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Issue 5 *A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals*

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Contract Law

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stating that

> [t]he appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order.[714]

Finally in *Robinson,* Justice McHugh held that

> [a]bsent legislation otherwise, the public interest in the enforcement of a noncustodial parent's obligation of support does not create a positive duty on the part of a prosecuting attorney to prosecute a civil contempt action which arises from a failure to comply with a divorce decree which orders support payments.[715]

B. Criminal Contempt

In *State ex rel. Robinson v. Michael,*[716] Justice McHugh indicated that "[w]here the purpose to be served by imposing a sanction for contempt is to punish the contemner for an affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court, the contempt is criminal."[717]

Justice McHugh also held that "[t]he appropriate sanction in a criminal contempt case is an order sentencing the contemner to a definite term of imprisonment or an order requiring the contemner to pay a fine in a determined amount."[718]

XII. CONTRACT LAW

A. Interpreting Contract

In *L.D.A., Inc. v. Cross,*[719] Justice McHugh restated a principle of law developed in *Quinn v. Beverages of West Virginia.*[720] He held in *Cross*:

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714 *Id.* at Syl. Pt. 3.

715 *Id.* at Syl. Pt. 6.

716 276 S.E.2d 812 (W. Va. 1981).

717 *Id.* at Syl. Pt. 4.

718 *Id.* at Syl. Pt. 5.

719 279 S.E.2d 409 (W. Va. 1981).

720 224 S.E.2d 894 (W. Va. 1976).

> Whether a contract is entire or severable is a determination to be made by the court according to the intention of the parties and such intention shall be ascertained from a consideration of the subject matter of the contract, a reasonable construction of the terms thereof and the conduct of the parties during their negotiations, all of which should be viewed in the light of the surrounding circumstances.[721]

B. Novation

In *Perlick & Co. v. Lakeview Creditor's Trustee Committee*,[722] Justice McHugh defined and set out the elements of a novation. He held:

> Novation is generally defined as a mutual agreement among all parties concerned for discharge of a valid existing obligation by the substitution of a new binding obligation on the part of the debtor or another. Thus, the necessary elements of a novation are (a) a previous valid obligation, (b) a consent by all parties to the new contract, (c) an abatement of the old contract and (d) a new contract which is valid and enforceable. Without any of these essential elements, there is no novation.[723]

C. Assignment

Justice McHugh held in *Clendenin Lumber & Supply Co. v. Carpenter*[724] that "[t]he phrase 'to another' as used in the definition of an assignment of earnings under *W.Va. Code* 46A-2-116(2)(b) [1974], includes an employer when that employer is also the creditor of the employee."[725]

D. Mechanic's Lien

In *Dunlap v. Hinkle*,[726] Justice McHugh relied upon the decision in *Lilly v. Munsey*[727] in order to hold:

> A mechanic's lien for supplies and labor used and employed in the improvement of real estate, to bind the interest of the owner of

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721 279 S.E.2d at Syl.

722 298 S.E.2d 228 (W. Va. 1982).

723 *Id.* at Syl. Pt. 2.

724 305 S.E.2d 332 (W. Va. 1983).

725 *Id.* at Syl. Pt. 1.

726 317 S.E.2d 508 (W. Va. 1984).

727 63 S.E.2d 519 (W. Va. 1951).

> such real estate, or any interest therein, must be based on contract for such improvement with such owner, of said real estate or interest therein, or his duly authorized agent.[728]

E. Oral Contract

Justice McHugh ruled in *Lorenze v. Church*[729] that "[a] person whose rights, status, or other legal relations are affected by an oral contract may obtain a declaration of those rights, status, or other legal relations under *W.Va. Code*, 55-13-2 [1941]."[730]

F. Oil and Gas Lease

In *Berry Energy Consultants & Managers, Inc. v. Bennett*,[731] Justice McHugh was concerned with rights of a lessor and lessee regarding property leased for oil and gas. Justice McHugh held:

> Under the provisions of *W.Va. Code*, 36-4-9a [1979], a "rebuttable legal presumption" that a lessee intends to abandon an oil and/or gas well shall not be created, where the lessee has paid or tendered "delay rental" for the leased premises. Where, however, a lessor and a lessee have entered into a lease for the purpose of "exploring and operating for" and "producing and marketing" oil and gas, and a well has been drilled by the lessee and gas discovered, the payment or tender by the lessee of delay rental for the leased premises does not relieve the lessee from an implied obligation to exercise reasonable diligence in marketing gas from the leased premises.[732]

Justice McHugh addressed several issues involving an oil and gas lease in *McCullough Oil, Inc. v. Rezek*.[733] The court held initially:

> An oil and gas lease (or other mineral lease) is both a conveyance and a contract. It is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the oil and gas interests: securing production of oil or gas or both in paying quantities, quickly and for as long as production in

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728 *Id.* at Syl. Pt. 1.

729 305 S.E.2d 326 (W. Va. 1983).

730 *Id.* at Syl. Pt. 1.

731 331 S.E.2d 823 (W. Va. 1985).

732 *Id.* at Syl. Pt. 2.

733 346 S.E.2d 788 (W. Va. 1986).

paying quantities is obtainable.[734]

Justice McHugh next held:

> A habendum clause in an oil and gas lease (or other mineral lease) providing for a short primary term and a secondary term for "so long as" production in paying quantities or operations therefor continue, or similar language, conveys a "determinable" interest, that is, an interest subject to a special limitation. Such an interest automatically terminates by its own terms upon the occurrence of the stated event, namely, expiration of the primary term without production or operations at such time, or the cessation of production or operations during the secondary term.[735]

Continuing in *McCullough Oil* Justice McHugh ruled:

> Where an oil and gas lease (or other mineral lease) contains a cessation of production clause applicable to the secondary term, the lease terminates automatically at the end of the "grace period" provided by such clause, unless production or operations are resumed within the grace period. The cessation of production clause grants the lessee the right to resume operations within the grace period; it does not impose the duty to do so.[736]

Justice McHugh concluded in *McCullough Oil* by holding that "[t]he lessee (or its assignee as operator) is not entitled to notice before the lease terminates automatically under the habendum clause or the cessation of production clause of an oil and gas lease (or other mineral lease)."[737]

In *Bruen v. Columbia Gas Transmission Corp.*,[738] Justice McHugh construed language in an oil and gas lease. The decision stated:

> If an oil and gas lease contains a clause to continue the lease for a term "so long thereafter as oil or gas is produced," but also provides for "flat-rate" rental payments, then quantity of production is not relevant to the expiration of the term of the lease if such "flat-rate" rental payments have been made by the lessee. Therefore, in a case involving termination of such an oil and gas lease which provides "flat-rate" rental payments, it is reversible error for a circuit court to instruct the jury that the word

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734 *Id.* at Syl. Pt. 1.

735 *Id.* at Syl. Pt. 2.

736 *Id.* at Syl. Pt. 3.

737 *Id.* at Syl. Pt. 4.

738 426 S.E.2d 522 (W. Va. 1992).

"produced" in the lease means "produced in paying quantities."[739]

G. Perfected Security Interest

In *Daniel v. Stevens*,[740] Justice McHugh addressed issues under the Uniform Commercial Code pertaining to security interests. The court held:

> Equitable estoppel is not a legally cognizable defense to avoid a prior perfected security interest in collateral, where the subsequent creditor or purchaser claims the equitable estoppel based upon an alleged representation by the prior secured party that its security interest had been terminated or released, but where the subsequent creditor or purchaser has not utilized available and convenient means of assuring priority, specifically, waiting until after a termination statement or a written release has been filed, pursuant to *W.Va. Code*, 46-9-404, as amended, or *W.Va. Code*, 46-9-406, as amended, respectively, before acquiring an interest in the collateral from the debtor.[741]

In *Daniel,* Justice McHugh also held:

> The husband's signature on the financing statement as a "debtor" is sufficient notice to interested persons that the secured party has a valid security interest in the listed collateral to the extent of the husband's ownership interest therein, even if the wife is a co-owner of the collateral and a co-debtor and she has not signed the financing statement. In those circumstances interested persons cannot successfully claim the total invalidity of the security interest based upon the allegation or the fact that the wife did not sign the financing statement as another "debtor," as required by *W.Va. Code*, 46-9-402(1), as amended.[742]

H. Parol Evidence Rule

Justice McHugh stated succinctly in *Haymaker v. General Tire Inc.*[743] that "[t]he parol evidence rule may not be invoked by a stranger to a release."[744]

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739 *Id.* at Syl.

740 394 S.E.2d 79 (W. Va. 1990).

741 *Id.* at Syl. Pt. 2.

742 *Id.* at Syl. Pt. 3.

743 420 S.E.2d 292 (W. Va. 1992).

744 *Id.* at Syl.

I. Liquidated Damages Clause

Justice McHugh wrote in *Wheeling Clinic v. Van Pelt*[745] that

> [i]n determining whether a clause in a contract stating a sum to be paid in the event of a breach of the contract is liquidated damages or a penalty, the important question is not the intention of the parties but rather the reasonableness in fact of the agreed sum when the contract was made.[746]

J. Promissory Note

Justice McHugh held in *Young v. Sodaro*[747] that "[u]nder the rule of perfect tender in time, a debtor, absent statutory authority or contractual language to the contrary, has no right to prepay a promissory note secured by a deed of trust prior to the date of maturity."[748]

XIII. CIVIL RIGHTS

A. Judicial Review of Decision by Human Rights Commission

In *State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*,[749] Justice McHugh held:

> A determination, by the West Virginia Human Rights Commission, that an employer has accorded disparate treatment to members of different races, is a finding of fact which may not be reversed by a circuit court upon review, unless such finding is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.[750]

B. Sufficiency of Administrative Complaint

Justice McHugh addressed several issues concerning prerequisites of a discrimination complaint filed with the Human Rights Commission in the case of

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745 453 S.E.2d 603 (W. Va. 1994).

746 *Id.* at Syl. Pt. 5.

747 456 S.E.2d 31 (W. Va. 1995).

748 *Id.* at Syl.

749 329 S.E.2d 77 (W. Va. 1985).

750 *Id.* at Syl. Pt. 5.