from the employment, except where the injuries are sustained on the employer's premises at a point reasonably proximate to the place of work. Hager v. State Compensation Comm'r., 112 W. Va. 492, 165 S.E. 668 (1932).


44 226 S.E.2d at 261. Additionally, the court noted that even were they to assume that the defendant was intoxicated and that the intoxication was responsible for his conduct, the necessary deliberate intention would still be lacking, as “[n]either gross negligence nor wanton misconduct are such as to constitute injury by deliberate intention as contemplated by the immunizing statute.” Id. In his concurring opinion, Justice Wilson expressed his disapproval of the court’s restrictive interpretation of the deliberate intention requirement. Id. at 261-62. The difficulties that the court has experienced in attempting to define “deliberate intention” as it relates to the Workmen's Compensation Act are examined in 72 W. Va. L. Rev. 90 (1970).

ployee immunity statute is found in the immunity statutes of other jurisdictions. Although such phraseology has generally been held to mean that the immunity attaches only when the co-employee who caused the injury is acting in the scope of his employment, there has been disagreement as to what “scope of the employment” test to apply.416 Some jurisdictions interpret it to mean that the co-employee must have been in the “scope of the employment” in the common law, respondeat superior sense of that phrase.417 Under this interpretation, immunity is conditioned upon a finding that the co-employee was actually pursuing some interest of the employer at the time of the accident. Others interpret such qualifying language to mean that the co-employee must have been acting in the “scope of the employment” in the workmen’s compensation sense for the immunity to attach.418 This interpretation uses the same test that is used to determine whether the injured employee’s injuries are compensable. In the context of Eisnaugle, it seems that either interpretation would provide an argument in favor of allowing the injured employee’s third party claim.

It is certainly arguable that a respondeat superior interpretation of the phrase “acting in furtherance of the employer’s business” is intended by the West Virginia Act. The language used in the immunity provision, in addition to closely approximating the common law definition of “scope of the employment,” differs substantially from the “in the course of and resulting from”419 language used in the Compensation Act to define sufficient work connection. However, if such an interpretation was applied by the court in Eisnaugle, it seems inconceivable that the defendant could have been brought within the statute’s immunity. He had not yet reported to work when the accident occurred and could not have been considered as actively engaging in his employer’s service at the time of the accident. In order to bring the defendant’s conduct within the purview of the immunity provision of the Act, it must be assumed that the court interpreted “acting in furtherance of the employer’s business” to require application of the workmen’s compensation “scope of the employment” test. The cases cited by the Eisnaugle court completely support this proposition.420

420 See note 5 supra.
The plaintiff in *Eisnaugle* alleged that the defendant’s intoxication should nullify the Act’s employee immunity. Support for this contention can be found in the provision of the Workmen’s Compensation Act relating to employee misconduct.\(^{42}\) That provision excludes from the benefits of the fund any employee whose injuries are caused by “the intoxication of such employee.”\(^{42}\) It seems unreasonable to suggest that the Act, read as a whole, would penalize the intoxicated employee in one instance by denying him the benefits of the fund upon an injury to himself, and would, at the same time, provide immunity when he injures an innocent co-employee.

IV. PETITIONS FOR REOPENING PNEUMOCONIOSIS CASES

In *Hamrick v. State Workmen’s Compensation Commissioner*,\(^ {43}\) claimant, who had previously been granted a twenty-five percent permanent partial disability award for occupational pneumoconiosis, filed a petition with the commissioner to reopen his claim asserting progression of his condition. The commissioner held that the claimant had been fully compensated by the prior award and denied the petition for a reopening. The claimant appealed the commissioner’s final order, asserting that the case should have been referred to the occupational pneumoconiosis board for advice on the matter of progression before the entry of a final order. The appeal board agreed, reversing the commissioner’s order and remanding the claim for referral to the occupational pneumoconiosis board. The claimant’s employer appealed the decision of the appeal board, and the West Virginia Supreme Court of Appeals reversed.

The court’s decision was based on the ground that the appeal board had made an erroneous conclusion of law relating to the commissioner’s statutory duty when considering petitions for reopening in occupational pneumoconiosis cases.\(^ {44}\) The claimant had asserted that the provision of the Workmen’s Compensation Act requiring that the occupational pneumoconiosis board’s find-

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\(^{42}\) *Id.*

\(^{43}\) 228 S.E.2d 702 (W. Va. 1976).

\(^{44}\) “Our review of this case concerns the legal conclusions of the appeal board rather than the findings of fact and we find those legal conclusions to be erroneous.” *Id.* at 704.
ings set forth whether or not the claimant’s exposure has “perceptibly aggravated an existing occupational pneumoconiosis” made it mandatory for the occupational pneumoconiosis board to determine whether the claimant’s condition had been aggravated. The court, however, found that the commissioner was under no statutory duty to refer a petition for reopening of an occupational pneumoconiosis claim to the occupational pneumoconiosis board but, rather, that the decision of whether or not to refer a reopening claim to the board was expressly placed within the commissioner’s discretion by the statute. Although recognizing that referral to the occupational pneumoconiosis board may sometimes be helpful, the court held that the appeal board’s determination that referral was mandated by the Act was erroneous.


228 S.E.2d at 703.

W. Va. Code Ann. § 23-4-8 (Cum. Supp. 1976) provides in pertinent part that: “If the compensation claimed is for occupational pneumoconiosis, the commissioner shall have the power, ... whenever in his opinion it shall be necessary, to order a claimant to appear for examination before the occupational pneumoconiosis board . . . .”