Survey of Developments in West Virginia Law: 1979

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SURVEY OF DEVELOPMENTS IN WEST VIRGINIA LAW: 1979

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ADMINISTRATIVE LAW

I. WEST VIRGINIA SUNSHINE ACT

In the recent decision of Appalachian Power Co. v. Public Service Commission,\(^1\) the West Virginia Supreme Court of Appeals substantially delineated and constricted the parameters of the West Virginia Sunshine Act\(^2\) by holding it inapplicable to most of the functions of the Public Service Commission.\(^3\) This case represents the first time the court has considered the scope of the Act since it was enacted in 1975.\(^4\)

The controversy arose when Appalachian Power Company\(^5\) filed a declaratory judgment action in the Circuit Court of Kanawha County seeking to have the Act applied to all of the PSC's proceedings and, consequently, to have any actions of the Commission taken in contravention of the Act's open meeting requirements rendered void.\(^6\) Upon a judgment entered in favor of

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\(^1\) 253 S.E.2d 377 (W. Va. 1979).
\(^3\) Hereinafter referred to as the PSC or the Commission.
\(^5\) Hereinafter referred to as APCO.
\(^6\) 253 S.E.2d at 379-80.
APCO, the PSC appealed. The court examined the decisionmaking process of the Commission and found it to be divided into three distinct segments. Analyzing each of these segments in light of specific statutory definitions, only the first, the hearing stage, was held to come within the ambit of the Sunshine Act, and then only when two or more Commission members were presiding.

Section 3 of the Act provides in broad terms that "[a]ll meetings of any governing body shall be open to the public." The court was confronted initially with determining which gatherings of a governing segment of a public body amounted to a "meeting" as defined in section 2(4) of the Act. APCO urged the court to adopt an expansive view of the term "meeting" and to construe it to encompass "any coming together of a governing body whether or not that assemblage is capable of legally transacting business." Rejecting this interpretation, the court instead narrowly interpreted the term "meeting" as used in the Act to include only "a convening of a governing body of a public body if the convening is for the purpose of making a decision or deliberating toward a decision, and if some statute or rule requires a quorum as a prerequisite to convening."

A hearing, the first stage of the Commission's decisionmaking process, did not meet the demands of this standard, since a hearing of the PSC could be convened without a quorum. In addition, since a hearing did not require the presence of any of the three Commissioners, it could not be considered in every instance a "convening" of the governing body. Based on these two factors, the court found that most hearings of the PSC were not subject

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7 Id. at 381.
8 Id. at 383.
10 Meeting is defined in part as:
   the convening of a governing body of a public body for which a quorum
   is required in order to make a decision or to deliberate toward a decision
   on any matter.
11 253 S.E.2d at 382. This interpretation is based on a reading of the clause
   "for which a quorum is required" as modifying "a public body," which immediately precedes it. See 73 Am. Jur. 2d Statutes § 230 at 414, 415.
12 253 S.E.2d at 381.
13 Id. at 383.
to the Act's proscriptions. In a notable exception, however, the court did include within the definition of "meeting" those hearings of the PSC which were attended by two or more Commissioners.\(^\text{14}\) Since the Commissioners' presence is not mandated by a quorum requirement as a prerequisite to the convening of a hearing, the court seems to have created an exception to its quorum requirement. In effect, this exception would seem to broaden the scope of "meeting" to include any convening of a majority of the members of a governing body whether a statute or rule requires a quorum or not.

The court did not apply this broad definition, however, to the second phase of the decisionmaking process, which was described as "the continuum of consultations, deliberations and the process of making a decision."\(^\text{15}\) After examining the informal nature of these activities, the court concluded that "a quorum is not required at any stage of this continuum and . . . no stage necessarily involves the convening of the governing body."\(^\text{16}\) Applying the narrow definition used to exclude most hearings, the court found that none of these activities amounted to a "meeting" and could be conducted without the compliance with the formal requirements of the Sunshine Act.\(^\text{17}\) The assemblage in which the Commissioners gather to render their final decision in a proceeding marks the third and final stage of the decisionmaking process. Although this gathering properly constitutes a meeting under the statute, it was viewed by the court as an adjudicatory decision in a quasi-judicial proceeding\(^\text{18}\) and, as such, was specifically excepted from the Sunshine Act.\(^\text{19}\) Pursuant to a procedural due

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) The court did not mention the possibility of two Commissioners deliberating together in this stage but, instead, emphasized the impracticality of subjecting informal Commissioner-staff consultations to the Act. It thus remained silent on the possible future application of its broader definition in circumstances where it would not cause undue hardship to apply it. See notes 26, 27, infra.

\(^{18}\) 253 S.E.2d at 385.

\(^{19}\) Even where a gathering of the public body's governing segment properly constitutes a meeting, the meeting is excluded from the Act's coverage where the meeting is "for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding." W. VA. CODE § 6-9A-2(4)(a) (1979 Replacement Vol.).
process mandate, these hearings necessarily involve "notice, presentation of evidence, the making of a record, examination of witnesses under oath and the exercise of subpoena power."\(^{20}\) In the court's assessment, these functions amount to a "judicial power exercised by an official not within the judicial branch of government," and were labelled as "quasi-judicial."\(^{21}\) The judgments arrived at in such proceedings, if final, the court concluded, are adjudicatory. This phase, consequently, is specifically exempted from the act.\(^{22}\)

While the court liberally applied its definition of "meeting" to hearings with two Commissioner's present, there is little indication that it will be similarly applied in the future. Given the definition of "meeting" adopted in Appalachian Power, the Sunshine Act's open meeting requirements would be restricted severely. The policy underlying the Act, as clearly articulated in its first provision, envisions a broader reading of the Act than the narrow definition adopted by the court. The Declaration of Legislative Policy states that it is in "the best interest of the people of this State for all proceedings of all public bodies to be conducted in an open and public manner."\(^{23}\) The court justifiably noted that this broad declaration and the subsequent statutory sections meant to enact the stated policy seem to have been written by two different persons.\(^{24}\) Yet, given the nature of the Act, there is little reason for this dichotomy. As written, the Act contains sufficient exceptions to prevent its application in impractical or inappropriate instances.\(^{25}\) To go further and constrict the Act's appli-

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\(^{20}\) 253 S.E.2d at 383-84.

\(^{21}\) Id. at 384.

\(^{22}\) Id. at 385.

\(^{23}\) W. Va. Code § 6-9A-1 (1979 Replacement Vol.). The declaration states as the reason for such a policy that "public agencies, boards, commissions, governing bodies, councils and all other public bodies in this State exist for the singular purpose of representing citizens of this State in governmental affairs . . . ."

\(^{24}\) 253 S.E.2d at 385 n.6. Commenting on the Declaration, the court states that "it is unfortunate that the actual words of the Act fail to properly implement this lofty policy."

\(^{25}\) "Meeting," as defined, does not include meetings wherein adjudicatory decisions are made, on-site inspections of projects or programs, or political party caucuses. W. Va. Code § 6-9A-3 (1979 Replacement Vol.). In addition, the Act allows a governing body to go into executive session when exceptional circumstances would merit non-disclosure of the information discussed. Some of these instances include discussion of personnel matters, consideration of a complaint
ability to only those situations where the governing segment of a public body convenes under a quorum requirement to reach or deliberate toward a decision limits the scope of the Act to an impalatable degree. If the Legislature does not amend the Act to broaden the definition of “meeting,” then the court should recognize that the Act, as a statute enacted in the public interest (which the Act itself expressly declares) should be construed liberally in favor of its intended effect.\(^2\) While the unique circumstances existing in this case perhaps warranted the particular result,\(^2\) future decisions should be guided to a greater degree by the nature of the governmental entity involved, by the subject matter of the proceedings being conducted and by the salutary public policy which initially inspired the Act’s adoption.

II. DUE PROCESS

A series of cases recently decided by the West Virginia court has dealt with the sufficiency of proceedings under due process considerations where the dismissal or transferral of

\(^2\) To properly implement the spirit of the Sunshine Act, unless specifically excepted, whenever a governing segment of a public body gathers to conduct business, it should hold the meeting open to the public. Additionally, “governing body” should be interpreted as any decisionmaking group within a public body, whether or not it is formally recognized as the official governing body. In the instant case, while the staff members meeting to conduct a hearing are not recognized as the official governing body of the Public Service Commission, the information gathered and discussed by them may in fact constitute a large part of the decisionmaking process. In this regard they may be considered a de facto governing body and, thus, be subjected to the Act’s requirements. But see note 27, infra.

\(^2\) In a similar case decided recently in Florida, under a very broad Sunshine Act which holds even quasi-judicial proceedings subject to the Act, the Florida court found that “nothing in the Sunshine Law requires each Commissioner to do his or her thinking in public” and that the members of a collegial administrative body are not required to avoid their staff during the evaluation and consideration stages of their deliberation. The practical effect of such an application, the court concluded, would lead to a situation where “the value of staff expertise would be lost and the intelligent use of employees would be crippled.” Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977) (construing Fla. Stat. Ann. § 286.011 (Cum. Supp. 1979)).
state school personnel was involved. In each case, the proceedings were found to be inadequate by due process standards.

In *Trimboli v. Board of Education* the court reinforced the rule established in an earlier opinion that an administrative body may not depart from the rules and regulations it has promulgated for its operation. Trimboli, in 1961, was hired by the Wayne County Board of Education as a teacher. In 1972, he became Director of Federal Programs in the school system's central office. Upon recommendation of the County Superintendent, and after a subsequent hearing and affirmation by the county school board, he was reassigned to teacher status.

A rule that had been previously promulgated by the West Virginia State Board of Education provided that "every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis." The court construed this order liberally in favor of school employees, finding that the word "should" was, in fact, a mandatory requirement. After this determination, the focus of the opinion shifted to the scope of the rule's applicability. A statutory enactment in 1949 provided that each county board of education could hire special supervisors and directors, whose "period of employment shall be at the discretion of the board." Even in light of this section, however, the court interpreted "every" as contained in the West Virginia Board of Education's evaluation rule as unequivocally applying to all school board employees regardless of the statutory nature of their position. In reaching this conclusion, the majority opinion emphasized that it will adhere to the general principal stated in the

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28 One of these cases, State ex rel. McLendon v. Morton, 249 S.E.2d 919 (W. Va. 1978), is discussed in the CONSTITUTIONAL LAW section of this survey.
31 254 S.E.2d at 562.
33 254 S.E.2d at 566.
34 *Id.* at 564, quoting W. VA. CODE § 18-5-32 (1977 Replacement Vol.).
35 Although it was recognized that incompetency was harder to prove in the case of an administrator who holds a special trust relationship with his superior, the court in its decision was persuaded by the fact that the order itself made no distinction between teachers and administrators. 254 S.E.2d at 566-67.
earlier decision of Powell v. Brown,\textsuperscript{36} that “an administrative board must abide by its rules.”\textsuperscript{37} Consequently, any action by a school board discharging, demoting or transferring an employee in derogation of an existing regulation’s due process procedures, when correctable conduct is involved, is prohibited.\textsuperscript{38}

In another case involving the job status of school teachers, the West Virginia court reiterated its commitment to construing school personnel laws and regulations so as to promote teachers’ job security. In Morgan v. Pizzino\textsuperscript{39} a group of teachers had their names placed on a transfer and reassignment list by the county board of education at the recommendation of the county school superintendent.\textsuperscript{40} They were later notified of this action and given the opportunity to appear before the board. They refused this invitation. Instead, they sought a writ of mandamus in the West Virginia Supreme Court of Appeals to force the school board and the county superintendent to place their names on the regularly employed personnel list or remove their names from the transfer and reassignment list.\textsuperscript{41}

Under section 7, article 2, chapter 18A of the West Virginia Code, a school board must give a teacher notice and a hearing before placing his or her name on such a list.\textsuperscript{42} The court took note of this requirement and dismissed the county school board’s attempt in the instant case to give subsequent notice and a hearing as contrary to the purpose of the statute’s requirement, thus strictly construing the due process provisions of the regulations and statutes in favor of the teachers.\textsuperscript{43} Significantly, however, the opinion noted that ordinarily in the future the court would not accept petitions alleging procedural irregularities until all admin-

\textsuperscript{36} 238 S.E.2d 220 (W. Va. 1977).
\textsuperscript{37} 254 S.E.2d at 562.
\textsuperscript{38} Id. at 567-68.
\textsuperscript{39} 256 S.E.2d 592 (W. Va. 1979).
\textsuperscript{40} Id. at 593.
\textsuperscript{41} Id.
\textsuperscript{42} W. VA. CODE § 18A-2-7 (1977 Replacement Vol.).
\textsuperscript{43} In so construing the statute, the court noted that “[t]he purpose of Code § 18A-2-7 notice and hearing is to give employees an opportunity to present their position to the Board before their names are listed. If a decision has already been made, and the employees have been prejudged, the process is meaningless.” 256 S.E.2d at 595.
istrative and circuit court remedies had been exhausted.\textsuperscript{44}

The court markedly retreated from this line of strict adherence to procedural due process in a case involving the dismissal of a State Penitentiary Correctional Officer. In Bone \textit{v. Department of Corrections},\textsuperscript{46} Bone was dismissed without notice from his position as a correctional officer. Three days later he received a letter outlining the reasons for his dismissal and offering him an opportunity to respond personally or in writing to his deputy.\textsuperscript{46} Following the proper administrative procedures, Bone chose to appeal his firing to the Civil Service Commission. Upon a ruling upholding the dismissal, he then appealed to the West Virginia Supreme Court.\textsuperscript{47}

Section 10(11), article 6, chapter 29 of the West Virginia Code states that discharge of employees in classified service "shall take place only after the person has been presented with the reasons for such discharge . . . in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request . . . to appear personally and reply. . . ."\textsuperscript{48} In the face of this statutory mandate, the Civil Service Commission promulgated a regulation which provided that in cases where gross misconduct had been alleged the decision to give notice could be dispensed with at the discretion of the "Appointing Authority."\textsuperscript{49}

Justice Caplan, speaking for the majority, acknowledged the requirements of the statute but felt that there had been "substantial compliance" with its terms, even though the letter containing the reasons for the dismissal and the invitation to respond had been mailed three days after Bone's discharge.\textsuperscript{50} Justice McGraw, however, in his dissent, argued that the statutory provision "unequivocally precludes summary judgment such as here occurred. . . ."\textsuperscript{51} This line of reasoning is similar to the general principle advanced by the majority in the teacher due process

\textsuperscript{44} 256 S.E.2d at 595.
\textsuperscript{46} 255 S.E.2d 919 (W. Va. 1979).
\textsuperscript{48} \textit{Id.} at 920.
\textsuperscript{47} \textit{Id.}
\textsuperscript{49} W. VA. CODE § 29-6-10(11) (Cum. Supp. 1979).
\textsuperscript{48} Civil Service Comm'n Reg., art. 11, section 10.
\textsuperscript{50} 255 S.E.2d at 922-23.
\textsuperscript{51} \textit{Id.} at 923 (McGraw, J., dissenting).
cases. McGraw noted that a refusal to strictly enforce the statutory due process provisions in an administrative proceeding "seriously weakens the protection afforded State employees by the Civil Service Law." As McGraw also notes, by upholding the propriety of the Commission's regulation promulgated in derogation of a specific statutory mandate, the majority seems to be approving such ultra vires rulemaking and "encouraging other agencies to ignore the clear dictates of the Civil Service Law."

III. ExHAUSTION OF ADMINISTRATIVE REMEDIES

The question of when a direct route to the Supreme Court of Appeals may be taken prior to the exhaustion of available administrative remedies was considered in Walls v. Miller. The decision of the court substantially restated the rule that when resort to administrative remedies would amount to a futile or unwarranted time-delaying process, a direct writ of mandamus in the Supreme Court of Appeals will lie.

The case involved an allegation by Walls, a United Mine Worker's Local President, that the Director of the Department of Mines had failed to enforce certain statutory mine safety provisions. Justice Neely, in the majority opinion, noted that Wall's challenge to the Director's policy was not limited to a single isolated instance of non-enforcement but was a challenge to the Director's "philosophy of enforcement" and to the Director's construction of the "requirements, purposes, and legislative intent of the three code sections under review." According to the court, these legal issues did not properly depend for their resolution on "the detailed factual development which the administrative process envisages." It was also noted that, although Walls could

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52 In each of the teacher due process cases, statutes and regulations were strictly construed in favor of the employee. In Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979) the majority made note of the fact that notice and an opportunity for a hearing after a decision has been made are meaningless. See note 43, supra.
53 255 S.E.2d at 923.
54 Id. at 923-24.
55 251 S.E.2d 491 (W. Va. 1979).
57 251 S.E.2d at 494.
58 Id. at 495.
59 Id.
have resorted to other legal or administrative remedies without a definitive resolution of the issues by the Supreme Court of Appeals, the deprivation of rights which Walls suffered would probably reoccur in many situations. These circumstances, the court concluded, were sufficient to justify the bypass of administrative remedies in favor of a direct writ of mandamus in the state's highest court.

Barry G. McOwen

ATTORNEY-CLIENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court of Appeals addressed the issue of ineffective assistance of counsel in several 1979 decisions. Although the court did not substantially alter its position, it did refine the principles set forth in earlier opinions on this subject. The recent cases afford an opportunity to observe how the court will apply the previously announced tests for ineffective assistance of counsel to certain factual situations.

State v. Bush\(^{62}\) concerned the appeal of a defendant convicted in the Circuit Court of Marion County of forcible rape. Bush contended on appeal that the trial court had committed error in denying his motion for a continuance, and, therefore, had denied him effective assistance of counsel.

Bush was arrested and charged by warrant with forcible rape on February 12, 1975. He contacted attorney Brent Beveridge with regard to obtaining assistance in having bond set. Despite Beveridge's efforts, no bond was ever obtained and Bush remained in the Marion County Jail pending trial. Beveridge represented Bush at the preliminary hearing conducted on February 18, 1975, at which Bush was bound over to the March term of the grand jury. Beveridge had attended the hearing on the request of Franklin Cleckley, Bush's attorney on previous occasions.

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\(^{60}\) Id.

\(^{61}\) Id. at 495-96.

\(^{62}\) 255 S.E.2d 539 (W. Va. 1979).
Subsequent to the preliminary hearing Beveridge discussed in some detail with Bush and his wife the necessity for making financial arrangements if his representation was to continue. Although discussions were also had concerning the employment of Cleckley and Beveridge, no agreement was reached. Beveridge had very little contact with Bush after these discussions. He filed no motions on the defendant's behalf and did not attend the hearing at which the trial docket was set. Cleckley had even less pretrial involvement in the case.

Cleckley was notified by letter from the prosecuting attorney that Bush's trial was set for April 18, 1975. Cleckley immediately informed the prosecutor that he was not representing Bush in the matter. A request was made that the court resolve the matter of counsel. On April 25, 1975, a Friday, Cleckley was attending a hearing at the Marion County Courthouse on another matter. While Cleckley was at the Courthouse, the judge inquired of Bush what arrangements he had made for counsel. Bush indicated that he desired to employ Cleckley and would inform the court Monday, April 28, whether he could raise the necessary funds. The court agreed to this procedure and continued the case until the next term of court. However, approximately one hour later, Cleckley received a handwritten note from the court which stated that a conversation with the prosecuting attorney had revealed that Beveridge had represented Bush after his arrest and, therefore, that the case would be tried on Monday, April 28.

The morning of the trial found Cleckley and Beveridge present, but not prepared to conduct Bush's defense. A motion was made that the trial be continued for a period of time adequate for counsel to prepare. The motion was denied and the trial proceeded, with Bush being convicted of forcible rape. On appeal, the court noted that only one prior case, State ex rel. West Virginia-Pittsburgh Coal Co. v. Eno, had addressed the issue of ineffective assistance of counsel resulting from inadequate preparation time. Eno held that "[t]he right of a defendant in a criminal case to be represented by counsel includes the right to effective assistance of counsel, and the refusal to allow counsel sufficient

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63 Id. at 541-42.
64 135 W. Va. 473, 63 S.E.2d 845 (1951).
time to prepare for trial is a denial of that right."\textsuperscript{65} In \textit{Eno}, counsel had been allowed less than twenty-four hours to prepare.

The court observed that "[f]or several reasons, some based on recent developments, the most important factor in considering claims of the sort advanced here is the length of time between the employment or appointment of counsel and the trial of the case."\textsuperscript{66} Factors noted were the increased complexity of criminal defense work and the increased burden placed upon lawyers by the holding in \textit{State v. Thomas},\textsuperscript{67} specifically, that the attorney must do more than simply insure that the trial is not a farce. He must "exhibit the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law."\textsuperscript{68} Thus, defense counsel has a "constitutionally assigned role of seeing to it that available defenses are raised and the prosecution is put to its proof."\textsuperscript{69} To meet this duty, timely appointment and a reasonable opportunity for adequate preparation are "absolute prerequisites."\textsuperscript{70} The court concluded that the \textit{Eno} principles controlled and that Bush had been denied effective assistance of counsel by the trial court's refusal to allow for more than one weekend in which to prepare for Bush's defense. It was further noted that the defendant, by his own actions, can deny himself effective assistance of counsel and will be unable to assert that defense if it is found that he has intentionally procrastinated in the employment of counsel. A strategy of delay was not noted on the part of Bush.\textsuperscript{71}

Although \textit{Eno} was found to be controlling, the court noted that Bush's conviction could have been overturned by applying the conventional standard of appellate review to the denial of a continuance by the trial court. It was observed that:

The granting of a continuance is a matter within the sound discretion of the trial court . . . and the refusal thereof is not ground for reversal unless it is made to appear that the court abused its discretion, and that its refusal has worked in-

\textsuperscript{65} Id. at 482, 63 S.E.2d at 850.
\textsuperscript{66} 255 S.E.2d at 542.
\textsuperscript{67} 203 S.E.2d 445 (W. Va. 1974).
\textsuperscript{68} 255 S.E.2d at 543.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 544.
jury and prejudice to the rights of the party in whose behalf the motion was made.\textsuperscript{72}

Unable to find any justification for the refusal to grant the continuance coupled with the inability of the defendant's attorneys to prepare, the court concluded that the trial court had abused its discretion and that Bush had been prejudiced because of the abuse.\textsuperscript{73}

\textit{State v. Bush} clearly shows that trial courts have a role in the providing of effective assistance of counsel to criminal defendants. The defense counsel must meet the standards of competence set forth in \textit{Thomas}, but the trial court must take steps to insure that counsel is designated with sufficient timeliness to allow for adequate preparation. The court must assist the lawyer in meeting his constitutional duty.

In \textit{Burton v. Whyte},\textsuperscript{74} the court was confronted with a petition for a writ of habeas corpus brought by a defendant convicted of grand larceny. The basis of the petition was that Burton's defense counsel had been incompetent and that, therefore, he had been denied effective assistance of counsel.

Burton and his brother were arrested for stealing a cash register. While at the police station, Burton was seen by the municipal police court judge, a personal acquaintance of Burton who had arranged for him to surrender several months prior on a charge of breaking and entering. Burton conferred with the judge at the station and expressed concern that the larceny charge would affect his chances of obtaining probation on the breaking and entering charge. The judge advised Burton that if he held any hope at all for probation on the prior charge he should fully cooperate with the authorities on the larceny charge. Burton pondered the matter for two days and informed the police that he would take them to the location of the stolen cash register. During the trip to the site he was informed of his \textit{Miranda} rights for the second time since his arrest. He furnished a written confession.

A pretrial motion was entered to suppress the confession. It

\textsuperscript{73 Id. at 546.  
\textsuperscript{74 256 S.E.2d 424 (W. Va. 1979).}
was contended that the confession was invalid because the police judge was an officer of the court and the confession made pursuant to his advice was not voluntary. The motion was denied and Burton's counsel advised him to enter a guilty plea, which was done. Burton's contention on appeal was that his counsel had been incompetent because he should have recognized that the confession was invalid as a matter of law. Burton also assigned a second basis for belief that the confession was invalid, this being that it had been rendered without prior consultation with counsel.75

In discussing the issues raised by Burton, the Supreme Court of Appeals noted the test of incompetent advice set forth in State v. Sims:76

Before a guilty plea will be set aside based on the fact that the defendant was incompetently advised, it must be shown that (1) counsel did act incompetently; (2) the incompetency must relate to a matter which would have substantially affected the fact finding process if the case had proceeded to trial; (3) the guilty plea must have been motivated by this error.77

The court discussed at some length the existing law on the validity of confessions. It was concluded that while there was some doubt, in all likelihood the confession was valid. This determination was fatal to Burton's petition as it prevented him from even meeting the first part of the Sims test. "[B]efore an initial finding will be made pursuant to the first step of the Sims analysis that 'counsel did act incompetently' (citation omitted) . . . the advice must be manifestly erroneous."78 The defendant had failed to show that the confession was so unquestionably invalid as to make his lawyer's advice incompetent. To further Burton's plight, it was noted that even if the confession were invalid, the second part of the Sims test would not have been met because the prosecution had sufficient evidence to warrant conviction without the confession or anything obtained as a result of it.79 The petition for writ of habeas corpus was denied.

75 Id. at 425-26.
76 248 S.E.2d 834 (W. Va. 1978).
78 Id. at 427-28.
79 Id. at 428.
**Burton** demonstrates the difficulty which will be encountered by a defendant attempting to show the incompetence of his defense counsel. The court noted that “clear proof of incompetency” would be required before it accepted the assertion that a guilty plea resulted from incompetent advice of counsel.80

**State v. Pelfrey**81 concerned an appeal from a conviction for malicious assault. The defendant made three assignments of error,82 in none of which was it contended that he was denied effective assistance of counsel. The court indicated that the errors assigned were of little merit, then noted two quotes from the trial court record which indicated that the appointed defense attorney was aware of errors in the trial but had not sought a new trial due to personal economic considerations and that the trial judge would have granted a mistrial had defense counsel made that motion.83

The court noted that “[e]rrors of counsel are not deemed to be ineffective assistance if those errors are arguably a matter of trial tactics or strategy.”84 However, there was no consideration of trial tactics in this case. The decision not to seek a new trial was based upon personal financial considerations. These considerations, the court held, had diluted the lawyer’s loyalty to his client, and placed him in violation of the Code of Professional Responsibility. In conclusion, the court stated:

> When in a criminal case, defense counsel, reinforced by the court, maintains a reasonable, good faith belief that error has occurred warranting mistrial, but fails to move for mistrial solely because of personal economic motivation, the defendant has been denied effective assistance of counsel.85

**Pelfrey** stands for the obvious proposition that an appointed attorney commits reversible error when he does not pursue certain legal remedies because of the low rate of pay for court-ap-

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80 *Id.* at 429.
82 The errors assigned were the denial of his right to a speedy trial, prejudice caused by admission of evidence of prior crimes, and prejudice caused by the cumulative effect of the prosecutor’s misconduct. *Id.* at 439.
83 256 S.E.2d at 439.
84 *Id.* at 440.
85 *Id.*
pointed attorneys.

II. JUDICIAL ETHICS

In *West Virginia Judicial Commission v. Allamong*, the question was discussed of whether and to what extent a magistrate who is a licensed attorney may engage in the practice of law. The case concerned Elden Allamong, magistrate of Mineral County, against whom a complaint had been filed with the Inquiry Commission that he was practicing law, in violation of Canon 5(F) of the Judicial Code of Ethics.

In discussing the question, the court noted that a conflict existed between the Canon, which prohibits the practice of law by a magistrate, and the West Virginia Constitution which allows a magistrate to “practice law except to the extent prohibited by the legislature.” It was contended that the legislature had restricted the practice of law by attorney magistrates with W. Va. Code section 50-1-4, which provides that a magistrate serving more than 5,000 people, as did Allamong, was to devote “full time to his public duties.” The court rejected this contention, noting that the Code discusses in section 50-1-12(d) limits placed upon the activities of magistrates, the restrictions consisting in relevant part of a prohibition against engaging in any “remunerative endeavor while on the premises of the magistrate court office.” It was noted as well that “full time” is an ambiguous term, and there were, therefore, insufficient grounds to conclude that the legislature had intended to prohibit the practice of law by magistrates who were so qualified, so long as they did so away from the magistrate office. The court also refused to accept the suggestion that W. Va. Code section 50-1-12, which requires that magistrates “abide by the code of judicial ethics,” incorporated by reference the prohibition in the Code of Judicial Ethics. The court noted that the Code could never be taken to override a constitutional provision. The court concluded that Allamong was to be allowed to practice law in his spare time away from the magistrate office.

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91 252 S.E.2d at 163-64.
Apparently, absent a clear directive from the legislature, the court will be unwilling to prevent magistrates from engaging in the practice of law when they are qualified to do so. The only restriction is that they cannot allow their law practice to interfere with the performance of their magisterial duties. The court reiterated that magistrates are subject to all of the Canons of the Judicial Code of Ethics except Canon 5(F).92

### III. Special Prosecutors

The Supreme Court of Appeals provided guidance with regard to appointment and payment of special prosecutors in *State ex rel Johnson v. Robinson.*93 The case arose when all members of the Cabell County prosecutor’s office were disqualified from a murder case. Two special prosecutors were appointed, who tried the case and obtained a conviction. At the close of the trial the special prosecutors made a motion to the trial court that $7,212.97 represented a reasonable fee for their services and that they should be paid that amount. The court entered orders awarding fees in the amount stated and directed the circuit clerk to certify the amount to the county commission for payment. The commission reviewed the order in July of 1978. By September, payment had not been made. The commissioners were ordered to show cause why they should not be held in contempt of court.94

The commissioners noted that W. Va. Code section 7-7-8 provided that the circuit court was to certify to the county commission the performance of services as special prosecutor and recommend the payment of a reasonable fee. The county commission was to determine whether the fee was reasonable and, if so, pay it.95 In this case, it had been determined by the commission that

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92 *Id.* at 164.
93 251 S.E.2d 505 (W. Va. 1979).
94 *Id.* at 506-07.
95 W. Va. Code § 7-7-8 (Cum. Supp. 1979) provides in pertinent part: If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case. The court shall certify to the county court the performance of that service when completed and recommend to the county court a reasonable compensation for the attorney for his service, and the compensation, when allowed by the county court, shall be paid out of the county treasury.
the fee was not reasonable. The commissioners contended that it was within their discretion to make that determination. The circuit judge disagreed. The commissioners sought a writ of prohibition to prevent enforcement of the order of the circuit court awarding the fees. The Supreme Court of Appeals agreed with the commissioners. The court looked to the statutory language and concluded that the determination of whether the fee paid a special prosecutor was reasonable was within the discretion of the county commission. The commissioners also contended that the Code allowed the appointment of one special prosecutor, not two or more, noting that the statute called for the designation of "some competent . . . attorney." The court declined to accept this contention. It was noted that "[w]ithout doubt there are complex cases that demand more than one prosecutor. If the circuit court . . . determines that the complexity of the case requires multiple prosecutors, such discretion, if exercised with reasonable limits is not to be interfered with."

Robinson points out the problem common to all court-appointed attorneys: payment. The system for payment of special prosecutors is cumbersome and allows for dramatic underpayment. It would seem that a system whereby the State paid special prosecutors would be preferable. The benefit would result from the, hopefully, less tenuous nature of State finances as compared with those of the counties. A fixed fee schedule as is utilized for defense counsel would allow for greater fairness to all attorneys who undertake this particular service.

Larry O. Ford

** 256 S.E.2d at 506.
** Id. at 508.
** Id.
** Id. at 508-09.
CONSTITUTIONAL LAW

I. FIFTH AMENDMENT AND DUE PROCESS

During the past year, the West Virginia Supreme Court of Appeals decided a series of cases involving Fifth Amendment and due process claims. In State v. Burton,100 the court addressed two significant constitutional issues. First, it adopted a liberal interpretation of the scope of the Fifth Amendment,101 holding the privilege against self-incrimination extended to "disclosures"102 that might furnish a link in a chain of evidence or lead to evidence which could be used in a criminal prosecution.103 The court also held that the state need only prove venue by a preponderance of the evidence.104

Thomas R. Burton was convicted of rape in the Circuit Court of Taylor County under a prior statute, W. Va. Code section 61-2-15. The defendant appealed the conviction on several grounds105 but particularly assigned as constitutional errors the fact that the trial court had permitted a State's witness to invoke the Fifth Amendment privilege as to a prior criminal conviction and an alleged failure on the part of the State to prove the venue of the crime. (The specific details of the crime are not particularly relevant to the constitutional issues raised.) The defendant, Burton, and another man, Jones, were arrested and charged with the rape

100 254 S.E.2d 129 (W. Va. 1979).
101 In State v. Boyd, 233 S.E.2d 710, 714 (W. Va. 1977), the West Virginia court clearly indicated that art. III, § 5 of the West Virginia Constitution provided at least co-equal coverage in regard to the privilege against self-incrimination. Thus, while in State v. Burton the parties only assert the protection of the Fifth Amendment to the United States Constitution, the same principles would apply under art. III, § 5 of the West Virginia Constitution. The court stated that this was in accordance with the general law of the land, citing 81 Am. Jur. 2d Witnesses § 31. 254 S.E.2d at 137.
102 This extension of Fifth Amendment protection is to be juxtaposed with those "disclosures" which, if answered, would in themselves support a conviction of the witness.
104 The State has the burden of proving the venue, that is, that the crime occurred in the county where the defendant is tried, by virtue of art. III, § 14 of the West Virginia Constitution. See also: State v. Tapp, 153 W. Va. 759, 172 S.E.2d 583 (1970).
105 254 S.E.2d at 132.
of a waitress during the commission of a robbery at a tavern in Taylor County. During the course of the defendant’s trial on these charges, the State produced Roy Myers as a witness. Myers had been in the Taylor County jail with the defendant and testified that during the course of a conversation, Burton admitted his involvement in a robbery at the tavern and that he had engaged in sexual relations with a waitress at the bar who had been bound with ropes during the robbery.

The defendant urged that reversible error was committed when the court permitted the State’s witness, Myers, to invoke the Fifth Amendment. Myers invoked the Fifth Amendment initially when he was asked on cross-examination why he was in the Taylor County jail. Additionally, Myers invoked the Fifth Amendment on questions relating to whether he had been convicted of a felony in Maine, had been placed on parole, and had violated the parole terms which brought about extradition proceedings in Taylor County. Counsel for the defendant, Burton, argued that the witness Myers’ prior felony conviction would not be incriminatory to Myers in any extradition hearing or subsequent parole revocation hearing Myers might face in Maine. Therefore, the defense counsel wanted the trial court to use its discretion and allow the defense to impeach Myers’ credibility by a prior criminal conviction.\(^{106}\) The West Virginia court disagreed with the contentions of defense counsel, stating that, historically, the Fifth Amendment had been extended to answers that would expose a witness not only to criminal prosecution but also to forfeitures and penalties.\(^{107}\) The court had no doubt that an extradition proceeding carried with it a sufficient penalty to cause evidence bearing on issues arising at such a hearing to come within the purview of the Fifth Amendment privilege against self-incrimination.

The defendant’s second constitutional assignment of error claimed that the State failed to prove the venue of the crime as required by article III, section 14 of the West Virginia Constitution. In general, there are two lines of authority regarding the

\(^{106}\) This matter might have been resolved by concluding that the trial court did not abuse its discretion. However, the record indicated that the issue was handled on the basis of the Fifth Amendment.

question of whether the State must prove venue beyond all reasonable doubt or whether it is sufficient to prove venue by a preponderance of the evidence.\textsuperscript{108} The West Virginia court held that the better-reasoned approach recognized that venue is not a fact which relates to the guilt or innocence of the accused. Therefore, venue is not a substantive element of a crime and need only be proven by a preponderance of the evidence.

In Burton, there was no dispute that the rape occurred at the bar known as the End of the Bridge, and that the End of the Bridge was in Grafton. The court then took judicial notice of the fact that Grafton was the county seat of Taylor County. The court did state that they were not removing proof of venue in a criminal case but only determining the amount of proof required. It was clear to the court that prior West Virginia cases had been liberal in weighing the State's proof of venue. In Burton, this liberal gloss was extended.

The West Virginia court addressed the constitutional issues of the defendant's right to be present in misdemeanor cases and the propriety of an increased sentence imposed at a trial de novo or upon remand in State \textit{v. Eden}.\textsuperscript{109} In Eden, the defendant was found guilty in Justice of the Peace court of the misdemeanor of reckless driving and was fined fifty dollars. The defendant appealed the decision and at the trial de novo in circuit court, the defendant was found guilty of the same offense, was sentenced to thirty days in jail, and was fined three hundred dollars. The defendant failed to appear in person at the trial in circuit court because his attorney failed to notify him of the trial date.

On appeal the court remanded the case for a new trial and held that imposition of an increased sentence at a trial de novo or upon reconvening in trial court after remand from an appellate

\textsuperscript{108} Courts which require proof of venue beyond a reasonable doubt focus on the fact that venue is a necessary jurisdictional element to sustain a criminal conviction. \textit{See, e.g.}, State \textit{v. Evely}, 228 N.W.2d 196 (Iowa 1975). Courts holding that a preponderance of the evidence is sufficient take the view that venue has no bearing on the guilt or innocence of the accused as far as commission of the crime is concerned. \textit{See, e.g.}, United States \textit{v. Luton}, 486 F.2d 1021 (5th Cir. 1973), \textit{cert. denied}, 417 U.S. 920 (1974).

\textsuperscript{109} 256 S.E.2d 688 (W. Va. 1979).
court violates due process. The court thus extended its rule to prohibit the imposition of an increased sentence upon reconviction where the case had been remanded from an appellate court, even though that issue was not directly before the court in the particular case. The court held the original sentence was the ceiling above which no additional penalty could be allowed. The court rejected the argument that the defendant consents to a possible increase in punishment by his appeal. The court held that conditioning the defendant's right to appeal on the notion that he has consented to a possible increase in sentence by exercising his rights violates due process. Further, increased sentencing would place an impermissible burden on appeal, since increased sentencing could be used vindictively to punish defendants who appeal. The court thus overruled the holdings in State ex rel. Boner v. Boles and State ex rel. Bradley v. Johnson that when a sentence is held to be void and a subsequent valid sentence is imposed, the valid sentence may provide greater punishment than that provided by the void sentence.

The second issue before the court in Eden involved the right of a defendant in a misdemeanor case to be present at trial. The court held that the defendant's right to be present at trial in a misdemeanor case is a fundamental constitutional right implicit in the right to confront one's accusers. The court held that the defendant's right to be present should be no different for a misdemeanor than for a felony trial and since the same liberty and property interests are at stake in both, due process dictates that

110 Id. at 876. W. Va. Const. art. III, § 10, provides that, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."
112 Id. at 873-74.
113 Id. The court relied heavily on Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), cert. denied, 390 U.S. 905 (1968), which placed a blanket prohibition on increased sentencing on reconviction in trial court after remand from an appellate court. The court also discussed North Carolina v. Pearce, 395 U.S. 711 (1969), in which the United States Supreme Court, while refusing to impose an absolute prohibition on increased sentencing, did discuss many of the same concerns about increased sentencing expressed in Patton.
116 256 S.E.2d at 871. The right to confront one's accusers is guaranteed by U.S. Const. amend. VI and W. Va. Const. art. III, § 14.
the right to be present at trial exists in both instances. In so
holding, the court rejected the previous West Virginia rule con-
tained in syllabus point four of State v. Campbell that a mis-
der. 117

The court considered the issue of waiver of Fifth Amendment
erights by entry of a guilty plea in State v. Grimmer. In that
case, Grimmer and a co-defendant had been charged in the same
indictment. Prior to Grimmer's trial, the co-defendant entered a
plea of guilty but then indicated his intention to appeal his con-

viction. At Grimmer's trial, Grimmer called the co-defendant to

vieve against self-incrimination. Gimmer, on appeal of his con-

ization, argued that the co-defendant's failure to testify deprived

Gimmer of his constitutional right to have compulsory process

for obtaining witnesses in his favor.

The West Virginia court affirmed Grimmer's conviction,
holding that even though one charged in the same indictment as
the defendant has entered a guilty plea, he may assert his Fifth
Amendment right not to testify at the defendant's trial if he has
expressed to the court his intention to appeal his conviction en-
tered on his guilty plea. The co-defendant's decision to appeal
allowed him to once again assert the constitutional rights which
he had waived by his guilty plea. Thus, the co-defendants could
invoke the privilege against self-incrimination at Grimmer's trial
because any statement made by the co-defendant at that trial
could be used against him at a new trial if one were afforded him

117 Id. at 872. The right of a defendant in a felony case to be personally pre-
sent at trial is explicitly provided for by W. Va. Code § 62-3-2 (1977 Replacement
Vol.).

118 42 W. Va. 246, 24 S.E. 875 (1896).

119 251 S.E.2d 780 (W. Va. 1979). The arraignment aspect of this case is dis-
cussed in the CRIMINAL LAW section of this survey.


122 251 S.E.2d 780, 786 (W. Va. 1979).

123 Id.
II. EQUAL PROTECTION AND DUE PROCESS IN EDUCATION

The constitutional considerations discussed by the court in Pauley v. Kelley could have serious ramifications for the financing of secondary education in West Virginia. Although the court remanded the case for further factual development, it did establish certain guidelines for determining whether the state school financing system violated equal protection provisions. These guidelines could have a substantial impact on the outcome of the case on remand.

In Pauley, the plaintiffs, parents of five children attending public schools in Lincoln County, brought an action on behalf of themselves and as a class claiming that the system for financing public schools violated the West Virginia Constitution. The plaintiffs claimed that their children were denied a "thorough and efficient" education and equal protection of the law. The complaint was particularly directed at the inequalities that existed in the state secondary education system created by markedly out-of-balance annual funding, which produced inadequate facilities, curriculum deficiencies, and a shortage of personnel in the schools of the property-poor counties, such as Lincoln, compared with those in the more wealthy counties of the state.

It is essential to note the procedural particularities of the case. The case was decided at the trial court level solely on the pleadings and admissions of the parties and the statistical materials available from public documents. No testimony was offered. The plaintiffs moved for summary judgment and the defendants moved to dismiss because the complaint failed to state a cause of action. The court then made factual findings to the effect that the Lincoln County school system was inadequate in comparison with four other counties. The trial court also decided that even

124 Id.
125 255 S.E.2d 859 (W. Va. 1979).
126 West Virginia Constitution art. XII, § 1 mandates the State to provide "a thorough and efficient system of schools" for the children of the State.
127 The West Virginia Constitution also mandates by virtue of art. III, § 10 that: "No person shall be deprived of life, liberty, or property, without due process of law..."
128 Those counties were Kanawha, Marshall, Brooke and Hancock. The
though the system of public schools in Lincoln County was not adequate there was no evidence presented that the public school children residing in property-poor counties were necessarily poorer than those children who resided in counties with a higher overall property value. Therefore, equal protection guarantees were inapplicable as to the nature of the classification as it did not fall into that category of classifications which were automatically considered suspect.\textsuperscript{129}

The defendant’s motion to dismiss was granted because the plaintiffs had not demonstrated that the poor school system in Lincoln County was a product of the then existing school financing system. This, according to the Supreme Court, was sufficient reason for not granting the plaintiff’s motion for summary judgment but it did not justify a granting of the defendant’s motion to dismiss. A motion to dismiss is designed simply to test the legal sufficiency of a complaint.\textsuperscript{130} Because the trial court recognized that the plaintiff had asserted valid constitutional challenges to the existing school financing system, a motion to dismiss was improper and the case was remanded to the trial court for further evidentiary development. Since there were significant and far-reaching public issues involved, the West Virginia court found it advisable to propose constitutional guidelines that the trial court should follow in the remanded case.

The court held that the lower court correctly recognized that federal Fourteenth Amendment equal protection rights were not available to the parents of children seeking educational equality.\textsuperscript{131} It was held the trial court had properly determined that even though federal equal protection standards were not available to children seeking educational equality within the State, this did not constrain a court from examining its own State Constitution

\textsuperscript{129} The classification was based merely on geographical lines not on the social class or wealth of the plaintiff class.


\textsuperscript{131} San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Note that the Texas school financing plan was attacked in Rodriguez on much the same theory as was used in this case.
to determine whether higher standards of equal protection than the comparable federal statutes were afforded by the State standard of protection.

The West Virginia court’s survey of other state court decisions on protection afforded children seeking educational equality recognized that those courts refused to test their respective state’s school financing formula solely on an equal protection clause. Thos courts recognized that there may be many instances where a state must spend unequal amounts among the various school districts. The court stated that the determination of whether a statute or governmental action violates the Equal Protection Clause is made by the application of one of two constitutional tests. The first and more demanding test relates to fundamental rights and constitutional freedoms. Under this test, a reviewing court must find that a compelling state interest is served to uphold such a statute. Constitutionality of a statute challenged under the Equal Protection Clause is also subject to the second, more traditional standard requiring that the state law be shown to bear some rational relationship to a legitimate state purpose.

The test adopted by the West Virginia court in this situation was the first test which relates to fundamental rights and compelling state interest. As previously noted, most state courts have been hesitant to demand equal education for children under the equal protection clauses of their respective state constitutions. Why did the West Virginia court determine that the state’s school financing system should meet the more demanding “compelling interest test” when other courts had used only a rational basis test? It was the court’s opinion that the mandatory requirement of “a thorough and efficient system of free schools” found in article XII, section 1 of the West Virginia Constitution clearly demonstrated that education is a fundamental constitutional right in the state. Because education is a fundamental right,

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under state equal protection guarantees, any discriminatory classification found in the education financing system cannot stand, unless the State can demonstrate some compelling interest to justify the unequal treatment.\textsuperscript{138} Furthermore, the court went on to state that a thorough and efficient system of schools "develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."\textsuperscript{137}

Justice Neely dissented in this case on the grounds that the majority of the court had overstepped the limits of the court. The dissent would have affirmed the judgment of the lower court because the entire question comes within the classic definition of a "political question"\textsuperscript{138} that courts do not decide. The question could indeed become one requiring legislative attention depending on the resolution of these issues at the trial and appellate levels in the future.

In \textit{State ex rel. McLendon v. Morton},\textsuperscript{139} the West Virginia court decided that a teacher who had satisfied the \textit{objective} eligibility standards for tenure adopted by a state college had a sufficient property interest\textsuperscript{140} or "entitlement" so that he or she could not be denied tenure on the issue of his or her competency without some procedural due process hearing. Vonceil McLendon was an assistant professor at Parkersburg Community College. She had six years of service and full-time employment in academic teaching. She met all of the objective criteria to make an applic-


\textsuperscript{137} 255 S.E.2d at 877. See this same page for the eight legally recognized elements of a "thorough and efficient system of schools."

\textsuperscript{138} This definition of political question was set forth in \textit{Baker v. Carr}, 369 U.S. 186 (1962), when Justice Brennan indicated that a question was not justiciable if it lacked judicially discoverable and manageable standards of resolution. 369 U.S. at 217.

\textsuperscript{139} 249 S.E.2d 919 (W. Va. 1978).

\textsuperscript{140} A property interest includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings, \textit{See Waite v. Civil Service Commission}, 241 S.E.2d 164 (W. Va. 1977), Syllabus pt. 3.
Tenure for teachers in state-supported colleges and universities is controlled by the Board of Regents Amended Policy Bulletin No. 36, effective July 1, 1974, entitled "Policy Regarding Academic Freedom and Responsibility, Appointment, Promotion, Tenure and Termination of Employment by Professional Personnel." Eligibility for tenure status, according to Amended Policy Bulletin No. 36, may be attained by all full-time employees who hold the faculty rank of assistant professor or above. Vonceil McLendon met these objective standards. Equally significant to the case was Section 9C of the Amended Policy Bulletin which stated that "[T]he maximum period of probation [for tenure determination] shall not exceed seven years; and at the end of the six years any non-tenured faculty member will be given notice in writing of tenure, or offered a one-year written terminal contract of employment." McLendon claimed, therefore, that once she met the objective standards or criteria for tenure eligibility, this bestowed upon her a property interest in tenure sufficient to require that she be afforded a procedural due process hearing before tenure could be denied her. The Board of Regents denied that the tenure policy conferred any property interest relative to McLendon's further employment.

In considering the tenure program of both the Board of Regents and the Parkersburg Community College, the court focused on the fact that the sixth year of a teacher's employment marks the critical time in the tenure decision. The rules and regulations of the college and the Board of Regents require that tenure decisions be made at the end of the sixth year of employment. Assistant professor McLendon's tenure application, in accordance with the tenure regulations, was processed by the tenure committee and ultimately resulted in a letter from the president of the college denying tenure. No reasons were given for the denial. It is important to note that McLendon was not automatically entitled, by virtue of her meeting the objective requirements in an application for tenure, to obtain tenure status. Both the Board of Regents...
gents' bulletin and the college regulations indicated that teaching competency was a further criteria for obtaining tenure. However, satisfying the objective eligibility standards for tenure gave McLendon a sufficient entitlement so that she could not be denied tenure on the issue of her competency without some procedural due process hearing. The court held, that under due process considerations, only a tenure denial notice which contained reasons for the denial and a subsequent evidentiary hearing could prevent an arbitrary and capricious denial of tenure.

The protection afforded McLendon under this rule is minimal. The tenure committee must only give notice of reasons as to why tenure has been denied and provide the teacher with an opportunity to submit evidence relevant to the issues raised in the notice. Only if the teacher demonstrates that the reasons given in the notice are wholly inadequate or without a factual basis is the administration required to prove otherwise.143

The court reached its decision as to the extent of the due process protection required in this instance by considering three distinct factors:144 (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest involved, including the fiscal and administrative burdens that additional procedural requirements would entail. It was apparent to the court that the private interest affected was of considerable importance. Simply, once tenure is acquired it ensures that a teacher cannot be dismissed except for specific reasons and then not until a full due process hearing has been held. Second, the court determined that the risk of erroneous deprivation of tenure was apparent in light of the fact that there were no orderly procedures protecting one who met the objective standards for tenure

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143 This procedure confers little practical protection since the burden on the teacher is simply too great to be of benefit. The teacher must demonstrate that the reasons in the notice are "wholly inadequate." Not many teachers can meet this standard. Theoretically, however, because tenure is of such concern to faculty there seems to be a legitimate basis for requiring that someone who has invested six years at a college be told the reasons why he or she is not being retained as a tenured member of the faculty.

eligibility. Finally, the court recognized that although the state interest in avoiding the increased fiscal and administrative burden produced by the additional due process requirements had to be considered, it could not measure the quality of due process solely by the burden that it may impose.

III. RESIDENCY REQUIREMENTS

In *Marra v. Zink*,145 the West Virginia court affirmed the Harrison County Circuit Court decision which held a Clarksburg, West Virginia, City Charter provision to be unconstitutional. The provision in question required candidates for City Council to be city residents for one year prior to their nomination for office. On April 15, 1977, Richard O. Ritter presented to the Clarksburg City Council his nomination for City Council accompanied by the required filing fee, and he also filed a statement stating that he had been a resident of the city of Clarksburg since August 9, 1976.146 The City Council approved the placement of Mr. Ritter's name on the ballot for the June 7, 1977, city election. Mr. Ritter was elected to a four-year term on the City Council. Appellants, as citizens and taxpayers of Clarksburg, challenged Ritter's eligibility to hold office.

On appeal, the court was asked to decide the extent to which either the Legislature or a municipal corporation may limit access to elected municipal office by imposing qualifications for election in excess of those established in article IV, section 4 of the West Virginia Constitution.147

At the outset, the court squarely confronted its holding in *State ex rel. Thompson v. McAllister*,148 in which the court stated that the West Virginia Legislature, under authority of West Vir-

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146 Simple arithmetic would have revealed to the Clarksburg City Council that Mr. Ritter had not fulfilled the one-year residence requirement.
147 Art. IV, § 4 of the West Virginia Constitution states: No persons, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of thirty, and the attorney general and senators the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the State for five years next preceding their election or appointment, or be citizens at the time this Constitution goes into operation.
148 38 W. Va. 485, 18 S.E. 770 (1893).
Virginia Constitution article IV, section 8 and its plenary law-making power, could create qualifications for holding municipal office which were in excess of those set forth in West Virginia Constitution article IV, section 4. Article IV, section 8 provides the authority for the Legislature to establish, by general law, "terms of office, powers, duties, and compensation of all public officers and agents, and the manner in which they shall be elected. . . ." However, as the dissent in Thompson noted, that constitutional section does not provide for the establishment of qualifications for eligibility requirements of elected officials. 149

Consequently, the court in Marra overruled Thompson 150 and held that West Virginia Constitution article IV, section 4 is the exclusive constitutional authority for the establishment of qualifications for municipal office. Since the court found no direct authority in the constitution for the Legislature to establish qualifications for office in excess of those imposed by West Virginia Constitution article IV, section 4, qualifications other than those imposed in article IV, section 4 were held to be unconstitutional by their very terms. Therefore, municipalities, as creatures of the State who draw their powers from the law which creates them, cannot, by a city charter provision, create a condition of holding public office which conflicts with either the state constitution or the general laws of the state. 151

The apparent authority for the city's adoption of a residency requirement could be found in West Virginia Code section 8-5-11 which states that "[A]ny city may by charter provision . . . determine and prescribe . . . the number, method of selection, tenure, qualifications, residency requirements, powers and duties of municipal officers and employees. . . ." 152 However, as noted, West Virginia Constitution article IV, section 8 does not specifically empower the Legislature to create qualifications for office.

The appellants argued that the constitutionality of the residency requirement could be sustained as incidental to the Legis-

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149 38 W. Va. at 500-01, 18 S.E. at 775-76.
lature's plenary power. The court rejected this argument, stating that the evolution of constitutional law has developed strong First Amendment and equal protection rights enabling one to become a candidate for public office. The court decided that the one-year residency requirement served no compelling governmental purpose in assuring that candidates were familiar with the city and knowledgeable about local issues. In rejecting appellants' argument that the one-year residency requirement would pass both a First Amendment and equal protection-compelling governmental purpose test, the court found the reasoning of the California case of Johnson v. Hamilton to be persuasive.

The force and effect of the court's decision in Marra v. Zink is to equate, except for those instances enumerated in West Virginia Constitution article IV, section 4, the right of suffrage with the right to hold elective office.

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163 The facts of this case further illustrate the irrationality of a one-year residency requirement. Consider that Mr. Ritter was born in Clarksburg in 1941 and lived in the city until 1964 and then again from 1970 until 1975. In 1975 Mr. Ritter moved to just outside the city limits of Clarksburg and then in August, 1976, moved back into the city. Would a one-year continuous residency make Mr. Ritter more familiar with that city than he already is? The court thought not.

164 15 Cal. 3d 461, 541 P.2d 881, 125 Cal. Rptr. 129 (1975). In that case the California court reasoned:

In terms of the education of the candidate, the argument that an extended residence is necessary for an understanding of local issues, while perhaps appealing in the abstract, nonetheless ignores the hard realities bearing on the relationship of candidate and issue. The knowledge, appreciation, and comprehension of the public issues and problems which a candidate . . . possesses . . . are so much the product of the variables of motivation, intelligence, maturity, experience, opportunity, and desire as to make any flat rule of physical residence appear immediately suspect and arbitrary. The congeries of individual capacities for observation, study, exposure, and growth are simply so different as to be inhospitable to a rigid fixed qualification tied to residence.

Similarly, the public's need for education and information about a candidate are [sic] not served by a proscription so imperious as one based upon extended physical presence alone. The advent of mass media . . ., the easy mobility of persons and image, and the increasing use of forums, debates, and voter education programs dilute the expectancy that voter education and education can best be served by an arbitrary residence requirement of the candidate. 125 Cal. Rptr. at 134, 541 P.2d at 886.
In *Spradling v. Hutchinson*, the West Virginia Supreme Court of Appeals held unconstitutional a West Virginia Code requirement that one seeking appointment as a police officer must have been a resident of the city to which he or she was applying for at least one year prior to the date of his or her application.

In *Spradling*, thirteen applicants were selected by the Police Civil Service Commission for the City of Charleston for appointment to the Charleston Police Department and were to be sworn in November 4, 1974. However, on November 1, the Fraternal Order of Police petitioned for an injunction against the induction of the applicants. A temporary injunction was issued but a permanent injunction was refused. The Fraternal Order of Police appealed contending that the applicants, *inter alia*, did not comply with the one-year residency requirement of West Virginia Code section 8-14-12.

In the decision with Justice Neely dissenting, the court found the one year residency requirement as stated in the statute was void. The basis of the court’s decision was that the statute was repugnant to the fundamental constitutional right to travel. Since the appellants failed to demonstrate a “compelling state interest” for the requirement, the decision of the Kanawha County Circuit Court was affirmed.

Residency requirements have been discussed in numerous cases since *Shapiro v. Thompson* when the United States Supreme Court recognized the right to travel as a fundamental constitutional right. The Court in *Shapiro* struck down a state statute requiring one-year residency prior to seeking welfare

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154 The statute also includes a county in which part of the city is situate. W. Va. Code § 8-14-12 (1976 Replacement Vol.).
157 The relevant portion of West Virginia Code § 8-14-12 reads as follows: "Any applicant for original appointment must have been a resident for one year, during some period of time prior to the date of his application, of the city in which he seeks to become a member of the said policy department . . . ." W. Va. Code § 8-14-12 (1976 Replacement Vol.).
169 W. Va. Code § 8-14-12 is a long statute. The court found no reason to invalidate those provisions of the statute that did not relate to the one-year residency requirement. In the court’s words, “the remainder of the statute is severable and survives.” 253 S.E.2d at 376.
assistance. After the Shapiro decision, the United States Supreme Court also found that durational residency requirements for eligibility to vote and for hospital and medical services unconstitutionally infringed upon an individual's fundamental right to travel.

It is important to note that not all cases discussing residency requirements have reached the same result. In Kozewinski v. Kugler, a New Jersey tenure statute which required police officers and firemen to be residents of the municipality in which they worked was upheld. The "compelling state interest" the court found was the "identity with the community" that police officers and firemen need to perform their individual functions.

Courts, therefore, differentiate between a requirement of continuing residency, such as the case in Kozewinski, and a requirement of prior residency of a given duration. Requirements of continuing residency have been upheld; those of prior residency of a given duration struck down.

The one-year residency requirement of West Virginia Code section 8-14-12 was a requirement of prior residency of a given duration. The fundamental weakness of the one-year residency requirement was illustrated by its application in this case. Consider that the residency of one of the applicant's in Kanawha County was only during the first eighteen months of his life—obviously more than "one year, during some period of time prior to the date of his application" that the statute prescribes. Yet, it is irrational to assume that at age eighteen months, this applicant was developing community knowledge that would make him a...

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163 Id. at 498-99.
165 Some lower federal and state courts have also decided residency requirement issues. Some have found that, as to firemen and police officers, statutory residency requirements do not violate the fundamental right to travel and hence need only a rational basis to pass constitutional muster. See, e.g., Andre v. Board of Trustees of Village of Maywood, 561 F. 2d 48 (7th Cir. 1977); Wright v. City of Jackson, Mississippi, 506 F.2d 900 (5th Cir. 1976).
166 253 S.E.2d at 376.
better policeman when he was appointed to the police force more than two decades later. Not only did this residency requirement fail to serve a compelling state interest, it also contained no rational basis.

Justice Neely dissented from the majority opinion, stating that the one year residency requirement for applicants to the police force of a municipality was reasonable.\(^{167}\) The residency requirement, according to Justice Neely, served to insure a police force familiar, both physically and psychologically, with the ways of the community as well as helping to preserve the community itself by offering work to the native sons and daughters of the state.

IV. PREJUDGMENT SEIZURE OF GOODS

The constitutionality of West Virginia's detinue statute was at issue in \textit{State ex rel. Yanero v. Fox}.\(^{168}\) Westinghouse Credit Corporation (WCC), as assignee of several conditional sales and installment sales contracts, filed suit in the Circuit Court of Marion County, alleging past due payment on those contracts. WCC also filed a bond and affidavit pursuant to West Virginia Code section 55-6-1 to obtain prejudgment possession of the contracted-for goods.\(^{169}\) The County Clerk issued the attachment orders. Without notice to the lessees and purchasers under the contracts, the circuit court ordered the sheriffs of Marion and Harrison counties to seize the goods. Yanero, a lessee under one of the contracts and a purchaser under another, moved the court to quash the seizure order. At a hearing, the court denied Yanero's motion but suspended his seizure order so that Yanero could seek a writ of prohibition from the West Virginia Supreme Court of Appeals.

The court held that before a prejudgment seizure can occur, a hearing must be held to determine whether or not a seizure is proper.\(^{170}\) The parties which will be affected by the seizure must be given notice of the hearing and an opportunity to attend the

\(^{167}\) Id. at 376-77 (Neely, J. dissenting).
\(^{168}\) 256 S.E.2d 751 (W. Va. 1979).
\(^{169}\) Id. at 752.
\(^{170}\) Id. at 757.
hearing and represent their interests.\textsuperscript{171} Thus, those portions of the West Virginia detinue statute\textsuperscript{172} which allow government officials to seize property in the possession of one party and deliver the property to another party without prior notice and hearing are an unconstitutional violation of the due process clause of the West Virginia Constitution.\textsuperscript{173}

The court, however, denied Yanero's application for a writ of prohibition.\textsuperscript{174} The court felt that the pre-seizure hearing on Yanero's motion to quash the seizure order was a hearing on the merits of whether seizure should be allowed, and, thus, the requirements of due process had been fulfilled.\textsuperscript{175}

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\textbf{CONTRACTS\textsuperscript{176}}

In \textit{Floyd v. Watson,}\textsuperscript{177} the Supreme Court of Appeals ordered specific performance of a settlement agreement to build a wall and conveyance of part of the property on which it was built. The case is significant because it involves the specific performance of a construction agreement.

In \textit{Floyd}, the owners of a housing subdivision, the Watsons, entered into a contract with the plaintiffs (the Floyds) "whereby the Watsons agreed to sell real property to the Floyds and construct a house and appurtenances upon the property according to specifications attached to the agreement."\textsuperscript{178} Among the appurtenances to be built was a wall upon which the dispute centered. The house was built and the property was deeded over to the Floyds. However, the Watsons failed to complete construction of the wall as promised in their contract. Furthermore, the portion

\textsuperscript{171} Id.  
\textsuperscript{172} W. Va. Code §§ 55-6-1 to -7 (1966).  
\textsuperscript{173} 256 S.E.2d 751, 757 (W. Va. 1979).  
\textsuperscript{174} Id.  
\textsuperscript{175} Id.  
\textsuperscript{176} The contempt aspect of \textit{Floyd v. Watson}, 254 S.E.2d 687 (W. Va. 1979), is discussed in the PROCEDURE section of this survey.  
\textsuperscript{177} 254 S.E.2d 687 (W. Va. 1979).  
\textsuperscript{178} Id. at 688.
of the wall that was completed extended onto part of the defendants' property, and proper completion of the construction required that it extend further onto the Watsons' property.

The Floyds sued the Watsons to force construction of the wall and conveyance of the additional property to them. However, prior to trial, the parties reached an oral compromise by which the defendant Billy J. Watson agreed to:

1. Tender plaintiffs a deed for the property on which the front wall was sitting;
2. Continue the wall along the diagonal portion of the plaintiffs' property, and
3. Furnish to plaintiffs a deed to any property owned by the defendants if any portion of said wall had to be erected on the defendants' property.¹⁷⁹

Upon the defendants' failure to comply with the above agreement, the Floyds brought a second suit, this time seeking specific performance of the so-called settlement agreement. The trial court granted the relief requested.¹⁸⁰

On appeal, the court reviewed the action of the trial court in granting specific performance of a settlement agreement called for construction of contracted work. The order of the trial court was affirmed. Although the settlement agreement is never expressly referred to as a construction contract in the opinion, the Supreme Court of Appeals nonetheless discussed the historical reluctance of courts to grant the remedy of specific performance for such contractual agreements. The court also noted that specific performance may be granted to enforce a compromise agreement, "assuming other requisites for this remedy are met."¹⁸¹ The court cited the rule that specific performance is not ordinarily decreed in construction contracts largely because of the impracticality of court supervision of the work combined with the usual availability of another remedy. However, courts do have discretion to grant such a remedy where "the particulars of the work are definitely ascertained, plaintiff has a substantial interest in having

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¹⁷⁹ Id. at 689 n.1.

¹⁸⁰ The terms of the oral compromise were incorporated in the court order which "designated the location of the wall and required the Watsons to complete construction and to deed to the Floyds the requisite property." Id.

¹⁸¹ Id. at 690.

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the contract performed, and money damages will not provide an adequate remedy."\textsuperscript{182} However, rather than discussing the applicability of this rule to the case at bar, the court simply affirmed the holding of the lower court with the following statement: "The agreement here includes a provision for conveyance of land, and therefore specific performance is proper."\textsuperscript{183}

It is difficult to assess the exact parameters of this decision. Quite obviously specific performance is appropriate to enforce a contract for the sale of land, but such a holding is hardly seminal.\textsuperscript{184} The uniqueness of this decision in West Virginia jurisprudence lies in that part of the opinion allowing specific performance of an agreement to construct a wall. However, it is hard to ascertain whether such a remedy could be had if the settlement agreement contained only a promise to perform services. The language of the opinion suggests that specific performance may be decreed on a construction contract which also requires the transfer of real property. One may infer from the opinion that specific performance could be decreed on a construction contract where "the particulars of the work are definitely ascertained, plaintiff has a substantial interest in having the contract performed, and money damages will not provide an adequate remedy."\textsuperscript{185} However, such was not the factual situation presented to the court in Floyd and hence, the intended scope and effect of the above-quoted language is uncertain.

Sarah G. Sullivan

CRIMINAL LAW AND PROCEDURE

I. INSTRUCTIONS

A. Invalid Instruction—Invited Error

In a case of first impression in West Virginia, the court in

\textsuperscript{182} Id.

\textsuperscript{183} Id. A 1978 decision by the Michigan Court of Appeals was discussed, supporting the rule that specific performance is the appropriate remedy for breach of a contract for the sale of land.

\textsuperscript{184} "The would-be purchaser under a land contract can ordinarily obtain an equitable decree of specific performance, in which the court will order vendor to convey the land according to the terms of the contract." D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 12.10 (1973).

\textsuperscript{185} 254 S.E.2d at 690.
State v. Dozier\textsuperscript{186} faced the question of whether a defendant may challenge on appeal the legality of giving a defective jury instruction which was given at the request of the defendant's attorney. The trial judge gave a jury instruction, requested by Mrs. Dozier's court-appointed attorney, which impermissibly relieved the state of its burden of proof respecting the intent element of murder in violation of State v. Pendry.\textsuperscript{187} Mrs. Dozier was convicted of first degree murder.

The court held that the offer of the defective instruction by the defendant's attorney was not invited error and, thus, Dozier could challenge on appeal the legality of giving the defective instruction.\textsuperscript{188} The court rejected the idea that the defendant had waived her right to a constitutionally correct instruction by her attorney's tender of the defective instruction.\textsuperscript{189} The court reasoned that since the defendant herself did not know that a constitutionally erroneous instruction was offered on her behalf, she had not made a knowing and intelligent waiver of her right to a constitutionally firm instruction. Further, the court placed on the trial judge the responsibility for giving constitutionally correct jury instructions. The court held the trial judge had erred in not refusing to give a patently unconstitutional instruction. Also, there was no evidence that defense counsel had deliberately used the defective instruction to create error in order to obtain a reversal in case of conviction.\textsuperscript{190}

The court noted that if the improper instruction had been contained in a charge prepared by the trial judge and given without objection of the defendant's counsel or offered by the state without objection by the defendant's counsel, the trial court or appellate court could notice plain error in the giving of such an instruction in order to avoid manifest injustice or clear prejudice to a party. The court felt that no distinction should be made between those situations and the situation in which the defective instruction is offered by the defendant.\textsuperscript{191}

\textsuperscript{186}255 S.E.2d 552 (W. Va. 1979).
\textsuperscript{187}227 S.E.2d 210 (W. Va. 1976).
\textsuperscript{188}255 S.E.2d 552, 555 (W. Va. 1979).
\textsuperscript{189}\textit{Id.}
\textsuperscript{190}\textit{Id.}
\textsuperscript{191}\textit{Id.}
B. Self-Defense

In *State v. Kirtley*, the defendant Kirtley appealed his conviction for involuntary manslaughter in a stabbing death by challenging the legality of certain jury instructions which were given at trial. The jury was instructed that the use of a deadly weapon in the commission of a homicide raises a presumption of malice. The jury was also instructed that the defendant has the burden of proving the defense of self-defense by a preponderance of the evidence.

On appeal, the court struck down the instruction concerning the presumption of malice as obviously defective under *State v. Pendry*. The court, however, rejected the defendant's argument that the giving of that constitutionally infirm jury instruction alone was sufficient to reverse the conviction for involuntary manslaughter. The court reasoned that since the guilty verdict was for an offense that does not have malice as an element, the instruction could not have affected the jury's fact finding process and, therefore, the error in giving the defective instruction was harmless beyond a reasonable doubt. In his concurring opinion, Justice Harshbarger argued that any constitutional error is harmful and, thus, the defective instruction was grounds for reversal.

The court did, however, reverse Kirtley's conviction and remand the case for a new trial on the grounds that the instruction on self-defense was improper. The court held that once there is sufficient evidence introduced in the case to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the state must prove beyond a reasonable doubt that the defendant did not act in self-defense.

II. Presentencing Reports

The question of the right of a defendant or his attorney to examine a presentence report was addressed by the court for the first time in *State v. Byrd*. The court adopted Rule 32(c)(3) of
the Federal Rules of Criminal Procedure as the standard in West Virginia. This rule requires the trial court, upon request, to allow the defendant or his attorney to read the presentence report prior to sentencing. The defendant may not read any portion of the report which recommends a particular sentence. The trial judge has discretion to omit certain other matters from the defendant's examination of the report. If such information is omitted, however, the court must give an oral or written summary to the defendant of the factual information contained in the omitted portion. In regard to both the report and the court's summary of omitted portions, the defendant has the right to comment on the information contained therein, and at the discretion of the trial judge, to introduce evidence relating to alleged factual inaccuracies. The discretion of the judge as to the introduction of evidence may be tested on appeal. Any information disclosed to the defendant must also be disclosed to the prosecution.

III. IDENTIFICATION IN A WARRANT

In State ex rel. Gonzales v. Wilt, the court dealt with the issue of the burden of proving the identity of a person named in a fugitive warrant. Benito Gonzales was arrested in West Virginia on the basis that he was the man described in a fugitive warrant issued by Texas authorities. Seeking to avoid extradition to Texas, Gonzales filed a petition for a writ of habeas corpus alleging that he was not the person named in the warrant. The state offered no evidence to contradict Gonzales' allegations, relying instead on the warrant and documents from Texas officials describing the person sought.

The court noted that the fugitive warrant, regular on its face, makes a prima facie case for extradition. However, if the accused presents evidence that he is not the person named in the warrant, the issue of identity is raised, and the burden is then on

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198 Id. at 324.
200 Specifically, Gonzales alleged that he had never used the name of the person charged in the Texas indictment, and that he did not have the physical characteristics of the person sought as described in identification documents furnished by Texas authorities.
the state to prove identity. Thus, the court ordered Gonzales freed from custody, since he had raised the issue of identity and the state had failed to meet the burden of proving identity. The court did not specify what quantity of evidence is sufficient on the part of the defendant to raise the issue of identity, or what evidence is sufficient on the part of the state to satisfy the burden of proving identity.

IV. DOUBLE JEOPARDY

The court construed the double jeopardy clause of the West Virginia Constitution in State ex rel. Dowdy v. Robinson. The indictment charged Dowdy with breaking and entering a building located at 200-22nd Street in Huntington. Proof was adduced at trial that the building in question was located at 220-22nd Street rather than at 200-22nd Street as provided in the indictment. Dowdy moved for a directed verdict of acquittal, arguing that the misdescription of the street address was a fatal variance between the indictment and the proof. The trial court granted Dowdy's motion. Dowdy was then reindicted using an indictment which contained the correct street address. Dowdy sought a writ of prohibition to prohibit the circuit court judge from trying him under the second indictment on the grounds that the trial would impermissibly place him in double jeopardy in violation of the United States and West Virginia Constitutions.

The West Virginia Supreme Court of Appeals granted the writ of prohibition. The key factor, in the court's view, was that the first trial had been terminated by a verdict of acquittal. The court stated that after a judgment acquitting a defendant, a retrial on the same offense is impermissible, no matter how erroneous the acquittal may have been. In Dowdy, the trial judge had options available to correct the misdescription in the indictment

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202 Id. In the earlier case of State ex rel. Mitchell v. Allen, 155 W. Va. 530, 185 S.E.2d 355 (1971), the court held that in a habeas corpus proceeding instituted to determine the validity of custody where the petitioner is being held in connection with extradition proceedings, the court in the asylum state may properly consider whether the petitioner is the person named in the extradition warrant.


204 Id. at 171.
which could have avoided the jeopardy problem.\textsuperscript{205} However, since the trial judge chose the option of granting a verdict of acquittal, this factor was controlling in the disposition of the case. Based upon this analysis, the court then declared West Virginia Code section 61-11-14\textsuperscript{206} unconstitutional as a violation of the double jeopardy clause of both the United States\textsuperscript{207} and West Virginia\textsuperscript{208} Constitutions because the code section permitted retrial in certain circumstances after a verdict of acquittal.\textsuperscript{209}

In deciding whether the attempted second trial was for the "same offense" as that term is used in the double jeopardy clause of the West Virginia Constitution, the court stated that "same offense" will be defined by either the same evidence or the same transaction test, whichever test offers the defendant greater protection.\textsuperscript{210} Under the same evidence test, the two offenses are the same unless one offense requires proof of a fact which the other offense does not.\textsuperscript{211} Under the same transaction test, the two offenses are the same if they grew out of a single criminal act, occurrence, episode or transaction.\textsuperscript{212} In Dowdy the court found that the defendant's only transgression was the breaking and entering of a building on 22nd Street. Thus, under the same transaction test, the attempted second trial violated the constitutional prohibition against twice being put in jeopardy for the same

\textsuperscript{205} Id. The court stated that in order to avoid the double jeopardy problem the trial judge could have either struck the street address in the original indictment as surplusage on the grounds that the remainder of the indictment fully informed the defendant of the charges against him or granted a mistrial for manifest necessity.

\textsuperscript{206} W. VA. CODE § 61-11-14 (1977 Replacement Vol.) provides:
A person acquitted of an offense, on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again upon a new indictment or other proper accusation, and tried and convicted for the same offense, notwithstanding such former acquittal.

\textsuperscript{207} U.S. CONST. amend. V.

\textsuperscript{208} W. VA. CONST. art. III, § 5.

\textsuperscript{209} 257 S.E.2d 167, 171 (W. Va. 1979).

\textsuperscript{210} Id. at 170.

\textsuperscript{211} Id. The same evidence test was developed in the majority opinions in Blockburger v. United States, 284 U.S. 299 (1932), and Brown v. Ohio, 432 U.S. 161 (1977).

\textsuperscript{212} Id. at 169. The same transaction test was developed in Mr. Justice Brennan's concurring opinion in Brown v. Ohio, 432 U.S. 161, 170 (1977).
Justice Miller entered a very strong dissent. He argued that a defendant is acquitted only when the ruling of the trial judge actually represents a resolution in the defendant's favor of an essential factual element of the offense charged or a resolution in the defendant's favor of an essential factual element of an affirmative defense of the defendant. In the instant case, the resolution in favor of the defendant was on an issue unrelated to an element of the crime or his defense; instead, the resolution below was based on mere surplusage, i.e., the incorrect street address. Justice Miller felt that an appellate court must look beyond the trial court's labeling of the motion that terminates the trial and focus instead on the substantive nature of the court's ruling.

V. WAIVER OF THE RIGHT TO COUNSEL

In State v. Bradley, the court dealt with the issue of waiver of the right to counsel. Bradley was suspected in the murder of a fellow inmate in the county jail. Before his arrest, Bradley had been advised of his Miranda rights twice and asked to sign a written waiver of those rights. On both occasions Bradley refused to sign the waiver and asked to see a lawyer. The sheriff failed to arrange for Bradley to obtain counsel and Bradley was later arrested on the murder charge. After his arrest and before he had obtained counsel, Bradley made oral statements to police officers which implicated him in the murder. These statements were admitted into evidence in the trial at which Bradley was convicted. The propriety of the admission of those statements was at issue before the West Virginia Supreme Court of Appeals.

The court rejected the State's argument that the defendant had waived his right to counsel by making the statements to the police. The court held that, if after requesting counsel, an accused recants his request before counsel can reasonably be secured, the

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213 Id. at 171.
215 Id. at 172.
heavy burden of the state to prove waiver is even heavier.\textsuperscript{218} This burden can best be met by a written statement, signed by the defendant, affirming the relinquishment of his theretofore asserted constitutional rights. Only when the defendant's intention to waive the right to counsel is clear may interrogation proceed.\textsuperscript{219} In \textit{Bradley}, the state had failed to meet its heavy burden of proving waiver. The defendant had not signed a written waiver of his right to counsel. Further, the court noted that Bradley had on two occasions specifically requested counsel and also had twice refused to sign a waiver of his right to counsel. Thus, the incriminating statements Bradley made to the police officers should not have been admitted at trial since those statements were obtained in violation of Bradley's right to have counsel present during interrogation.

\section*{VI. GRAND JURY PROCEEDINGS}

In \textit{State v. Frazier},\textsuperscript{220} the defendant was convicted for delivering marijuana. During the grand jury proceeding, the state trooper who investigated the case was allowed to remain in the grand jury room after testifying. While in the grand jury room, the trooper questioned other witnesses who also gave evidence against the defendant. The defendant's conviction was overturned by the West Virginia Supreme Court of Appeals on the basis of the long-standing \textit{Wetzel} rule that while the grand jury is considering evidence, no other witnesses are allowed to be present in the grand jury room.\textsuperscript{221} In \textit{Frazier} the error was compounded when the trooper questioned the other witnesses. The court in applying the \textit{Wetzel} rule recognized that "[i]t cannot be expected that law enforcement officials who are directly involved with the solution

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\textsuperscript{218} 255 S.E.2d 356, 358 (W. Va. 1979).
\textsuperscript{219} Id.
\textsuperscript{220} 252 S.E.2d 39 (W. Va. 1979). For a further discussion of this case see Comment, 82 W. Va. L. Rev. 703 (1980).
\textsuperscript{221} State v. Wetzel, 75 W. Va. 7, 83 S.E. 68 (1914). The court stated: It is the policy of the law to preserve inviolate the secrecy of proceedings before the grand jury and the discussion of evidence before them relating to an alleged crime which they are considering, by persons not sworn to testify as witnesses, will vitiate an indictment returned by them whether they were actually influenced by such discussion or not. The law seeks to guard against even the possibility of such influence. 75 W. Va. 7, 83 S.E. 68, Syll. pt. 4.
of a crime and the prosecution of its perpetrators will maintain an impartial role."  However, the court refused to speculate as to whether the Wetzel rule would apply to a mere accidental intrusion of such officials into the grand jury room.

VII. ARRaignMENT

At issue in State v. Grimmer was the failure of the prosecution to properly arraign the defendant. The defendant appealed his conviction as an accomplice to a shotgun murder following a robbery-burglary attempt. The record failed to show that any arraignment had actually taken place. The defendant was fully aware of the charges against him, however, since a copy of the indictment had been given to him. He filed numerous motions and pleadings seeking more detailed information of the charge and was given a bill of particulars. The defendant had a jury trial which resulted in a guilty verdict against him.

It has been the long-standing rule in this state, as first announced in State v. Moore, that the defendant must be "present in court, and plead to the indictment against him in person, and the record must affirmatively show this." However, West Virginia Code section 62-3-2 does not provide that a formal arraignment is required. In considering whether the failure to arraign the defendant constituted prejudicial error, the court noted that everything in the arraignment proceeding had been completed except the taking and recording of the plea. The essential elements of a sufficient arraignment, fully advising the defendant of the nature of the charge, of the right of a jury trial, and of the consequences of any plea tendered were compiled within the partic-

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222 252 S.E.2d at 42.
223 251 S.E.2d 780 (W. Va. 1979). The Fifth Amendment aspect of this case is discussed in the CONSTITUTIONAL LAW section of this survey.
224 57 W. Va. 146, 147, 49 S.E. 1015 (1905). The point was made in subsequent cases including State v. McGee, 230 S.E.2d 832 (1976).
225 W. Va. Code § 62-3-2 (1977 Replacement Vol.) provides:
   A person indicted for felony shall be personally present during the trial therefor. If he refuse to plead or answer ... the trial shall proceed as if the accused had entered that [not guilty] plea ... . The formal arraignment of the prisoner, the proclamation by the sheriff, and the charge of the clerk to the jury ... shall be dispensed with.
ular case. The court concluded that the defendant had not been deprived of any essential right affecting his trial and as such the failure to record the arraignment under the circumstances in the case constituted harmless error. The court thus overruled State v. Moore which required the record to show an arraignment in every case.

VIII. Confession

In State v. Vance, the admissibility of the defendant’s confession at trial was in issue. The trial court, after an in camera hearing, determined that the defendant’s statements had been voluntarily made and thus admitted them into evidence. However, the jury was not instructed as to the voluntariness of the statements. The defense did not offer any instructions nor did the court give any instructions concerning the confession.

It is recognized that the state must prove by a preponderance of evidence that any confession of an accused was made voluntarily before such confession may be admitted into evidence during the trial of a criminal case. But there is a split of authority on the procedures to be used in making the voluntariness determination. The majority of jurisdictions follow the “Wigmore” or “orthodox” rule under which the trial judge makes the sole and final determination as a matter of law as to the voluntariness of the confession. The jury only weighs the credibility or weight given the confession. The jury only weighs the credibility or weight given the confession if it is admitted into evidence. In other jurisdictions, the “Massachusetts” or “humane” rule is followed and under this rule the court makes the initial determination of voluntariness and then the jury is instructed that they must find the confession to have been voluntarily given before they may consider it as evidence.

In West Virginia, there has been inconsistency as to the method to be used under the two lines of authority. In adopting

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227 250 S.E.2d 146 (W. Va. 1978).
230 See 250 S.E.2d 146 at 150 n.3 for a listing of cases following each view in West Virginia. See also Jackson v. Denno, 378 U.S. 368 (1964).
the "Massachusetts" or "humane" rule, the court quoted the Supreme Court of Vermont:

[W]e feel the so-called 'orthodox' rule contains aspects of harshness inconsistent with the general administration of criminal law in this jurisdiction. It attaches to the preliminary determination of the court an aura of infallibility which, while it may be consistent with the requirements of the constitution, is not consistent with the general concepts of the right to jury trial.\(^231\)

However, the court did not find reversible error in the failure to give instructions with respect to the confession. The court did rule that in all future trials where an objection is made to the admission of a confession on the grounds of voluntariness, the defendant is entitled to an instruction upon request. Justice McGraw would have gone a step further by requiring instructions whether requested or not.\(^232\)

The issue addressed in *State v. Canby*\(^233\) was the admissibility of a confession made after an illegal arrest. The defendant was arrested without a warrant and immediately taken to the county jail for questioning. He confessed to participation in a series of barn burnings. He was not taken before a justice of the peace for more than 23 hours after his arrest. The defendant sought reversal of his conviction for second degree arson on the grounds that his confession was a direct result of an illegal arrest and that the confession had been obtained without compliance with West Virginia Code section 62-1-5\(^234\) requiring the presentation of an accused party before a magistrate without delay.

Based upon the facts of the case, the court found that the oral confession had resulted from the illegal arrest but could not find any causal connection between the arrest and the confession. The court had previously held that noncompliance with West Virginia Code section 62-1-5 would not invalidate a confession ob-

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\(^232\) 250 S.E.2d at 151.

\(^233\) 252 S.E.2d 164 (W. Va. 1979).

\(^234\) W. VA. CODE § 62-1-5 (1977 Replacement Vol.) provides:

An officer making an arrest . . . shall take the arrested person without unnecessary delay before a justice of the county in which the arrest is made . . . .
tained pursuant to a legal arrest. The court stated that where noncompliance is combined with an illegal arrest, exclusion of the confession is mandated to insure protection under West Virginia Constitution, article III, section 6. However, the court stopped short of requiring a mandatory exclusion in all situations, such as where there has been a clear showing of circumstances sufficient to break the causal connection between the illegal arrest and the confession.

IX. Speedy Trial

In State v. Cox the defendant alleged that he had been denied a speedy trial because there had been a delay of two and one half years from the time of the indictment until his trial. However, the defendant never asserted any right to a speedy trial until two years after the indictment had been returned. The main reason for the delay was the incarceration of the defendant in a federal penitentiary.

In determining that the defendant was not denied his right to a speedy trial, the court applied the balancing approach used in Barker v. Wingo, where the conduct of the defendant and government are weighed against one another. The factors considered in the balancing process are the length of delay, the reason for the delay, the defendant's assertion of his rights, and any prejudice resulting to the defendant. The court stated that none of the factors alone is sufficient to support a finding of a deprivation of the right to a speedy trial.

X. Plea Bargaining

The enforceability of a promise made by a law enforcement officer to a defendant during questioning was considered in State

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236 W. Va. Const. art. III, § 6 provides:
The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated.
237 The West Virginia court followed the federal approach developed in Brown v. Illinois, 442 U.S. 590 (1975), by not requiring mandatory exclusion.
The defendant alleged that he was promised immunity from prosecution in exchange for certain information.

When charges were brought, the defendant sought to terminate the prosecution by enforcement of an agreement allowing him to plead guilty to a specific offense. The court noted that a plea bargaining agreement may be specifically enforced when it is shown that the party has relied detrimentally on the agreement. The court found that the defendant had not proven any detrimental reliance and held that law enforcement officers do not have authority to promise that a defendant will not be prosecuted in exchange for information, thus rendering the agreement unenforceable. However, the court did note that a situation might exist in which an uneducated person would perceive a law enforcement officer as being a voice of authority so as to justify reliance on the official's representations. It appears that if the defendant can prove that he detrimentally relied on what he thought was the voice of authority, then he can have the prosecution terminated.

XI. MALICE AND CAPACITY

In State v. Brant, the defendant was convicted of second degree murder. On the afternoon of February 11, 1976, the defendant and a friend, David Harless, began drinking substantial quantities of beer and whisky and continued most of the evening. Around 9:00 p.m., they took a friend, Douglas Dawson, home. Mr. Dawson was awakened at 2:00 a.m. and returned to the Iaeger Cafe which the defendant had recently purchased. He joined the defendant and Harless in drinking. The cafe was full of empty bottles and cans. When Mr. Dawson prepared to leave at 5:00 a.m., the defendant drew a gun and said to Harless, "Okay, David, we are not going to tear any more of this stuff up," and proceeded to shoot Harless, who turned and said, "Willie, shoot again." The defendant and David Harless were close friends, future business partners, and had never argued or shown any out-

243 253 S.E.2d 517, 521 n.2.
244 252 S.E.2d 901 (W. Va. 1979).
ward signs of aggression.

On appeal, the court held that the giving of an instruction that malice may be inferred from the use of a deadly weapon is erroneous where the state's own evidence affirmatively shows an absence of malice. However, the inference of malice from the intentional use of a deadly weapon will continue to be allowed in the majority of cases. The court also examined the traditional rule concerning the defense of intoxication in criminal cases. The general rule is that intoxication is not a proper defense unless two generally recognized exceptions apply. The court assumed that the intoxication in the particular case impaired the defendant's nervous system so completely as to cause total incapacitation. Based upon the facts, the court held that there was a total breakdown of the defendant's system, such that no malice could be inferred despite the use of a deadly weapon.

The court limited its ruling to the facts of the case and reiterated:

that intoxication can never be used as a defense where it is alleged that there was diminished capacity, except where previous exceptions apply, but can only be used when there is demonstrated a total lack of capacity such that the bodily machine completely fails. Furthermore, where a weapon is involved it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the voluntary intoxication brought to the forefront.

XII. PRETRIAL ORIENTATION

In another aspect of State v. Vance, the defendant had

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246 The two exceptions to the rule denying intoxication as a defense in criminal matters are: (1) it may be considered to reduce first degree murder to second degree murder because it can negate the element of premeditation and deliberation required for a conviction of first degree. State v. Robinson, 20 W. Va. 713 (1882); (2) it can serve as a defense to a specific intent crime such as burglary when it appears that the defendant was so incapacitated that he could not formulate the intent to commit a felony after breaking and entering. State v. Phillips, 80 W. Va. 748, 93 S.E. 828 (1917).
247 252 S.E.2d at 904.
248 250 S.E.2d 146 (W. Va. 1978). The confession aspect of this case was discussed in a preceding segment of this section.
moved to disqualify the entire panel of petit jurors on the grounds that the judge had held a private orientation meeting with jurors on the first day of duty. The orientation meeting was not recorded but there was no evidence that the defendant or his client was purposefully excluded. The basis of the defendant's argument was that there was no way of determining whether improper remarks were made to the prospective jurors.

The court could find no prior West Virginia cases concerning pretrial orientation, but the court did take judicial notice of the fact that several judicial circuits conduct orientation meetings to instruct prospective jurors of their duties and responsibilities. Most jurisdictions and federal courts use juror handbooks to prevent a slip of the tongue or an erroneous statement of law which would present a danger to the accused's right to a fair and impartial trial. The court held, on a prospective basis, that a court reporter must record all proceedings during pretrial orientation. Because the defendant failed to show any prejudice, the court did not reverse the conviction.

XIII. DEFENDANT AND WITNESS ATTIRE

Although the United States Supreme Court has determined that it is error to violate a defendant's constitutional right to wear civilian attire at trial, the West Virginia Supreme Court of Appeals has recently determined that there is one situation in which that error will be deemed harmless. In State ex rel McMannis v. Mohn, the defendant had been confined in the state penitentiary on a felony conviction. At the time of his subsequent trial, he had been returned to Mineral County to be tried for a sexual offense which allegedly occurred in the Mineral County Jail while he was awaiting a hearing on a writ of habeas corpus relating to the previous felony conviction. Throughout his trial he was clothed in prison issue bearing the inscriptions "West Virginia Penitentiary" and "WVP" both on the seat of the pants and the back of the shirt. The defendant's attorney did not object to this attire until after he had examined the first defense witness and

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249 Id. at 151-52.
250 Id. at 152.
had called his second.

The court held that

a criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire. However, where a criminal defendant is tried in identifiable prison attire without any initial objection, and the offense for which he is tried is prison-related such that the jury necessarily knows from the evidence that he was in prison at the time of the commission of the offense, the error will be deemed not prejudicial under the doctrine of harmless constitutional error.\(^{253}\)

If there is an objection at the start of trial or if the charged offense is not prison related, the defendant's constitutional guarantee to be presumed innocent until proven guilty is violated if he is tried in identifiable prison garb.

Since the right of the accused to be tried in civilian attire is bottomed on his constitutionally sanctioned presumption of innocence, it was held by the court not to extend to his witnesses.\(^{254}\) Thus, the court stated that the accused had no constitutional right to have his witnesses appear at trial without physical restraints or in civilian attire. Although this may substantially impair the credibility of their testimony in the jury's mind, it does not reach the status of a constitutional guarantee. However, the court did acknowledge that, had the case been under review on an appeal rather than by a habeas corpus proceeding, it may have resulted in reversible error if a timely objection had been made.

**XIV. Search and Seizure**

In *State v. Williams*\(^{255}\) the court reaffirmed principles applicable in determining the voluntariness of a search by consent. The case arose when five police officers confronted Williams without a warrant at his home in the early morning hours. Williams was taken to the police barracks and given a detailed explanation of his Miranda rights. Because the police were aware of Williams' limited intelligence, every effort was made to ensure he understood his rights. Shortly after arriving at the station, the police

\(^{253}\) *Id.* at 808.

\(^{254}\) *Id.*

\(^{255}\) 249 S.E.2d 758 (W. Va. 1979).
officers asked the defendant if he would show them the contents of his pants pockets and he did so. Later, the officers searched the defendant's jacket and found a watch in the lining bearing the victim's initials. After being confronted with the watch, the defendant admitted playing a minor role in the crime. At trial, the watch and the confession were introduced into evidence. Following a verdict of guilty of first degree murder, the defendant was sentenced to life imprisonment, without a recommendation of mercy. On appeal, the West Virginia Supreme Court of Appeals, held that considering the totality of the circumstances, the defendant did not freely and voluntarily consent to the search of his jacket, and therefore it was error to admit the watch into evidence.

The factors to be considered in determining whether consent to a search has been voluntarily given were listed by the court. Although the court examined all of the circumstances surrounding the case, a number of elements were given particular attention. The court's major concern was whether the defendant was in custody when the consent was given. The theory that there is a heightened possibility of coercion where the alleged consent was made by a person in custody was acknowledged by the court. Thus, an alleged consent to search while in custody must be subjected to the most careful scrutiny.

Other factors to be considered in the determination of voluntariness included the authority of the person consenting to the search, knowledge of the constitutional right to refuse permission to search, and the intelligence of the person consenting to the search. While these are some of the factors to be used by the court in making its determination, it was made clear that "whether a consent to a search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."  

XV. Arrest

On February 20, 1979, the West Virginia Supreme Court of Appeals, in State v. Canby, significantly changed the law relating to warrantless arrest. Canby was arrested at his home on July 211 State v. Thomas, 203 S.E.2d 445 (W. Va. 1974).


256 252 S.E.2d 164 (W. Va. 1979).
16, 1975 without a warrant and was immediately taken to the Berkeley County Jail for questioning where he orally confessed to participation in numerous barn burnings. He sought reversal of his conviction, contending that the oral confession was improperly admitted at his trial since it was the result of an illegal arrest. The court agreed with the appellant and reversed the trial court's decision.

The court first recognized that both the Constitution of the United States and the Constitution of West Virginia protect citizens from unreasonable arrests, searches, and seizures. The court noted that the general method for implementing that protection is in the requirement that a warrant based on a showing of probable cause must be obtained from a neutral magistrate before an arrest, search, or seizure may be initiated.

Affirming the long-standing rule that warrantless arrests, searches, and seizures are generally unreasonable, the court held that two requirements must be satisfied in order for a police officer to make a warrantless arrest. First, the officer must have, at the time of the arrest, sufficient reliable evidence to provide a strong showing of probable cause. The court added a new requirement that there must be exigent circumstances, not of the police officer's creation, which militate in favor of immediate arrest. Justice Neely writing for the court stated that

the test of exigent circumstances for making an arrest for a felony without a warrant in West Virginia is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made the accused would be able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others.

The standard used in determining whether or not exigent circumstances are present is what a reasonable, well-trained police officer would believe, not what the arresting officer actually did believe. Also, the court stated that the rarity of justifiable warrantless arrests is increased by the requirement under the new magistrate court system that a magistrate be available twenty-

259 U.S. Const. amend. IV.
261 252 S.E.2d at 167 (W. Va. 1979).
four hours a day.\textsuperscript{262}

The court has deviated from the federal rule on warrantless arrests by making exigent circumstances an added requirement in all felony cases. In \textit{United States v. Watson},\textsuperscript{268} the United States Supreme Court declined to condition warrantless arrest power on proof of exigent circumstances since the rule "has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee and the like."\textsuperscript{264} Thus, the West Virginia Supreme Court of Appeals has taken an additional step toward the protection of individual rights.

\section*{XVI. In Camera Hearing on the Voluntariness of a Confession}

In \textit{State v. Staley}\textsuperscript{265} the West Virginia Supreme Court of Appeals reaffirmed its position requiring an in camera hearing on the voluntariness of a confession. On December 27, 1969, Edward Mullen was brutally beaten at his home and subsequently died. At approximately 3:15 p.m. that afternoon the petitioner, who lived with Mullen, was arrested. He was taken to the county jail and was placed in a conference room, where he remained until the deputy sheriff arrived around 9:00 p.m. At 9:12 p.m., the petitioner signed a confession stating that he had beaten Mullen. It was 9:45 before the petitioner was taken before a justice of the peace.

At Staley’s trial, the deputy sheriff testified as to the contents of the confession. The petitioner contended that his statement should have been excluded from evidence because of the unreasonable delay on the part of the State in taking him before the justice of the peace after his arrest. The court rejected this claim and held that, pursuant to the recent decision of \textit{State v. Mason}\textsuperscript{266} which discussed circumstances constituting reasonable

\begin{itemize}
  \item \textsuperscript{262} Id.
  \item \textsuperscript{263} 423 U.S. 411 (1976).
  \item \textsuperscript{264} Id. at 423.
  \item \textsuperscript{265} 253 S.E.2d 66 (W. Va. 1979).
  \item \textsuperscript{266} 249 S.E.2d 793 (W. Va. 1978).
\end{itemize}
delay under West Virginia Code section 62-1-5, the five and one-half hour delay was reasonable.

However, the court reversed the decision of the trial court because the judge failed to conduct an in camera hearing on the voluntariness of the petitioner's confession. Although the court conducted a short conference with counsel in chambers on the state of the petitioner's mind at the time he gave the confession, no witnesses were called, no evidence developing the circumstances surrounding the giving of the statement was introduced, and the court failed to rule on the voluntariness of the confession. Thus, following the ruling in State v. Fortner, the court held "that it is the mandatory duty of a trial court, whether requested or not, to hear the evidence and determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence, and the failure to observe this procedure constitutes reversible error."

Cheryl Lee Davis
James J. Sellitti
Robert Lee Stultz

DOMESTIC RELATIONS

I. EQUITABLE ADOPTION

In Wheeling Dollar Savings and Trust Co. v. Singer, the West Virginia Supreme Court of Appeals recognized the doctrine of equitable adoption which gives a child who has not been adopted pursuant to statutory procedures, in some instances, the same rights and privileges enjoyed by formally adopted chil-

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267 W. VA. CODE § 62-1-5 (1977 Replacement Vol.) provides in part:
An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a justice of the county in which the arrest is made. . . .

269 253 S.E.2d at 68 (W. Va. 1979).
The court justified extending the protection of the law to those who, for all practical purposes, have been adopted but have not gone through the formal paperwork procedures by pointing to the circumstances and equities of the child’s relationship with his adoptive parents. The court thus viewed an equitably adopted child to be as much a family member as a formally adopted child and held that discrimination against such a child because of his status was untenable.

In *Singer*, the appellant, Ada Belle Singer, was taken from an orphanage at age 8 or 9 by Lyda Wharton. She was given the name of Wharton, treated like an adopted daughter and represented to the world as being the Whartons’ adopted child. She believed that indeed she had been formally adopted. Lyda Wharton was the beneficiary of a testamentary trust which had been set up by her aunt in 1923. On Lyda Wharton’s death her children were to share in the distribution of the principal of the trust. Lyda died in 1974 and Ada Belle Singer claimed that, as the adopted daughter of Lyda Wharton, she should receive the principal of the trust. Lyda had no other children and a guardian ad litem for the unknown heirs of the aunt challenged Ada Belle Singer’s claim.272

In a declaratory judgment proceeding the Ohio County Circuit Court found that Singer was not the legally adopted daughter of Lyda Wharton since there had been no formal adoption proceedings. Ada Belle Singer appealed. The West Virginia court held that formal statutory procedure is not the exclusive method by which an individual may be accorded the protections of adoptive status.273 The court found that when a child is raised by persons not his or her parents from an age of tender years, treated as a natural child, represented to others as a natural or adopted child, and led to rely to his or her detriment upon the existence of formal paperwork, there is no reasonable distinction between that child and one who has been formally adopted. The court went on

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271 In discussing the policy behind the recognition of this doctrine the court pointed to its decision in *Wheeling Dollar Savings and Trust Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977), which permitted adopted children to be treated as natural children in the administration of trusts. *Hanes* was a major step in improving the status of formally adopted children.

272 250 S.E.2d at 371.

273 *Id.* at 373.
to say that the

equitably adopted child and the formally adopted child are not without differences. The formally adopted child need only produce his adoption papers to guarantee his treatment as an adopted child. The equitably adopted child in any private property dispute such as the case under consideration involving the laws of inheritance or private trusts must prove by clear, cogent, and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to a formally adopted child.\textsuperscript{274}

The court remanded the case to the circuit court to give the appellant the opportunity to prove the factual basis for her claim of equitable adoption, specifying that one of the most important elements should be proof that she was held out to all the world as a natural or adopted child.\textsuperscript{275}

II. Property Settlement and Divorce Decrees

Outrageous traps for the unwary have been created by the use and misuse of the terms "ratified", "confirmed", "merged" and "adopted" in property settlements and divorce decrees. The West Virginia Supreme Court of Appeals' opinion in \textit{In re Estate of Hereford}\textsuperscript{276} is a major step toward clarifying the confusion caused by these words of art.

In 1957, Frank Hereford divorced his first wife, Quinta Hereford. Prior to the divorce, Mr. Hereford agreed to pay $250 a month in alimony to Quinta for as long as she lived or until she remarried. There was no mention, however, of whether the payments would continue upon Mr. Hereford's death.\textsuperscript{277} The divorce decree stated only that the prior agreement was "ratified, approved and confirmed" insofar as it did not conflict with the other provisions of the decree. In 1975, Frank Hereford died and the alimony payments stopped. Quinta Hereford was then 70 years old, lacking financial assets, in poor health, and living in a nursing home. She filed a claim against her former husband's estate which was allowed by the Commissioner of Accounts and the

\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{Id.} at 341.
\textsuperscript{276} 250 S.E.2d 45 (W. Va. 1978).
\textsuperscript{277} \textit{Id.} at 48.
circuit court over the unsuccessful challenge of the executrix.\textsuperscript{278}

In its decision, the court focused both on the equities of Quinta Hereford’s claim and the legal impact of the words of art, “ratified, approved and confirmed”, used in the divorce decree. Since the law of domestic relations is governed by the traditions of equity, the court decided that the facts in the case should have a significant impact on the result. It thus found that “alimony could be a charge against the deceased former husband’s estate where the present value of the former wife’s entitlement to alimony during her natural life was not speculative, there were extenuating equitable considerations militating in favor of continuing alimony after the death of the former husband, and no hardship was created to other dependents.”\textsuperscript{279} The court then moved to clear away the confusion of prior case law surrounding the use of certain words of art in divorce decrees.\textsuperscript{280} Formerly, a great deal of incomprehensible domestic relations law in West Virginia hinged upon the technicality of whether a property settlement had been “ratified and confirmed” by a court, in which case the parties were left to contract remedies for the enforcement of the settlement or, alternatively, whether provisions of a property settlement were “merged” into the divorce decree. If the provisions were “merged,” they became subject to the continuing jurisdiction of the court which could extinguish or enlarge rights to periodic payments initially provided by the property settlement agreement.\textsuperscript{281}

As a result of the court’s decision in \textit{Hereford} all of these distinctions have been erased, and in settlements after February 1, 1979, the parties may agree to anything in the property settlement as long as it is approved by the circuit court.\textsuperscript{282} Thus, in the future, it will be assumed

\begin{itemize}
\item that any award of periodic payments in a divorce decree is in-
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\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.} at 46-47.
\textsuperscript{281} Corbin v. Corbin, 206 S.E.2d 898 (W. Va. 1974).
\textsuperscript{282} 250 S.E.2d at 51.
tended to be judicially decreed alimony unless there is some explicit, well expressed, clear, plain, and unambiguous provision in either the court approved property settlement agreement or the decree. The question of whether a court shall have continuing supervision over the amount of an alimony award, whether the alimony award shall be enforceable by the contempt remedy, or whether alimony at all shall be awarded as opposed to a lump sum settlement are all fit subjects for negotiation between the parties subject to the overall supervision of the court. Mature adults with the help of the court and counsel should be permitted to negotiate terms and thereby bind themselves.283

In McKinney v. Kingdon284 the court addressed the issue of whether a circuit court has jurisdiction in a divorce action to award the wife possession and title to an automobile previously owned by the husband. The lower court had awarded the wife a divorce, custody of the children, and possession and ownership of the family automobile. The husband sought a writ of prohibition to prohibit enforcement of the divorce decree as to the automobile.

The court stated that jurisdiction in divorce cases is purely statutory and West Virginia Code section 48-2-15 permits courts to deal with the property of the parties when necessary to effectuate orders entered for the welfare of the parties or of their minor children.285 The court pointed to the decision in Murredu v. Murredu,286 in which the court had awarded the husband custody of the children, the right to live in the jointly-owned house until the youngest child achieved majority, and possession of the household furnishings.

Building on that precedent, the court determined that the purpose behind granting possession and ownership of the automobile to the wife was to implement the order granting her custody of the children. Again citing Murredu, the court stated that the car is necessary to the proper care and custody of the children as for taking to and from the doctor and dentist, or getting their groceries or buying them clothing or any of the other

283 Id. at 52.
285 Id. at 218.
286 236 S.E.2d 452 (W. Va. 1977).
multitudinous reasons that one must leave his home to do in order to care for his family. The topography and rural nature of West Virginia further necessitates the accessibility of an automobile to a family with young children.287

The court limited its holding to automobiles so that the existing law concerning the disposal of real property and other personal property would not be affected.288 The court also stated that titular ownership is a necessary corollary of an automobile’s possession and use, and since taking care of taxes, insurance and licenses is difficult without the title, transfer of title to the wife could be ordered by the lower court.289

III. CHILD CUSTODY

In Brotherton v. Boothe,290 the West Virginia Supreme Court of Appeals decided that grandparents do not have a legal right to visit a grandchild over the objection of the child’s parent.

In Boothe, a child whose mother was afflicted with multiple sclerosis had lived with her grandparents from the age of six months until she was four years old, when her mother died. Her father then demanded and received custody from the grandparents after a habeas corpus proceeding. After that, the grandparents were granted only rare visits with their grandchild, until finally the father decided that there would be no future visits. Although the grandparents did not allege that the father was unfit, they did state that their visits were in the best interests of their granddaughter. The circuit court was unpersuaded and dismissed their petition seeking visitation rights.291

In a case of first impression, the West Virginia court joined the majority of states which have held that a parent who has legal custody of his child also has the right to determine when the child may visit and be visited by the child’s grandparents, and that a court has no authority to decree visitation rights to grandparents when such rights have not been agreed to by the par-

287 251 S.E.2d at 219.
288 Id.
289 Id. at 220.
291 Id. at 36-37.
ent.292 In addition, the court stated that any moral duty there may be upon a parent to allow such visits is not a proper subject of judicial enforcement. Consent to visitation by a non-parent is a parental right that is premised on the proposition that the parent has properly performed his parental duties, has not abandoned the child, and has not forfeited any of his parental rights.293 Thus only when it appears that the parent has forfeited his rights in a manner recognized by law may the court interfere.294

In cases in which child custody is an issue, and there is some question as to the quality of care that the child will be receiving, it is not uncommon for the trial judge to request a home evaluation be undertaken by the local welfare department. Due to the fact that the welfare department has certain expertise in this area and the department is mandated by statute to care for those children who are neglected or abused, the judge often gives great weight to these home evaluations. But this practice is open to abuse unless the trial judge is diligent in ensuring that this report is made known to him only through proper evidentiary procedures.

Thus, in Rosier v. Rosier,295 where the custody of an infant daughter was in dispute, the judge requested and received a report prepared by the local welfare department following an investigation of the background, living conditions, and general circumstances of the parties. This report was not placed into evidence and the parties had no opportunity to object to its contents nor question those who prepared the report. It was apparent from the record, however, that the trial judge based his award of custody to the father on the welfare investigation report.296 The mother appealed and the court held that in divorce proceedings involving questions of child custody, reports addressed to a judge by public assistance agencies which have not been admitted into evidence should not be considered for any purposes, absent the express consent of the parties.297

292 Id. at 36.
294 250 S.E.2d at 38.
296 Id. at 554.
297 Id.
This ruling may be interpreted as a warning to trial judges that child custody hearings are indeed important and that the informality and flexibility of such proceedings should not be allowed to become so lax as to deny to the parties their substantial rights as to the proper admission and consideration of evidence.

IV. PREVENTION OF DOMESTIC VIOLENCE

In 1979 the West Virginia Legislature added an entirely new article to the Domestic Relations Chapter entitled, "Prevention of Domestic Violence." This new statute was expressly designed to prevent continuing abuse of one household or family member by another member, and to provide temporary and immediate relief for the abused party so that he or she may make rational decisions regarding his or her future. The kinds of abuse which the statute seeks to prevent include the intentional or reckless causing of bodily injury, the use of threats of serious injury to frighten and intimidate other household members, and the sexual abuse of those under eighteen. To commence legal action, the victim, or parent for a child victim, files a petition with the circuit court or magistrate court, and such court must give the petition priority over all other civil actions except trials in progress. The court can then issue any temporary orders it deems necessary to protect the victim until a full hearing is held. The hearing must be held within five days and the complainant must prove abuse by a preponderance of the evidence.

Upon a finding of abuse the court may grant such protective orders as it deems necessary to protect the victim. Such orders may include enjoining the abuser from committing further abuse, excluding the abuser from the household, or ordering the abuser to pay support to the victim for thirty days. No protective order can exceed thirty days, but it can be renewed. To enforce these orders the court is given contempt powers and penalties may be imposed which include imprisonment for up to thirty days and/or a fine not to exceed one thousand dollars.

Id. § 48-2A-1.
Id. § 48-2A-2.
Id. § 48-2A-5.
Id. § 48-2A-6.
Id. § 48-2A-7.
This legislation should help curb the incidence of domestic violence since it provides immediate and substantial relief to the victim. The enforcement provisions, especially imprisonment, should strongly deter violation of any protective orders. Unfortunately, due to the complex and highly emotional nature of domestic violence, it is also possible that this legislation could actually aggravate domestic disputes. One spouse could use the threat of an abuse petition to intimidate the other, thus making the court an unwitting partner in domestic discord. As with most other types of innovative legislation, however, the new Code provisions can only be objectively evaluated by the deterrent impact generated over the period of application.

Roderick Stephen Lewis

EVIDENCE

I. CONFESSIONS AND ADMISSIONS OF AN ACCOMPlice

In State v. Adkins,\textsuperscript{304} the West Virginia Supreme Court of Appeals clarified the rule pertaining to the admissibility of the confessions and admissions of an accomplice at the trial of a co-conspirator. Overruling the principle of State v. Price\textsuperscript{305} and State v. Bennett,\textsuperscript{306} the court determined the proper rule to be that the "admission or confession of an accomplice standing alone, may not be introduced into evidence against another accomplice as an admission against interest."

However, the court noted there is no prohibition against testimony by an accomplice witness implicating the defendant in the crime when the defendant has an opportunity to cross-examine the accomplice or his testimony and cross-examination is appropriately preserved in some other manner.

Under the Adkins rule, the key factor in determining admissibility hinges on the prosecution's motive for calling the accomplice. If the testifying accomplice is called for the purpose of giving detailed testimony and not for the purpose of demonstrating that he has either confessed or pled guilty to participating in the crime with which the defendant accomplice is charged, then such

\textsuperscript{304} 253 S.E.2d 146 (W. Va. 1979).
\textsuperscript{305} 114 W. Va. 736, 174 S.E. 518 (1934).
\textsuperscript{306} 203 S.E.2d 699 (W. Va. 1974).
\textsuperscript{307} 253 S.E.2d at 147 (W. Va. 1979).
testimony may be permitted. On the other hand, if the accomplice is called solely for the purpose of demonstrating to the jury that he has confessed or pled guilty, the testimony will be deemed inadmissible.

II. Admissibility of Unrelated Criminal Acts of the Defendant

The general rule in West Virginia is that the state in a criminal case may not introduce evidence of a substantive offense committed by the defendant which is separate and distinct from the specific offense charged in the indictment.308 However, where the evidence of the collateral offense satisfies two requirements it may be admitted for a limited purpose. In State v. Nicholson,309 which reaffirmed prior decisions on the issue,310 the court held that the unrelated criminal act must fall within the exception that evidence of collateral offenses which are identical to the crime charged, are near in point in time and tend to show motive or intent or a system of criminal action on the part of the defendant may be admitted. In addition to coming within the above exception, there must also be a balancing test to insure the probative value of the evidence is not outweighed by the risk that its inclusion will create substantial danger of undue prejudice to the defendant. In order to insure the balancing test is met, the trial court should require the state to disclose in advance, by in-camera hearing, any evidence of collateral crimes it intends to introduce at trial.

Recognizing the possibility of inciting undue prejudice by the introduction of collateral crimes into evidence, the court also requires a limiting instruction to be given. The court stated "the jury must be cautioned by proper instructions that such evidence is not to be considered as establishing guilt of the crime with which the defendant is charged."311 The question now becomes whether the instruction must be given sua sponte or by request only. Although it appears from the language of the opinion that the instruction must be given whether requested or not, the court

311 252 S.E.2d at 898 (W. Va. 1979).
leaves this question open.

III. HEARSAY

In the case of State v. Williams, the court added a new twist to the admissibility of hearsay under one of its many exceptions. In Williams the trial court excluded the testimony of Steve Casey on the grounds that it was hearsay. Casey’s testimony was that jailmate Marshall Hayden had told him that he and Kelley had entered and robbed the Tri-State Carry Out. Casey would have testified that Haden had not made any mention of the appellant Williams. The court reviewed its prior position which rejected declarations against penal interests as an exception to the hearsay rule.

Addressing the underlying rationale of the hearsay rule, the court noted that hearsay evidence is excluded because it is not considered sufficiently trustworthy. Adopting Rule 804(b)(5) of the Federal Rules of Evidence, the court held that “[h]earsay evidence which is against the penal interest of the extrajudicial declarant is admissible even though it does not fall within a recognized exception to the hearsay rule if it possesses sufficient indicia of reliability to satisfy the court that it is trustworthy.”

Based on the Williams decision, simply because an extrajudicial statement falls within an exception to the hearsay rule does not necessarily compel its admission into evidence. Nor does the

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312 249 S.E.2d 752 (W. Va. 1978).
314 Fed. R. Evid. 804(b)(5) provides: (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.
315 249 S.E.2d 752, 753 (W. Va. 1978).
fact that a statement is not within a recognized exception require its exclusion. The new rule in West Virginia requires an inquiry into the reliability of the hearsay. Exceptions to the rule are henceforth only presumed to be reliable.316 Thus, if the party opposing the hearsay offers enough evidence to overcome the presumption of reliability the hearsay will be excluded. On the other hand, hearsay that does not fall within an exception may be introduced into evidence if sufficient proof of reliability is presented.

Under the Williams decision, the trial judge is given considerable latitude in determining the reliability and trustworthiness of objectionable hearsay. However, the degree of reliability that must be proven is different for both the state and the defendant. The court stated that "the rules of evidence should be applied in favor of the defendant in consonance with the philosophy of Anglo-American law that it is better to release the guilty than to punish the innocent."317 Thus, the state has a greater burden of proving reliability or lack of reliability than the defendant.

IV. Polygraph

The West Virginia Supreme Court of Appeals has recently decided the issue of the admissibility of polygraph results in evidence. In State v. Frazier,318 the defendant submitted to a polygraph test prior to trial pursuant to a written stipulation. The stipulation provided that the test results, together with the opinion of the polygraph operator, would be admissible in court either for or against the defendant. The polygraph expert was called at trial by the state and testified that the defendant lied during the test. After cross-examination, the defense counsel's motion to strike the expert's testimony was denied.

Rejecting the use of the stipulation as a ground for admissibility, the court held the polygraph results could not be introduced merely to show credibility or as an extrajudicial exculpatory statement. As to the issue of use of test results to establish credibility, the court noted that the test results would ordinarily

316 Id.
317 Id. at 757.
318 252 S.E.2d 39 (W. Va. 1979). The double jeopardy aspect of this case is discussed in the CRIMINAL LAW AND PROCEDURE section of this survey.
not be admissible unless the defendant took the witness stand. The court also noted that a defendant’s extrajudicial exculpatory statements usually cannot be included in evidence inasmuch as such statements are generally thought to be too self-serving.

Not only did the court reject the stipulation as a ground for admissibility, but it also discredited the scientific reliability of the test itself. Although the court acknowledged that the underlying concept of a polygraph test rests on the scientific principle that it measures a person’s physiological reactions, it did not accept the premise that the expert plays a neutral role in the interpretation of the test results. Thus, because of the high degree of interpretative subjectivity on the part of the operator, the court failed to give polygraph results the same admissibility as those of a scientific test.

James J. Sellitti

PROCEDURE

I. DISCONTINUANCE BY THE COURT

In Arlan’s Department Store of Huntington v. Conaty, the West Virginia Supreme Court of Appeals addressed the issue of a circuit court’s power to reinstate a case to its civil docket after expiration of the statutory time period allowed for reinstatement.

The plaintiff had filed an action to recover damages for false arrest against Arlan’s Department Store in September, 1970. National Detective Bureau, Inc. and Betty Sue Robinson were made third-party defendants in January, 1971. No further action was taken until January, 1975, when pursuant to West Virginia Code section 56-8-9, the suit was dismissed from the active docket for failure to prosecute. Two and one-half years later, in September, 1977, the plaintiff petitioned the circuit court to reinstate the action. Notice was given to the original defendant but not to the

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320 W. Va. Code § 56-8-9 (1966) provides: “Any court in which is pending any case wherein for more than two years there has been no order but to continue it, . . . may, in its discretion, order such case to be struck from its docket; and it shall thereby be discontinued.”
third-party defendants. After the judge reinstated the case to the active docket, the defendant sought a writ of prohibition from the West Virginia Supreme Court of Appeals to prevent further prosecution of the case.

Dismissals or discontinuances of civil actions for failure to prosecute and their reinstatements are controlled by West Virginia Rule of Civil Procedure 41(b).321 In Conaty, the court found that Rule 41(b) had incorporated, without substantive change, the provisions of West Virginia Code section 56-8-9 and section 56-8-12. These provisions were relevant to any determination of judicial authority to reinstate a discontinued civil case. Accordingly, the court held that where an action is dismissed under Rule 41(b) for failure to prosecute, and is not reinstated within the statutory period allowed under West Virginia Code section 56-8-12,322 the circuit court is without power to reinstate the expired action unless the plaintiff can make a showing of fraud, accident, or mistake.323

Not only did the court find that the circuit court did not have jurisdiction over the cause of action, but it also held that the circuit court lacked jurisdiction over the parties to the action since the plaintiff had failed to give notice of her reinstatement to all the parties as required by Rule 5.324

In Conaty, the court adhered to the general rule of Moore v. Pyles325 and held that the circuit court has the power and authority under Rule 41(b) of the West Virginia Rules of Civil Procedure to reinstate an action when the time limit for filing a reinstatement motion has expired, if proper grounds are

321 W. VA. R. Civ. P. 41(b) provides for striking an action from the docket if no action is taken within two years and for reinstating within three terms of the court.

322 W. VA. CODE § 56-8-12 (1966) provides: "[a]ny court may, on motion, reinstate on the trial docket of the court any case dismissed . . . within three terms after the order of dismissal shall have been made . . . ."


324 W. VA. R. Civ. P. 5 provides: "[e]very written motion . . . shall be served upon each of the parties" except as otherwise provided.

325 121 W. Va. 537, 5 S.E.2d 445 (1939).
II. ATTACHMENT

The West Virginia Supreme Court of Appeals in Gee v. Gibbs was asked to decide, on certification from the circuit court, whether a vested remainder whose situs is in West Virginia is subject to attachment so as to confer jurisdiction. Gibbs had executed a note payable to Morris Plan Bank & Trust Company with the plaintiff Gee signing as an accommodation maker. When Gibbs defaulted on the payment, Gee paid the amount due as an accommodation maker. Gee, a West Virginia resident, then instituted suit in West Virginia against the non-resident Gibbs, attempting to gain jurisdiction by attachment and garnishment of Gibbs's vested remainder interest in a trust.

The court in deciding the trust was subject to attachment under West Virginia Code section 38-7-7, held that the vested trust fell under the traditional notions of an "estate." Since the question was not certified by the trial court, the court did not decide whether the attachment was constitutional under the landmark decision of Shaffer v. Heitner. So it remains to be seen if the attachment under West Virginia Code section 38-7-7 will survive the Shaffer decision.

III. STANDING

In Shobe v. Latimer, the plaintiffs sought a declaratory judgment to declare a contract between the West Virginia Department of Natural Resources and Dorcas Public Service Commission illegal, void, and unconstitutional. The trial court dismissed the complaint on the grounds that the plaintiffs did not have standing under the Declaratory Judgment Act. Plaintiff

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325 253 S.E.2d 140 (W. Va. 1979).
326 W. Va. Code § 38-7-7 (1968) provides: "[e]very attachment issued under the provisions of this Article may be levied upon any estate, real or personal, of the defendant named therein . . . ."
328 433 U.S. 186 (1977). In Shaffer, the Court held the presence of property alone would not support jurisdiction when it is completely unrelated to the cause of action.
Shobe was the affected riparian land owner, while plaintiff Nester was a user of the stream and chairman of Trout Unlimited.

The court, in rejecting the requirement of legal rights for standing to sue, noted that the federal courts had abandoned the requirement of personal legal interest in Association of Data Processing Service Organization, Inc. v. Camp. In adopting a new test for standing, the court quoted Professor Wright's analysis of the Camp case:

(The Court) announced a two-part test for standing. Standing exists if 'the plaintiff alleges that the challenged action has caused him injury in fact, economic, or otherwise' or if 'the interest sought to be protected by the complaint is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.'

Justice McGraw, writing for the court, stated that environment concerns should not be lost in the theoretical law of standing. He further noted that the legislature has recognized the importance of protecting the natural resources of the state. He pointed out that Shobe's interest existed as a property owner and that Nestor's "status" as a user of the stream and as an officer in a non-profit organization devoted to the preservation of a trout stream showed personal interest. Thus, both Shobe and Nester had standing to sue.

The court concluded that a person has standing under West Virginia Code chapter 55, article 13 to obtain a declaration of rights, status, or legal relations when his significant interests are affected by governmental action. However, the court stated that no formula exists for determining the significant interest in close power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

cases, but rather it is a question of degree.

IV. Venue

Another aspect of Shobe v. Latimer concerned venue. The plaintiffs had sought a preliminary and permanent injunction under the Declaratory Judgment Act to prohibit the defendants from carrying out the water contract executed between the West Virginia Department of Natural Resources and Dorcas Public Service Commission. The Circuit Court of Kanawha County had dismissed the action on the theory that it did not have venue to enjoin the act of diverting water in Grant County.

Since the Declaratory Judgment Act does not fix venue, the court found the general venue statute applied. In an action against a state officer, venue, under West Virginia Code section 14-2-2, lies in Kanawha County Circuit Court or where the cause of action takes place. Therefore, the court held that venue would have been proper in the Kanawha County Circuit Court even though the land is located in Grant County. In Brent v. Board of Trustees of Davis and Elkins College, the court addressed the meaning of the doing business requirement for venue over foreign corporations in a circuit court. The controlling statute is West Virginia Code section 56-1-1 which provides that a foreign corporation may be a party to a suit in the circuit court of any county "wherein it does business." The statute provides no guidelines as to the proper interpretation to be given this doing business requirement, nor were there any previous judicial interpretations clearly defining this provision.

In Brent, a student at Davis and Elkins College was injured

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335 253 S.E.2d 54 (W. Va. 1979).
336 W. Va. Code § 14-2-2(a) (1979 Replacement Vol.) provides that any action against a state officer be brought in Kanawha County Circuit Court. However, W. Va. Code § 14-2-2(b) (1979 Replacement Vol.) provides that any proceeding for injunctive relief involving real property may be brought in the circuit court of the county where the real estate is located. Therefore, the plaintiffs in Shobe had a choice where to bring the action.
339 Both parties to the lawsuit evidently cited earlier West Virginia decisions as being relevant to the venue issue. The court dismissed the applicability of these cases in a footnote to the opinion. Id. at 433 n.2.
when a glass test tube exploded during a chemistry lab. She sued the college, the laboratory supervisor and Corning Glass Works, the manufacturer of the test tube, in Hancock County circuit court. Corning was a foreign corporation authorized to do business in West Virginia. The circuit court dismissed Ms. Brent's complaint on the ground that it lacked venue as to the manufacturer. She appealed.

The controlling issue on appeal was whether Corning could meet the "wherein it does business" standard set out in West Virginia Code section 56-1-1. Finding no guidance elsewhere, the court looked to definitions of "doing business" for purposes of jurisdiction. Specifically, the court looked to the definition of "doing business" found in the West Virginia long-arm statute. Jurisdiction and venue were considered in the opinion to be such closely related concepts, that the definition of doing business for determining when jurisdiction attaches was held to be applicable to the "wherein it does business" provision of the state venue statute. Therefore, in order to determine whether a corporation

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W. VA. CODE § 31-1-15 (1975 Replacement Vol.) which provides:
For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this State, (b) if such corporation commits a tort in whole or in part in this State, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this State notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this State at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply of such defective product as hereinabove described shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of state pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract, tort, or manufacture of sale, offer of sale or supply of such defective product shall be of the same legal force and validity as process duly served on such corporation in this State.

Jurisdiction and venue were compared summarily and, in the court's opinion found to be designed to meet basically the same considerations. The court noted that "venue restrictions are designed to protect defendants from litigating in inconvenient forums." 256 S.E.2d at 434. Jurisdictional concepts were described
is doing business within a county for purposes of venue, the court applied the test that is set out in W. Va. Code section 31-1-15, which determines jurisdiction.

Finding the record to be inconclusive for purposes of applying the statutory standard, the case was reversed and remanded to the circuit court in order to
decide if Corning Glass Works has made any contracts to be performed in whole or in part, by any party thereto, in Hancock County; if it has committed a tort in whole or in part in the County; or if it has manufactured, sold, offered for sale or supplied any product in defective condition and such product has caused injury to any person or property within Hancock County.3

There is one rather cryptic limitation added to this definition of doing business for purposes of venue wherein the court held that, "[t]hese activities must be related to this particular cause about which the court's venue is questioned." Therefore, not only must the corporation do business in the particular county wherein venue is sought, but apparently that business activity must also be related in some way to the cause of action before the circuit court. This prevents the result seemingly suggested earlier in the opinion that, "once a corporation is authorized to do business in a state it could be sued in any county." The business done must have some relation to the cause of action brought in that county.

V. Garnishment

The question of the applicability of the West Virginia Rules of Civil Procedure to a statutory proceeding for the reduction of a
garnishment was decided by the West Virginia Supreme Court of Appeals in July of 1979.

The court, in Cottrell v. Public Finance Corp.,345 decided that a garnishee’s petition to reduce the garnishment against him was analogous to other statutory proceedings to which the Rules apply, and held that the Rules apply to proceedings under West Virginia Code section 46A-2-130(3), which provides generally for the reduction or removal of an execution upon the earnings of a “consumer.”346 Statutory proceedings for a reduction in garnishment were held to be “other judicial proceedings” within the meaning of Rule 1 of the West Virginia Rules of Civil Procedure.347 This conclusion was based upon what the court called a comparison of the proceedings under section 46A-2-130 to other statutory proceedings to which the Rules apply. Only one example of another proceeding is mentioned in the opinion, that being West Virginia Code section 38-9-4 which provides an equitable remedy for a creditor who claims a debtor has overvalued a homestead exemption. The similarities between the two proceedings which led the court to a finding that the Rules of Civil Procedure are applicable were found in that the “two statutes are similar in regard to the nature of the minimal procedure set forth and in

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346 W. VA. CODE § 46A-2-130 (1976 Replacement Vol.) provides:
No court may make, execute or enforce an order or process in violation of this section. Any time after a consumer’s earnings have been executed upon pursuant to article five-A (§ 38-5A-1 et seq.) or article five-B (§ 38-5B-1 et seq.), chapter thirty-eight of this Code by a creditor resulting from a consumer credit sale or consumer loan, such consumer may petition any court having jurisdiction of such matter or the circuit court of the county wherein he resides to reduce or temporarily or permanently remove such execution upon his earnings on the grounds that such execution causes or will cause undue hardship to him or his family. When such fact is proved to the satisfaction of such court, it may reduce or temporarily or permanently remove such execution.
347 Rule 1 of the West Virginia Rules of Civil Procedure provides:
These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, and in any appellate review of such actions, suits, or other judicial proceedings, with the qualifications and exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (emphasis added).
regard to the absence of any other statutory direction in the pro-
cedure to be followed."\textsuperscript{348}

In holding that the Rules apply, the court went on to reverse
the trial court for its failure to "properly" resolve the question
of the timeliness of the answer, which was timely insofar as the
court's show of cause order to the petition was concerned, but was
not within the time period prescribed by the Rules.\textsuperscript{349}

Finally, the court in \textit{dicta} outlined the standards to be used
in determining if a case of undue hardship has been shown on a
petition for a reduction in garnishment.\textsuperscript{350} The conceptual frame-
work upon which this unique provision is based is that a person
should have enough money left after the deduction of the gar-
nishment from wages to meet ordinary and necessary expenses
and still have money for unforseen expenses and discretionary
spending.

"[P]articularity in pleading and proof"\textsuperscript{351} is required and the
court, in a footnote, emphasized the desirability of using pre-
hearing conferences and stipulations to "avoid uselessly lengthy
proceedings and to explore the possibility of settlements."\textsuperscript{352}

Circuit courts are to determine what expenses are ordinary and
necessary. Outlining what constitute ordinary and necessary

\textsuperscript{348} 256 S.E.2d at 579.

\textsuperscript{349} On appeal, petitioner Cottrell, has raised an issue regarding whether the
trial court had ruled correctly on his objection to the timeliness of the answer filed
by the respondent finance company. Part of the difficulty stemmed from the fact
that the court had, acting \textit{ex parte}, abated the garnishment pending a hearing on
the same day that Cottrell filed his petition. A hearing was scheduled beyond the
period within which an answer must be filed. Public Finance Corp. filed its answer
at the hearing and on appeal, claimed that by setting the hearing for a date be-

\textsuperscript{350} Cottrell, on appeal, claimed that the trial court had ruled contrary to the
clear weight of the evidence and had abused its discretion in holding that he had
failed to prove a case of undue hardship. However, the court declined to review
this question because of the absence of findings of fact on the record. 256 S.E.2d
at 579 (W. Va. 1979).

\textsuperscript{351} 256 S.E.2d at 581.

\textsuperscript{352} \textit{Id}. at 581 n.12.
expenses, the court refers to standards used in other areas of the law such as in the field of domestic relations. Accordingly, such expenses as "family clothing, education or recreation, dwelling, medical care, transportation . . . food . . . tools for the debtor's trade or business," as well as expenses pursuant to court orders and contractual obligations are to be considered in determining the debtor's ordinary and necessary expenses. The overall standard is one of reasonableness.

The Cottrell decision clearly holds that the Rules apply to the unique garnishment reduction proceedings provided under West Virginia Code section 46A-2-130(3) and suggests the kind of pleading and proof required for a garnishee facing "undue hardship" to escape all or a part of the effect of a garnishment against him.

VI. CONTEMPT POWERS

Although not raised by the appellants in Floyd v. Watson, the court, sua sponte, examined the propriety of a jail sentence which had been imposed on the Watsons upon their continued failure to comply with a lower court's order to construct the wall and to deed over the requisite property in dispute.

The court used a two-step analysis to evaluate the propriety of imposing a jail sentence for contempt. First of all, the contempt proceedings must be characterized as either civil or criminal. Secondly, if found to be wholly civil in nature, a jail sentence could only be imposed if the contemnor is given an opportunity to purge himself of the contempt.

353 Id. at 580-81.
354 254 S.E.2d 687 (W. Va. 1979). The contractual aspect of this case is discussed in the CONTRACTS section of this survey.
355 The Watsons were first cited for contempt upon their failure to comply with the court order entered in the plaintiffs' second suit. Their request for a jury trial on the contempt and their potential punishment was denied. After a hearing, the court found the Watsons guilty of contempt and ordered them to purge themselves by building the wall. A graduated fine was also imposed. A second hearing was held about 25 days later after which the Watsons were again held in contempt, but this time were fined and sentenced to 70 days in jail. 254 S.E.2d at 689. For a more detailed background, see the discussion of the case in the CONTRACTS section of this survey.
In *Hendershot v. Handlan*,356 relied upon in *Floyd*, the West Virginia court recognized that no clear line of demarcation exists between civil and criminal contempt. In some circumstances, the proceedings may contain characteristics of both civil and criminal contempt. The West Virginia court uses the same analysis in *Floyd* as that employed by the United States Supreme Court in a 1911 decision357 to distinguish between civil and criminal contempt. The court must examine the nature of the punishment imposed. If it is primarily designed to vindicate the public authority, the contempt is criminal. If the punishment is primarily coercive however, and if it is designed to benefit the complaining party, the contempt is civil. Applying this analysis to the situation between the Floyds and the Watsons, the court found that the purpose of the contempt was coercive rather than punitive. The purpose of the court’s order holding the Watsons to be in contempt was to provide a remedy to the complaining party.

Once the contempt is characterized as civil, the propriety of a jail sentence becomes much more suspect. Citing a 1970 Maryland case, the court said that “the authorities are in almost unanimous agreement that the imposition of a fixed term of imprisonment for civil contempt is improper where the contemnor is given no opportunity to purge himself of the contempt.”358 Since the punishment for civil contempt should be remedial, it should be designed to coerce the contemnor into acting in such a manner as to benefit the complainant. Imposition of a definite jail sentence, with no opportunity for the contemnor to purge himself of the contempt, does nothing but punish. For this reason, the court set aside the jail sentence imposed on the Watsons, affirming the

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357 Gompers v. Buck’s Stove & Range Co., 221 U.S. 418 (1911). The West Virginia court cited generously from this opinion by Justice Lamar. The United States Supreme Court ‘held in this case that imprisonment may be ordered for civil contempt, but only where the imprisonment is intended to be coercive rather than punitive. Imprisonment is coercive according to Justice Lamar, where the sentence is indeterminate and the contemnor is simply held until he performs the act required by court order. The fatal flaw in the imposition of a jail sentence on the Watsons therefore, was the fact that they were given a *determinate* sentence which is punitive and is therefore improper in cases of civil contempt.
lower court’s order in every other respect.

Robert Lee Stultz
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PROPERTY

I. COAL, OIL, AND GAS

A. Leases

In two recent decisions, the West Virginia Supreme Court of Appeals considered attempts by lessors to void leases of mineral interests.

*Goodwin v. Wright* involved an oil and gas lease with a primary term of ten years and an extended term for as long thereafter as oil and gas, or either of them, was produced. The lease further provided that free gas was to be furnished to the lessor for domestic use and that delay rental was to be paid until a well yielding royalty to the lessor was drilled. Even though the lessor was furnished with free gas, he sought to have the lease cancelled since he had received no delay rental or royalty for more than four years. The circuit court held that his acceptance of the free gas prevented the termination of the lease.

The West Virginia Supreme Court of Appeals was faced with two threshold questions. First, whether the term “produced” as used in oil and gas leases meant “produced in paying quantities” and second, whether furnishing free gas for domestic use on the premises constituted production sufficient to keep the lease in force after the primary term. As to the first question, the court noted that it had never upheld an extension of a lease beyond its basic term, when its continuation was predicated on lessee development or production activities and there had been no work on the lease and no substantial production or diligence in

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569 255 S.E.2d 924 (W. Va. 1979).
570 Id. at 925.
571 Id.
572 Id.
573 Id. at 926.
seeking production. The court then adopted the majority rule that the term "production", when used in a mineral lease as the basis for continuation of the lease in force, meant production in paying quantities. In response to the second question, the court held that supplying free gas for domestic use does not satisfy a duty to produce absent some agreement, or facts that might bind the lessors by estopping their complaint about lack of production, and that the use of such free oil or gas does not, in itself, constitute production that would keep a lease in effect after the basic term.

A lease of coal lands was at issue in Iafolla v. Douglas Pocahontas Coal Corp. The lease provided, inter alia, that the lessee anticipated beginning operations on a date certain but was under no duty to do so and that the lessee agreed to pay a minimum rental of twelve hundred dollars for each lease year, regardless of whether any coal was mined. The lessee made timely rental payments during the term of the lease, but nevertheless the lessor sought to terminate the lease since there was a failure to produce coal. The circuit court held, among other things, that the lessee had abandoned the lease by its failure to mine coal and, therefore, the lease was terminated.

The primary question which faced the court was whether the lessors of mineral rights under a lease which provided that the

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364 Id.
365 Id. at 925. The court cited Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942), as authority for the majority rule.
366 255 S.E.2d at 924 (Syllabus pt. 1). The court notes that here the lessor received neither rental nor royalty payments and there was no attempt to produce and market oil and gas. Two West Virginia cases are then distinguished where leases were upheld when there was no paying production, but only because of the fact that both lessors received rental payments as though there was paying production. The court further states that the lease should have been cancelled since a lessor cannot remain bound to such a lease when it does not pay because the objective of such lease is not merely to have oil or gas flow from the ground but to obtain production that is commercially profitable to both parties. Id at 926.
369 Id. at 130.
370 Id. at 131.
371 Id.
lessee either exploit the minerals or pay a minimum rental in lieu of such exploitation may cancel the lease for failure by the lessee to exploit the minerals. It was held that where the parties have agreed to a lease in which the lessee has the option to either pay a minimum rental or exploit the minerals, such a lease is valid and enforceable in the absence of fraud, mistake, misrepresentation, or failure of consideration and may not be unilaterally cancelled by the lessor.\(^\text{372}\) In reaching this decision, the court stated that there were no cases in West Virginia which held that a lease calling for minimum rental payment in lieu of exploitation could be abandoned as long as the minimum rental payment was regularly paid, with one possible exception.\(^\text{373}\) The court then recognized that abandonment could be based on an implied covenant to exploit within a reasonable time,\(^\text{374}\) but also recognized that such a covenant could not supersede an express contradictory covenant.\(^\text{375}\) The court limited its holding, however, by stating that there could be a situation where minimum rental payments were timely made and constructive fraud would arise, thus voiding the lease.\(^\text{376}\) The application of this potential rule would seem to be confined to a situation where a change in circumstances, unforseeable by the parties, would become so unfair and uneven as to render the lease’s enforcement equivalent to the perpetration of a fraud upon the lessor.

B. Partition

In Consolidated Gas Supply Corp. v. Riley,\(^\text{377}\) Consolidated, the owner of an undivided eleven-twentieths interest and lessee of all oil and gas underlying certain tracts of land, filed suit against the individual co-owners of the remaining interests in such oil

\(^{372}\) Id.

\(^{373}\) Id. at 131-32. The court distinguishes Wilson v. Reserve Gas Co., 78 W. Va. 329, 88 S.E. 1075 (1916), on the basis that the lease in that case had different terms than the lease in question here.

\(^{374}\) The court distinguishes Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S.E. 493 (1893), since it did not involve minimum rental payments and reconciles the same case stating that a reasonable time of seventeen years espoused in Bluestone had not elapsed in the case at hand. 250 S.E.2d at 133.

\(^{375}\) An express contradictory covenant was present in the lease. 250 S.E.2d at 134 n.3.

\(^{376}\) 250 S.E.2d at 133.

\(^{377}\) 247 S.E.2d 712 (W. Va. 1978).
and gas seeking partition of the mineral interests through sale. The circuit court, apparently without considering partition in kind, ordered that the mineral interest be partitioned by sale.\(^{378}\)

The first question presented to the court on appeal was whether, as a matter of law, there was an absolute right to partition the oil and gas by sale. The court's discussion focused on two West Virginia partition statutes.\(^{379}\) The court noted that even though the West Virginia partition statute\(^{380}\) was drawn in mandatory language, it had never interpreted the statutory right to partition by sale as absolute when partition in kind was not feasible and further noted that the statutory requirements must be met before a partition by sale may be authorized.\(^{381}\) These statutory requirements compel the party desiring partition through sale to demonstrate that the property cannot be conveniently partitioned in kind, that the interests of one or more parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale. The court held that there was no absolute right of partition by sale\(^{382}\) but that there was a statutory right to have partition in kind considered.\(^{383}\)

The second issue in the case was whether a subsisting lease on a mineral interest was an absolute bar to partition.\(^{384}\) The court stated that the case law\(^{385}\) suggested that partition of a min-

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\(^{378}\) Id. at 713.

\(^{379}\) W. Va. Code §§ 37-4-1,-3 (1966). Section 37-4-1 provides:

Tenants in common, joint tenants and coparceners of real property, including minerals, and lessees of mineral rights other than lessees of oil and gas minerals, shall be compelled to make partition, . . . (emphasis added).

Section 37-4-3 provides:

[O]r in any case in which partition cannot be conveniently made, if the interests of one or more of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, and the interest of the other person or persons so entitled will not be prejudiced thereby, the court . . ., may order such sale, or such sale and allotment . . . (emphasis added).


\(^{381}\) 247 S.E.2d at 714.

\(^{382}\) Id. at 714-15.

\(^{383}\) A majority of jurisdictions hold that oil and gas are real property and may in appropriate circumstances be partitioned in kind. Id. at 716.

\(^{384}\) 247 S.E.2d at 717.

eral interest on which there was a subsisting lease was available by virtue of statute.\textsuperscript{388} The court espoused the view that it was not suggesting that there would be no set of facts in a particular case which would preclude partition of a mineral interest where there was a subsisting lease, but held that a subsisting lease on a mineral interest was not an absolute bar to partition.\textsuperscript{389}

II. Estates, Gifts and Trusts

In \textit{Kanawha Valley Bank v. Friend},\textsuperscript{390} the court extended the doctrine of constructive fraud to a situation involving joint bank accounts with the right of survivorship. This case arose when Dunbar, attorney-in-fact for Judy, transferred some thirty thousand dollars ($30,000.00) of Judy's money into a joint savings account, in the name of Judy and Dunbar, with the right of survivorship. This transaction occurred approximately four months prior to Judy's death. Upon Judy's death, the executor filed a declaratory judgment action to determine the ownership of the funds in the accounts. The circuit court held\textsuperscript{391} that Dunbar owned the money by virtue of the survivorship provisions of the West Virginia Code.\textsuperscript{392} The beneficiaries under Judy's will appealed contending that the circuit court ignored the presumption of constructive fraud.\textsuperscript{393}

The court had previously interpreted the statute authorizing joint bank accounts with the right of survivorship in \textit{Dorsey v. Short}.\textsuperscript{394} In that case, the court held that joint bank accounts with the right of survivorship created a conclusive presumption of a \textit{causa mortis} gift at the death of the donor-depositor in the absence of fraud, mistake, or other equally serious fault.\textsuperscript{395} The question for the court in \textit{Friend} then became whether construc-

\footnotesize{
\textsuperscript{388} W. Va. Code § 37-4-7 (1966). Section 37-4-7 provides:

Any person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land is allotted or sold, on the same terms on which, by his lease, he held it before the partition.

\textsuperscript{389} 247 S.E.2d at 717.

\textsuperscript{390} 253 S.E.2d 528 (W. Va. 1979).

\textsuperscript{391} Id. at 529.

\textsuperscript{392} W. Va. Code § 31A-4-33 (1975 Replacement Vol.).

\textsuperscript{393} 253 S.E.2d at 529-30.

\textsuperscript{394} 205 S.E.2d 687 (W. Va. 1974).

\textsuperscript{395} 253 S.E.2d at 529-30.
}
tive fraud existed so as to vitiate the presumption of a *causa mortis* gift under *Dorsey*. In its decision, the court stated that a power of attorney created an agency which established a fiduciary relationship between the principal and agent. The court cited the standard of conduct for an agent which had been outlined in *Sutherland v. Guthrie*. In that case the court stated that an agent was held to the utmost good faith, and would not be allowed to use the principal's property for his own advantage, or to derive secret profits or advantages to himself by reason of the principal-agent relationship. Thus, in *Friend* the court stated that a presumption of fraud would arise where the fiduciary was shown to have obtained any benefit from the fiduciary relationship and that the burden of proof would be on the fiduciary to establish the honesty of the transaction.

Finally, the court held that it would join the majority of jurisdictions which hold that in certain instances a presumption of constructive fraud may arise in connection with joint bank accounts with survivorship, if the parties to the joint account occupy a fiduciary or confidential relationship. This presumption requires that the person who benefits from the creation of the account bear the burden of proving that the funds were, in fact, a *bona fide* gift. In reversing the lower court and remanding this case, the court stated that the fiduciary had not met the burden of proof which the court suggests is something more than a mere preponderance of the evidence.

**III. EMINENT DOMAIN**

In *Handley v. Cook*, a landowner brought an action in prohibition challenging an order which granted a power company a right of entry over his lands for construction of a high voltage power line to serve a single coal mining operation. The West Virginia Supreme Court of Appeals issued a rule to show cause on two specific questions. First, whether supplying electricity to a single mining operation was a public use under the laws of the

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394 86 W. Va. 208, 103 S.E. 298 (1920).
395 253 S.E.2d at 530-31.
396 *Id.* at 531.
397 *Id.* at 531-32.
398 252 S.E.2d 147 (W. Va. 1979). This case is also discussed in Comment, 82 W. Va. L. Rev. 357 (1979).
State of West Virginia, and second, whether an order which granted a right of entry for construction of a power line was appealable notwithstanding the fact that construction had not begun and compensation had not been determined.\textsuperscript{599}

In analyzing the first question, the court stated that it was apparent that the power company had the power of eminent domain for construction of power transmission lines. Then, the court reviewed the cases most analogous to \textit{Handley} and found that when dealing with gas and power lines they had, without exception, found a public use present.\textsuperscript{400} In holding that condemnation of private property to erect an electric power transmission line to a single commercial customer was a public use, the court noted that it would not distinguish between residential and commercial users and would give paramount consideration to the nature of the use rather than the number of persons served.\textsuperscript{401} As to the second question, the court stated that it was clear that the circuit court had jurisdiction in condemnation proceedings and that unless it so exceeded its legitimate powers as to vitiate that jurisdiction, prohibition was not the proper remedy.\textsuperscript{402} In finding that the circuit court had acted properly, the court held that in a condemnation proceeding the order adjudicating the right to take was a final order and upon the order's issuance, the landowner could apply for a writ of error and supersedeas.\textsuperscript{403} Finally, the court overruled all language in prior cases that implied that the land must actually be taken into possession and use or compensation actually determined before a writ of error would lie.\textsuperscript{404}

Justice McGraw's dissent in \textit{Handley} centered on his contention that the majority failed to take an important issue into account in making its decision. Apparently he felt that the power company failed to get Public Service Commission approval for its line and as a result the circuit court should have dismissed the

\textsuperscript{599} Id.
\textsuperscript{400} Id. at 148. The court did not imply that anything for which a power or gas company seeks to condemn private property will be considered a public use, but only that condemnation of rights-of-way to provide energy have been considered by the court as serving a public use. \textit{Id.} at 148-49.
\textsuperscript{401} Id. at 147, 149.
\textsuperscript{402} Id. at 148.
\textsuperscript{403} Id. at 149.
\textsuperscript{404} Id.
condemnation proceedings. Thus, Justice McGraw opined that the circuit court had no jurisdiction over the subject matter of the controversy, that an action in prohibition was proper, and that to turn down such an action was a denial of due process of law to the landowners.

West Virginia Board of Regents v. Fairmont Morgantown Pittsburgh Railroad Co. was a case of first impression in West Virginia. The Regents brought an eminent domain proceeding to condemn an aerial easement and certain surface rights-of-way for construction of a personal rapid transit system, better known as PRT, to serve West Virginia University. This easement was parallel to the railroads' tracks for a linear distance of four-fifths of a mile. The circuit court rendered judgment in a nominal amount for the railroads and they appealed. The salient question before the court was the determination of the proper measure of damages in a case of this nature.

After a brief citation of authority, the court decided that the railroads were entitled to more than nominal damages and that they had an absolute right to a determination of the amount of damages by a properly instructed jury. It was felt that there were three aspects to the railroads, damages: first, the value of the land taken for the use of the PRT; second, the value of the aerial easement over the railroads' right-of-way; and, third, the damage to the residue of the railroads' right-of-way as used for railroad purposes.

The court, following the weight of general authority, noted that railroads were not limited to the fair market value of land along rights-of-way measured by the price per square foot of comparable property in the same neighborhood used for private purposes as were normal landowners. As to the first aspect of dam-

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405 Id. at 150.
406 Id. at 151.
408 Justice Neely states, "[W]e do not routinely construct systems of electric powered, rubber tired, computer controlled cars operating on elevated guideways." Id. at 142.
409 250 S.E.2d at 142-43.
410 Id. at 143.
411 According to the weight of authority, special rules for railroads are a result of the favored position which railroads are accorded in the United States. Also, since this land is for a special limited purpose, it is not commonly bought and sold.
ages, the court held that the measure was the fair market value of the property taken for the special purpose of a railroad right-of-way. Further, the court held that the value of the aerial easement was the fair market value of the aerial easement for railroad right-of-way purposes. Finally, as to the third aspect of damages, the court held that the railroad could recover the cost of required safety devices, safety devices not required if such devices were actually employed in like circumstances by a majority of United States railroads, and the increase in its insurance premiums as a result of the added risk.\textsuperscript{412}

IV. Statutory Construction

In Rogers v. City of South Charleston,\textsuperscript{413} the West Virginia court construed statutes granting power to city board of park and recreation commissioners. The board granted a private individual an irrevocable and exclusive option to purchase a tract of land located in a municipal recreation area, and Rogers commenced an action for injunctive relief. The circuit court found that the option granted was beyond the statutory authority of the board and was therefore void. The board appealed.\textsuperscript{414}

The court was faced with the question of whether the board was clothed with the statutory authority to grant the option.\textsuperscript{415} In

\textsuperscript{412} 250 S.E.2d at 145. This case grew out of a situation where the railroad right-of-way was taken for the construction of a parallel or intersecting facility by another public utility. As a result, the court limited its decision to condemned railroad rights-of-way. Note that this unique rule would not apply to other railroad property which could be freely exchanged in the market place.

\textsuperscript{413} 256 S.E.2d 557 (W. Va. 1979).

\textsuperscript{414} Id. at 559-60.

\textsuperscript{415} W. VA. Code §§ 8-21-1 to -2 (1976 Replacement Vol.). Section 8-21-1 provides:

\begin{quote}
Every city is hereby empowered and authorized . . . to create by ordinance, a board of park and recreation commissioners, for the purpose of establishing, constructing, improving, extending, developing, maintaining and operating a city public park and recreation system.
\end{quote}

Section 8-21-2 provides:

\begin{quote}
The board of park and recreation commissioners . . . shall have the power to purchase, hold, sell and convey real or personal property; receive any gift, grant, donation, bequest or devise; sue and be sued; contract and be contracted with; and do any and all things and acts which may be necessary, appropriate, convenient or incidental to carry out and
analyzing the question, the court stated that it was clear that the board did not have the power to contract or to convey property to the same extent as a private corporation since it was limited by its statutory purpose and by its character as a public corporation and a trustee. It was also noted that the statutes provided no express grant of authority for the board to enter into option agreements. Therefore the court held that the board exceeded its statutory authority by giving a private or special interest, exclusive, irrevocable rights to purchase in the future real property held for park and recreation purposes and that such an option agreement was void.

Justice Neely, in a strong dissent, concluded that the statutes granted the board authority to contract and make option agreements since there were no express limitations on the right to convey property, nor any express requirements which mandated sale at public auction. Justice Neely felt that the majority had indicated a certain indifference to the economic needs of West Virginia, a certain ignorance of basic business practices, and a callous disregard of an urgent public policy to create employment. Justice Neely opined that the majority had used the legal process to frustrate legitimate economic development and that they had ignored the real issue of whether the contract itself was

effectuate the purposes and provisions of this article...

416 256 S.E.2d at 560-61.
417 Id. at 561.
418 Id. The court felt that there were two reasons for this: first, the option effectively tied the hands of future governing bodies in exercising the full jurisdiction of their office by depriving them of a discretion which public policy demands remain unimpaired and was therefore beyond the authority of the board; second, the board is a public trustee holding the power to sell and lease property but not to grant options to purchase since trustees should exercise their judgment at the time of the sale and not at the time of making the option as to whether the sale is beneficial to the trust estate. Id. at 562-63.
419 Id. at 563. The court also held that in absence of express statutory authorization regarding manner of sale, a board of park and recreation commissioners, being a public corporation, walks in the shadow of the city and any sale or conveyance of such property to a private or special interest must be accomplished by means of a public auction held upon proper notice. Id. at 557.
420 Id. at 566.
421 Id. at 568. The land in question was the proposed site for a large shopping mall.
reasonable.\textsuperscript{422}

\textit{Stephens v. Raleigh County Board of Education}\textsuperscript{423} presented the court with the problem of construing a statute which provided in general terms for the means by which a county board of education could dispose of property. The court was specifically concerned with a provision which gave the grantor of the property, his heirs or assigns, the right to repurchase that property if it was located in a rural community.\textsuperscript{424} The consolidated cases involved small tracts of land which were located near incorporated towns and residential subdivisions. Thus, the sole issue presented to the court pertained to the definition of the term "rural community" as used in the statute.\textsuperscript{425}

In its deliberations, the court examined its opinion in \textit{Carper v. Cook},\textsuperscript{426} in which it termed the provision a concession of the law to those living in farming communities, so that a small portion of the farm would not be taken for school purposes and then be allowed to pass into the hands of a stranger to the damage of the residue of the land.\textsuperscript{427} The court noted that areas which had been subdivided or prepared for development or lot sale, incorporated cities, towns, and villages, and other built-up incorporated areas which would qualify for incorporation in terms of absolute population and population density could not be considered as ru-

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{422} \item \textit{Id.} at 567, 569. The test Justice Neely proposed was whether the contract, at the time of its execution, was apparently fair, just, and reasonable and was prompted by the necessities of the situation or in its nature was advantageous to the municipality.
\item 257 S.E.2d 175 (W. Va. 1979).
\item W. VA. CODE § 18-5-7 (1977 Replacement Vol.) which provides:
\begin{quote}
If at any time the board shall ascertain that any building or any land no longer shall be needed for school purposes, the board may sell, dismantle, remove or relocate any such buildings and sell the land on which they are located, at public auction, after proper notice, and on such terms as it orders, to the highest responsible bidder. But in \textit{rural communities} the grantor of lands, his heirs or assigns, shall have the right to purchase at the sale, the land, exclusive of the buildings thereon, and the mineral rights, at the same price for which it was originally sold. . . . (emphasis added).
\end{quote}
\item 257 S.E.2d at 177-78.
\item 39 W. VA. 346, 19 S.E. 379 (1884).
\item 257 S.E.2d at 179. The thrust of the repurchase privilege statute was to protect farm interests and interests associated with rural estates; that is, the preservation of "home places" and operative agricultural units. \textit{Id}.
\end{enumerate}
\end{footnotesize}
rural communities.\textsuperscript{428} Finally, in \textit{Stephens}, the court stated that the guiding criterion would be the predominating character of the community as a whole and held that a rural community could be distinguished by its dominant character as a social and economic unit founded in rural, land-based interests. It was further suggested that a rural community was inhabited, in the main, by country people, who lived a country life, engaged in country pursuits, were removed from the immediacy of urban and suburban environs, were not immediately tied to any city or urban area, and worked, socialized and politicked as an independent, integral community.\textsuperscript{429}

V. \textsc{Ad Valorem Taxation}

The West Virginia Supreme Court of Appeals reaffirmed its willingness to construe tax statutes liberally in favor of the taxpayer and against the taxing authority in \textit{Consolidation Coal Co. v. Krupica}.\textsuperscript{430} On February 1, 1979, pursuant to statutory authority, the County Commission of Marshall County convened its session as a board of equalization and review.\textsuperscript{431} The commission assembled at 10:00 a.m. and received three taxpayer objections. After receiving no more objections, the commission, at 3:35 p.m., entered an order foreclosing all other objections. At 3:45 p.m.,

\textsuperscript{428} Id. The court notes that the difficult decision will be in distinguishing rural from predominately suburban communities. It states that suburbs are a component part of the urban community and cannot, by definition, be a rural community.

\textsuperscript{429} Id. at 180. The court further opined that the question of whether any given community was rural would best be left to jury determination. Id. at 177 n.2.

\textsuperscript{430} 254 S.E.2d 813 (W. Va. 1979).

\textsuperscript{431} W. Va. Code § 11-3-24 (1974 Replacement Vol.) (amended 1979). Section 11-3-24, prior to the 1979 Amendment, provided:

\begin{quote}
The county court shall annually, not later than the first day of February, meet for the purpose of reviewing and equalizing the assessment made by the assessor. It shall not adjourn for longer than three days at a time until this work is completed, and shall not remain in session for a longer period than twenty-eight days . . .

If any person fails to apply for relief at this meeting, he shall have waived his right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness of his list as finally fixed by the county court, except on appeal to the circuit court. . . .
\end{quote}
Consolidation appeared to file its objection, but the commission was not in session. Consolidation filed a written objection with the county clerk but the commission deemed it untimely.\textsuperscript{433} Thereupon, Consolidation sought a writ of mandamus. The sole question before the court was whether the foreclosure of the objection was valid under the West Virginia statute\textsuperscript{433} which governs the procedure of review and equalization before county commissions.

This was a question of first impression, as the court did not find any direct holding on what constituted a timely filing.\textsuperscript{434} In construing the tax statute in favor of the taxpayer and against the taxing authority, the court held that the West Virginia statute permitted the taxpayer a reasonable time from the opening of the county commission’s term as a board of review and equalization to file an objection to the property tax assessment.\textsuperscript{435} Yet the court declined to set the outer boundaries of what would be a reasonable time period for the filing of an objection to a tax assessment and stated, “[o]bviously legislative clarification would be beneficial in this area. . . .”\textsuperscript{436}

As a result of \textit{Krupica} the legislature amended the West Virginia Code. The statute now provides:

The county commission shall annually, not later than the first day of February, meet for the purpose of reviewing and equalizing the assessment made by the assessor. It shall not adjourn for longer than three days at a time until this work is completed, and shall not remain in session for a longer period than twenty-eight days and shall not adjourn sine die before the fifteenth day of February. . . . \textsuperscript{437}

Thus, it is exceedingly clear from the amended statute that the taxpayer has fifteen days, commencing on the first day of February, within which to file his objection and that the county commission cannot adjourn and foreclose all other objections until after the fifteen day period has expired.

\textsuperscript{433} 254 S.E.2d at 815.
\textsuperscript{435} 254 S.E.2d at 815.
\textsuperscript{435} Id. at 818.
\textsuperscript{436} Id. at 818 n.7.
Blair v. Freeburn Coal Corp.\textsuperscript{438} involved a situation where Carmack acquired a coal tipple via various mesne transfers by bill of sale. The assessor assessed the tipple as real property and the taxes went delinquent. The real estate was forfeited to the state and the Deputy Commissioner of Forfeited and Delinquent Lands sold the tipple to Blair. Subsequently, Carmack leased the tipple to Freeburn and Blair leased it to Winner. When Winner attempted to take possession, it encountered Freeburn who was already in possession of the coal tipple. Freeburn filed a motion for summary judgment on the ground that the coal tipple was personal property and the sale by the Deputy Commissioner was void. The circuit court held for Freeburn and Blair appealed.\textsuperscript{439}

The sole question presented to the court was whether Blair acquired a valid title to the tipple through the deed from the Deputy Commissioner. In analyzing the problem, the court stated that the legislature provided that only real property was to be assessed on the land books. The court then recognized the fact that since the tipple had been transferred by bill of sale on several occasions, it was clearly considered by all concerned to be personal property and was never intended to become part of the realty.\textsuperscript{440} Therefore, it was suggested that the tipple was a chattel real which should not have been entered in the real property books.\textsuperscript{441} Finally, the court held that the assessor should have entered the tipple on the personal property books, that his real property assessment was unlawful, and that such assessment was void and could constitute no valid basis for the sale of the tipple by the Deputy Commissioner.\textsuperscript{442}

*Timothy B. Butcher*

**TORTS**

During the past year, the West Virginia Supreme Court of

\textsuperscript{438} 253 S.E.2d 547 (W. Va. 1979).
\textsuperscript{439} Id. at 550.
\textsuperscript{440} Id. at 551.
\textsuperscript{441} Id. at 552. The court states that the determination of whether a fixture becomes part of the real estate to which it is affixed is based on the intention of the parties.
\textsuperscript{442} Id.
Appeals answered three questions in the tort law area which have long been the subject of discussion and speculation. The questions concerned the statute of limitations for libel actions, the developing doctrines in the area of product liability law, and the debate over comparative versus contributory negligence. The answers to the questions held some surprises, as the court applied a one-year statute of limitations to libel actions, adopted a products liability standard similar to the California Greenman rule, and established a fifty percent comparative negligence rule for West Virginia.

I. Statute of Limitation for Libel Actions

The court, in a per curiam opinion, announced in Cavendish v. Moffitt that "libel is a form of defamation which... is limited by the one-year limitation period established in West Virginia Code, 55-2-12(c)." Cavendish concerned an appeal from a circuit court's dismissal of a libel action brought against a writer for the West Virginia Daily News concerning an article published on February 10, 1975. The basis for the dismissal was that the libel suit was barred by a one-year statute of limitations, as the complaint was filed on March 3, 1976, one year and twenty-one days after the cause of action accrued.

The court reasoned that since no specific limitation for libel actions are established by any section of the West Virginia Code, such actions are governed by the provisions of West Virginia Code section 55-2-12. This statute provides specific limitations upon personal actions for damage to real and personal property and for personal injuries, while providing a one-year limitation for all other personal actions which do not survive at common

444 Id. at 559.
445 W. Va. Code § 55-2-12 (1966) which provides:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damages to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.
law. The court held that section 55-2-12 must be read in pari materia with West Virginia Code section 55-7-8a. Section 55-7-8a(a) provides that actions for fraud and deceit are personal actions which survive the death of an injured party or the death of the person liable. The court reasoned that since the Legislature isolated fraud and deceit as personal actions which do survive, "the Legislature intended to exclude from statutory survivability under subsection a (of West Virginia Code §55-7-8a) such personal torts as defamation, false arrest and imprisonment, and malicious prosecution." Personal actions lacking such statutory survivability, and having no common law survivability, had been held to take the one-year statute of limitations under West Virginia Code section 55-2-12(c) in Snodgrass v. Sisson's Mobile Home Sales, Inc. Thus, the court affirmed the rationale of Snodgrass in upholding the lower court's dismissal of the action, thereby adopting a one-year statute of limitation for libel actions in West Virginia.

II. PRODUCTS LIABILITY

In Morningstar v. Black & Decker Manufacturing Company, the West Virginia court had its first opportunity to accept a question of law certified to it under the Uniform Certification of Questions of Law Act. In this case, the United States
District Court for the Southern District of West Virginia sought clarification of the West Virginia law governing the extent to which a manufacturer of a defective product is liable in tort to a person injured by that product. The district court had pending before it a personal injury action brought against the Black & Decker Manufacturing Company for personal injuries and loss of consortium allegedly caused by the failure of the safety guard on a power saw manufactured by the defendant. The West Virginia court seized upon this opportunity to bring West Virginia into the majority of jurisdictions recognizing "strict liability in tort" in product liability cases. Prior to the court's discussion of product liability tort law, however, attention was focused on the court's ability to change the common law in light of article VIII, section 13 of the West Virginia Constitution and section 2-1-1 of the West Virginia Code.463

Justice Thomas B. Miller, writing for a unanimous court, concluded that the West Virginia Constitution and Code did not prevent the court from changing the common law.463 Instead, the court found that article VIII, section 13 and section 2-1-1 were intended to establish the initial body of law under which West Virginia courts were to operate. This conclusion was based upon the "lack of consistency on the part of this Court in its treatment of West Virginia Code, § 2-1-1 and Article VIII, Section 13 of our Constitution,"464 and decisions of other jurisdictions faced with similar statutory or constitutional prohibitions. The court also determined that this adoption of the common law by constitutional

of the West Virginia Supreme Court. It was held in Morningstar that the power to answer these questions is discretionary with the court, and that in answering such questions the court must determine the present law bearing on the certified issue. 253 S.E.2d at 669. W. Va. Const. art. VIII, § 13 reads: "Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature."

463 W. Va. Code § 2-1-1 (1979 Replacement Vol.) states: "The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State."

464 Id. at 671.
and statutory provisions included the adoption of the "historic power" of courts "to evolve and alter the common law."\textsuperscript{455}

In its discussion of the decisions of other jurisdictions, the court failed to mention a 1971 Utah decision\textsuperscript{456} in which the Utah Supreme Court pointed to a section of the Utah code\textsuperscript{457} similar to section 2-1-1 of the West Virginia Code when it refused to abrogate the common law doctrine of contributory negligence. It is also interesting to note that the court's conclusion that its past treatment of article VIII, section 13 and section 2-1-1 of the Code had been inconsistent is based upon a rather limited discussion of relevant cases which offer arguments against the court's authority to alter the common law as it existed in 1863.\textsuperscript{458}

After disposing of the issue surrounding the authority of the court to change the common law adopted by the West Virginia Constitution and Code, the court turned its attention to strict liability in tort. The court stated "the cause of action covered by the term 'strict liability in tort' is designed to relieve the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability."\textsuperscript{459} The court stated that the issue before it was whether or to what extent a third party, lacking privity of con-

\textsuperscript{455} Id. at 676.
\textsuperscript{457} Utah Code Ann. § 68-3-1 (1970) which provides that, "The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities or the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

\textsuperscript{458} Cases cited by the court as authority against the power to change the common law contain such decisive statements concerning this issue as: "[t]his court . . . is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of government." Cunningham v. County Court of Wood County, 148 W. Va. 303, 308, 134 S.E.2d 725, 728 (1964); and "these provisions (article VIII, § 13 and § 2-1-1) make it clear that only the Legislature has the power to change" the common law adopted by these provisions. State v. Arbo- gast, 133 W. Va. 672, 675, 57 S.E.2d 715, 717 (1950). In Adkins v. St. Francis Hospital of Charleston, 149 W. Va. 705, 143 S.E.2d 154 (1965), the court justified the abrogation of the doctrine of charitable immunity by pointing out that the doctrine was not the common law rule of England or Virginia on June 20, 1863.

\textsuperscript{459} 253 S.E.2d at 677.
tract with the seller or manufacturer of a defective product, could recover in tort for personal injuries caused by such a product. 460

The court went on to adopt the Greenman 461 rule permitting recovery in a tort product liability action where it is proven that a defective product causes personal injury. The Restatement rule, 462 which requires a showing that the defective condition was unreasonably dangerous, was expressly rejected, as was the doctrine of Rylands v. Fletcher, 463 which declares that conditions or activities inherently dangerous result in liability for injuries without a showing of negligence or defective condition. The general test for establishing strict liability in a tort product liability suit in this state now requires a plaintiff to establish that the involved product was defective, 464 "in the sense that it [was] not reasonably safe for its intended use." 465 "Reasonable safeness" is a standard determined "by what a reasonably prudent manufacturer's standards should have been at the time the product was made." 466 An "intended use" of a product is "all those uses which a reasonably prudent person might make of the product, having in mind

460 Id. at 676.
462 Restatement (Second) of Torts § 402A (1965).
463 L.R. 3 H.L. 330 (1868). The West Virginia Supreme Court refused to impose upon the manufacturer of a product the role of an insurer which is created by the absolute liability resulting from application of the Rylands doctrine.
464 The court recognized three categories of product defects: design defectiveness; structural defectiveness; and use defectiveness. The first two are concerned with the physical condition of the product rendering it unsafe for reasonable, intended uses, while the third category focuses on unsafeness due to the lack of, or inadequacy of warnings, labels and instructions. 253 S.E.2d at 682. "Unsafe" was held by the court to impart a standard of testing the product by what a reasonably prudent manufacturer would achieve regarding product safety, taking into consideration the "general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made." Id. at 683.
465 253 S.E.2d at 683.
466 Id. The court states that this rule is applicable in suits against both the manufacturer and the seller in a case involving a product which is expected to and does reach the consumer in a condition substantially the same as when it was sold. The court further noted that in most jurisdictions a seller who has not contributed to the defect has an implied indemnity remedy against the manufacturer when the injured user sues the seller.
its characteristics, warnings and labels.\textsuperscript{467}

The defense of abnormal use is still available to the defendant in a product liability case.\textsuperscript{468} The assumption of the risk defense is available in those cases where it is shown that the plaintiff continued to use the product subsequent to his gaining "actual knowledge" and "full appreciation of the defective condition."\textsuperscript{469} The court said that contributory negligence was available as a defense when it consisted of more than a failure to discover or guard against the possibility of the defect. But, since the supreme court has subsequently abandoned the defense of contributory negligence in favor of the doctrine of comparative negligence,\textsuperscript{470} there is some question as to the effect of comparative negligence upon product liability law and the cases brought thereunder. A judicial decision or statutory enactment will be required to determine whether the doctrine of comparative negligence is applicable in product liability suits, and if so, how this doctrine is to be applied.\textsuperscript{471}

II. COMPARATIVE NEGLIGENCE

In Bradley v. Appalachian Power Co.\textsuperscript{472} the West Virginia Supreme Court of Appeals abrogated the defense of contributory negligence, and replaced it with the doctrine of comparative negligence. Bradley concerned the appeal of two cases in which the plaintiffs unsuccessfully sought comparative negligence instructions in order to avoid the defense of contributory negligence.

\textsuperscript{467} Id.

\textsuperscript{468} Id. Abnormal use, in light of the definition given to "intended use" by the court, includes those uses which a reasonably prudent person would not make of the product, having in mind its characteristics, warnings, and labels. For a good discussion of abnormal use and other defenses in product liability suits, see, Noel, \textit{Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk}, 25 \textit{Vand. L. Rev.} 93 (1972).

\textsuperscript{469} 253 S.E.2d at 683.

\textsuperscript{470} Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979), discussed in the next segment of this section.

\textsuperscript{471} See V. Schwartz, \textit{Comparative Negligence} (1974), particularly Chapter 12 for a good discussion of strict liability and comparative negligence.

\textsuperscript{472} 256 S.E.2d 879 (W. Va. 1979). For a more detailed analysis of the ramifications of this decision see Symposium on Bradley v. Appalachian Power Co.—West Virginia Adopts Comparative Negligence, 82 W. Va. L. Rev. 473 (1979).
Justice Miller, again writing for a unanimous court, concluded that adoption of the fifty percent approach to comparative negligence in West Virginia would overcome the harshness of the contributory negligence defense and avoid the potential injustices involved in applying the pure comparative negligence model.

The court quickly disposed of the issue of authority to change the common law in light of article VIII, section 13 of the West Virginia Constitution and West Virginia Code section 2-1-1, by pointing to the recent decision in Morningstar v. Black & Decker Manufacturing Company. The remainder of the opinion is devoted to a discussion of why contributory negligence should be abandoned, why the fifty percent model of comparative negligence is favored over the pure concept, how to apply the fifty percent model, and, finally, a discussion of the decision’s retroactivity.

The defense of contributory negligence, strictly applied by juries, barred a plaintiff from recovery if it was found that his negligence “contributed in the slightest degree” to the accident. The court labeled this rule as an “anomaly” in our system of jurisprudence based on “concepts of justice and fair play,” since it “excuses the defendant from the consequences of all of his negligence, however great it may be.” In order to absolve the harshness which results from application of the contributory negligence defense, the court adopted a rule which allows a party to recover damages in a tort action so long as his negligence or fault, which proximately contributed to the accident, does not equal or exceed the combined negligence or fault of the other parties involved. This approach was favored over the pure comparative negligence model which allows a plaintiff to recover regardless of the degree of his negligence, so long as his award is reduced in proportion to his contributory negligence. The court, in Bradley, acknowledged that most commentators and those jurisdictions which have judicially adopted comparative negligence have criticized the fifty percent rule, primarily on the ground that it involves the establishment of an arbitrary line beyond which contributory negli-

473 See notes 451-452, supra.
474 See text accompanying notes 450-58, supra.
476 256 S.E.2d at 882.
477 Id. at 879.
In declining to adopt the pure comparative negligence rule, the court said that it was unwilling "to abandon the concept that where a party substantially contributes to his own damages, he should not be permitted to recover for any part of them." Adoption of the pure comparative negligence model would result in such an outcome, according to the court. "The practical result of such a system is that it favors the party who has incurred the most damages regardless of his amount of fault or negligence," and thus would be a "radical change in our present fault-based tort system." To demonstrate this result, the court offers the following hypothetical: Plaintiff, having insurance coverage totaling $50,000.00 is involved in an accident resulting in $20,000.00 damage to him and $800,000.00 to the defendant. If plaintiff is found to be ten percent at fault and defendant guilty of ninety percent of the fault proximately causing the accident, plaintiff's recovery is $18,000.00 and defendant's award is $80,000.00 under the pure comparative negligence system.Offsetting plaintiff's liability to defendant by his $50,000.00 insurance coverage and his $18,000.00 recovery still leaves him with a potential $12,000.00 uninsured exposure. Such a result would discourage plaintiffs from bringing damage suits, a result not favored by the court. The possibility of such an occurrence, combined with the contention that juries would likely conclude a plaintiff should be denied recovery whenever his negligence approached the fifty percent level, were offered by the court to counter the criticism that the fifty percent rule represents an arbitrary line drawing lottery. It must be noted that the comparative negligence rule will not be applicable to situations involving an intentional tort. In such a case, the "plaintiff would recover his damages undiminished by any contributory negligence." Nor does adoption of comparative negligence alter basic West Virginia law concerning joint

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478 Id.
479 Id. at 885.
480 Id. at 883.
481 Id. at 887.
482 Id. at 883.
483 Id. at 883 n.12.
484 Id. at 887.
tortfeasors. The court does state that the common law principles of joint and several liability are preserved, but there are other questions concerning multiple parties in a fifty percent system which are not answered by Bradley. These questions concern the following:

1) Whether plaintiff's negligence is to be compared with the negligence of all defendants in the aggregate or each defendant individually?
2) How will indemnity and contribution be handled?
3) How will awards be apportioned when multiple plaintiffs are involved?
4) What affect, if any, does the negligence of unjoined tortfeasors have?
5) How will counterclaims by defendants guilty of less than fifty percent of the negligence be handled?

Application of the comparative negligence doctrine requires the jury to state, by general verdict, the total amount of damages each party is entitled to recover. Then, by special interrogatory, the jury must apportion the percentage of fault or contributory negligence attributable to each party. It is the trial court's duty to calculate the net amount of each party's award by deducting from each gross award the party's percentage of fault.

The rule of Bradley, adopting comparative negligence in West Virginia, is fully retroactive, and thus will apply in all cases pending at the time of the decision. "Retroactivity of an overruling decision is designed to provide equality of application to the overruling decision because its new rule has been consciously designed to correct a flawed area of the law." The court held that the following factors are to be considered in determining whether or not to make an overruling decision retroactive.

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485 256 S.E.2d 879.
486 See V. Schwartz, Comparative Negligence (1974), particularly § 3.5(c) and Chapter 16 for a good discussion of multiple parties in comparative negligence cases. See also, C. Heft, Comparative Negligence Manual (1978).
487 It would appear that Bradley answers this question where it states that "[a] party is not barred from recovering damages . . . so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." 256 S.E.2d at 885.
488 Id.
489 Id. See also Sullivan v. Billey, 256 S.E.2d 591 (W. Va. 1979).
490 256 S.E.2d at 880, Syll. pt. 4.
First, retroactivity is less justified when the substantive issue overruled involves a traditionally settled area of the law as opposed to a dynamic area, and the new rule was not clearly foreshadowed. Second, retroactivity is more readily accorded decisions concerning procedural rather than substantive law. Third, since common law decisions usually involve fewer parties and have a narrow impact, they are more likely to be granted retroactivity. Fourth, prospective application is favored when decisions represent a clear departure from prior precedent and where substantial public issues arising from statutory or constitutional interpretations are involved. Fifth, greater limitations should be placed upon new decisions which result in a radical departure from the previous substantive law. Sixth, other jurisdictions should be examined to determine their treatment of the retroactive/prospective question in the same area of the law.\textsuperscript{491}

\textit{Allen R. Prunty}

**WORKMEN'S COMPENSATION**

In the case of \textit{Mitchell v. State Workmen's Compensation Commission},\textsuperscript{492} the West Virginia Supreme Court of Appeals was presented with a number of complex and important issues. The claimant, Roger Mitchell, sustained a lower back injury on May 26, 1976, in the course of and resulting from his employment and he had begun receiving treatment from a physician on the same day. On July 14, 1976, the Commissioner awarded Mitchell temporary total disability benefits. Later that summer the doctor informed the Commissioner that, as of August 30, 1976, the claimant had reached a maximum degree of improvement. Mitchell requested that he be sent to another doctor and the Commissioner then sent him to a different physician who started Mitchell on a therapy program.\textsuperscript{493}

On November 2, 1976, the employer protested the continuation of temporary total disability benefits and urged the Commissioner to terminate benefits as of August 30, 1976, since on that

\textsuperscript{491} Id. at 880, Syll. pt. 5.
\textsuperscript{492} 256 S.E.2d 1 (W. Va. 1979).
\textsuperscript{493} Id.
day the original treating physician stated that Mitchell had reached a maximum degree of improvement. With the claim under protest, the Commissioner continued to pay Mitchell temporary total disability benefits. On September 26, 1977, over a year after the injury, the second physician released Mitchell from treatment to return to work. The last hearing on the employer's protest was held in January, 1978, and the Commissioner terminated the claimant's benefits as of August 30, 1976, and the Appeals Board affirmed.494

The basic issues presented in this case were: 1) the extent of the Commissioner's authority to permit an employer to protest the continuation of temporary total disability benefits when a timely protest was not made to the original award under West Virginia Code section 23-5-1; 2) the limits of the Commissioner's authority to terminate temporary total disability benefits without according the parties an evidentiary hearing; and 3) the effect of the 1976 amendments to West Virginia Code section 23-4-1c regarding overpayments of temporary total disability benefits.

The court held that the employer's protest should not have been considered under West Virginia Code section 23-5-1 since it was filed beyond the 30 day period prescribed in the statute.495 Under section 23-5-1 the Commissioner is empowered to make an initial award without a prior evidentiary hearing. Only if this award is challenged within the 30 day period does the right to a hearing apply. This type of protest is really a challenge as to whether the claimant meets the statutory eligibility requirements,

494 Id. at 5.
495 W. VA. CODE § 23-5-1 (1978 Replacement Vol.) provides in part:
The commissioner shall have full power and authority to hear and determine all questions within his jurisdiction, but upon the making or refusing to make any award, or upon the making of any modification or change with respect to former findings or orders, as provided by section sixteen [§ 23-4-16], article four of this chapter, the commissioner shall give notice, in writing, to the employer, employee, claimant or dependent, as the case may be, of his action, which notice shall state the time allowed for filing an objection to such finding, and such action of the commissioner shall be final unless the employer, employee, claimant or dependent shall, within thirty days after the receipt of such notice, object, in writing, to such finding. Upon receipt of such objection the commissioner shall, within fifteen days from receipt thereof, set a time and place for the hearing of evidence. . . .
thus invoking the Commissioner's jurisdiction to make an award. Here, the protest was made over three months after the Commissioner's initial award.

The second method of protesting the continuation of temporary total disability benefits is where the employer obtains new medical evidence that the claimant has reached maximum degree of improvement or is certified to return to work. There is no time limit on this type of challenge, nor is there a requirement that a hearing be held before termination since the decision is based on new medical information transmitted to the Commissioner and on evidence contained in the claimant's file. But in such a protest under West Virginia Code section 23-5-1c, the Commissioner is required to notify the claimant that a discontinuation has been requested.

Although the Commissioner can terminate benefits without a hearing under section 23-5-1c, there are certain minimal due process procedures which must be followed. In Mathews v. Eldridge the United States Supreme Court set forth a balancing test for procedural due process in the termination of disability benefits. Generally this test involves the individual's right to receive the government-created benefit versus the government's right to establish standards for the accurate and efficient administration of such benefits. In the instant case, unlike Matheus, the third party interest of the employer was considered and the fact that the benefits could only last for a maximum of 208 weeks was distinguishable from Mathews where the benefits were for life.

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496 256 S.E.2d at 8.
497 Id.
498 W. Va. Code § 23-5-1c (1978 Replacement Vol.) provides:
   In any case wherein an employer makes application in writing for a modification of any award previously made to an employee of said employer, and such application discloses cause for a further adjustment thereof, the commissioner shall, after due notice to the employee, make such modifications or changes with respect to former findings or orders in such form as may be justified, and any party dissatisfied with any such modification or change so made by the commissioner, shall upon proper and timely objection, be entitled to a hearing as provided in section one [§23-5-1] of this article.
499 256 S.E.2d at 9.
501 256 S.E.2d at 10.
The Supreme Court of Appeals held that, in light of Matthews, the procedural due process rights due the claimant in the face of a challenge to the continuation of temporary total disability benefits under section 23-5-1c are: 1) prior written notice to the claimant of the reasons for considering termination; 2) the right of the claimant to submit for consideration on his behalf any countervailing medical evidence; and 3) the claimant's statutory right to an evidentiary hearing under section 23-5-1, upon timely protest to an adverse order. But if the claimant has actually returned to work, he will be held to have voluntarily terminated his rights to temporary total disability benefits and the Commissioner is then not required to send him a prior notice of termination.

As to the third issue, the court felt that the Commissioner had misunderstood and misinterpreted the law as to overpayments. A protest of an initial award of temporary total disability benefits under section 23-5-1 is really directed at the Commissioner's jurisdictional foundation for the award, i.e., whether the claimant met the statutory requirements. If the employer prevails in his protest, it means that the claimant was not lawfully entitled to the benefits and he must repay them. But where the initial award is not challenged, and instead only the continuation of such award is subsequently contested, the claimant will be deemed to have lawfully received the initial benefits.

Under such a protest, the Commissioner can terminate the benefits when the claimant has reached maximum degree of improvement, but he cannot find an overpayment. The initial award is lawful up until the time that the Commissioner orders discontinuation. It is the Commissioner and not the doctor who makes the ultimate factual determination as to the degree of disability based on medical information contained in the claimant's file. The date of his order is the date of his decision; he cannot adopt the date of a particular physical examination, which means he cannot terminate the benefits retroactively.

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502 Id.
503 Id.
504 Id. at 12.
505 Id. at 13.
506 Id.
The specific relief given in *Mitchell* was that the hearing under West Virginia Code section 23-5-1 was not proper since the protest was filed more than 30 days after the initial award and therefore the results of that hearing were invalid. Since the second physician treated the claimant until September 26, 1977, and the claimant apparently returned to work on that date, the Commissioner should have terminated benefits as of that date. Therefore, the Commissioner's ruling of February, 1978 and the Appeal Board's affirmation were overturned.\textsuperscript{507}

The *Mitchell* decision is important because it clearly delineates the procedural rights of employee-claimants when there is a protest to the continuation of temporary total disability benefits. The court's ruling "recognizes that once the government establishes a program distributing benefits, it must employ certain basic procedures to ensure that the operation of the system does not undermine the human dignity and self-respect of persons who seek those benefits."\textsuperscript{508} The case is also significant in that it clarifies the application of the statute as to overpayments, so as not to overburden claimants, who in most instances are in no financial condition to repay any benefits received.

In *Hagy v. State Workmen's Compensation Commissioner*,\textsuperscript{509} the West Virginia court touched upon some of the same issues as in *Mitchell*\textsuperscript{510} and used the *Mitchell* case for guidance. In *Hagy*, the claimant's widow appealed an order which denied her an award for permanent partial disability benefits and which retroactively terminated her husband's temporary total disability benefits as of April 1, 1976. The claimant was awarded temporary total disability benefits for broken fingers which resulted in atrophy of his forearm and biceps. On April 1, 1976, the treating physician stated that the claimant had reached a maximum degree of recovery. There was no award of permanent partial disability benefits, although the doctor recommended that he be evaluated for such benefits. The claimant died in a non-work related accident on May 11, 1977. On October 20, 1977, the Commissioner entered an order terminating temporary total disability benefits.

\textsuperscript{507} *Id.* at 14.
\textsuperscript{508} *Id.*
\textsuperscript{509} 255 S.E.2d 906 (W. Va. 1979).
\textsuperscript{510} 256 S.E.2d 1 (W. Va. 1979).
as of April 1, 1976.

As to the permanent partial disability benefits, the court held that a dependent can only receive the balance of such an award when such an award has been ordered during the worker's lifetime. After death there is no way to make a medical evaluation of the injury.

Thus, in Hagy, as in Mitchell, the protest to the temporary total disability benefits concerned the continuation of the benefits and not the initial award. Therefore, following the principles announced in Mitchell, the date of termination for purposes of any overpayment was the date of the Commissioner's order and not the date of some prior physical examination. In Mitchell it was the claimant's return to work that automatically terminated benefits. Here, it was the claimant's death that terminated benefits. Therefore, the Commissioner should have terminated the temporary total disability benefits as of May 11, 1977, the date of death, and not as of April 1, 1976.511

In Wnek v. State Workmen's Compensation Commissioner,512 the court again demonstrated the application of Mitchell. In this case the claimant received a back injury on October 4, 1977 and was awarded temporary total disability benefits. On April 3, 1978, the employer protested the continuation of the benefits. In September of 1978, the Commissioner referred the claimant to a Dr. Hughes, and before receiving a report from the physician but after a hearing on the protest the Commissioner terminated the temporary total disability benefits on October 2, 1978 retroactive to July 17, 1978. Pending the results of a myelogram ordered by Dr. Hughes, the claimant's temporary total disability benefits were reinstated from December 11, 1978 to February 5, 1979, and these benefits were not in dispute.

On March 20, 1979, the claimant sought mandamus for temporary total disability payments from July 17, 1978 through December 11, 1978 and from February 5, 1979 to March 23, 1979. On March 23, 1979, the Commissioner awarded the claimant a ten percent permanent partial disability and denied any payments as

511 255 S.E.2d at 911.
512 256 S.E.2d 772 (W. Va. 1979).
sought in the mandamus.\footnote{513}{Id. at 773.}

The court held that the claimant had no absolute right to have temporary total disability benefits continue from the time of injury until a permanent partial disability award was made. As the court said in \textit{Mitchell}, in a proceeding under West Virginia Code section 23-5-1c, where an employer protests the continuation of benefits, the Commissioner can on his own initiative terminate benefits when credible evidence is present in the claimant's file that he has reached maximum degree of improvement or is certified to return to work. Since there was nothing in the statute that required the Commissioner to act on this point, mandamus would not lie.\footnote{514}{Id. at 774.}

As to the Commissioner's order of October 2, 1978, retroactively terminating benefits as of July 17, 1978, in \textit{Mitchell} the court had held that the proper date of termination is the date of the Commissioner's order. Therefore, the Commissioner had a nondiscretionary duty to terminate the benefits as of October 2, 1978, and mandamus was granted to require the Commissioner to award the claimant temporary total disability benefits from July 17, 1978 to October 2, 1978.\footnote{515}{Id.}

There had been no case in West Virginia where the court had specifically held that an employee can become totally and permanently disabled as a result of multiple hernias. This changed with the decision of \textit{Pertee v. State Workmen's Compensation Commissioner}.\footnote{516}{Id. at 779.} In this case, the claimant sought total and permanent disability benefits by virtue of the combined effects of six inguinal hernias. The claimant was 39 years old, had a grade school education and had a work history of only heavy physical labor. He had received so many operations that the muscles were very weak, there was much pain and swelling, and he had pain when moving his legs. Lay witnesses said that his normal activities were limited, that he limped and that sometimes he had to be assisted in placing his legs into a car. The doctors that treated the claimant reported that although the most recent hernia was somewhat repaired, the muscle and tissue were so weak that even

\footnotesize{\begin{itemize}
\item \footnote{513}{Id. at 773.}
\item \footnote{514}{Id. at 774.}
\item \footnote{515}{Id.}
\item \footnote{516}{255 S.E.2d 914 (W. Va. 1979).}
\end{itemize}}
normal activity could cause it to reoccur, and that, therefore, he should do no more heavy physical labor.\textsuperscript{517}

The court held that as a result of six recurrent inguinal hernias, the claimant was unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he had previously engaged with some regularity over a substantial period of time, and therefore a permanent total disability existed.\textsuperscript{518}

In \textit{Boggs v. State Workmen’s Compensation Commissioner},\textsuperscript{519} the court addressed the problem of a second injury award under West Virginia Code section 23-9-4b. In 1974, Boggs was granted a fifty percent permanent partial disability for occupational pneumoconiosis. Shortly thereafter he requested that his case be reopened for progressive or aggravation to consider the combined effects of a prior disability together with his occupational pneumoconiosis.

In 1948, Boggs had contracted tuberculosis and as part of the then-recognized appropriate treatment, his lung was medically collapsed as a form of therapy. This caused impairment of lung capacity and the residual effects along with the occupational pneumoconiosis rendered the claimant totally disabled. Boggs did not claim compensation for the tuberculosis, but he claimed that the collapsed lung was a traumatic event with residual effects and that he should qualify for a “second injury” award under section 23-9-4b.\textsuperscript{520}

The court held that the collapsed lung was not an injury by accident as required by statute, and that the injury could not be attributed to a definite, isolated, fortuitous occurrence.\textsuperscript{521} The collapsed lung, the court stated, should be considered in the context of the situation in which it occurred, i.e. in relation to the tuberculosis, and that since the tuberculosis was not compensable the claimant was not eligible for a total disability award, but only for such disability as was attributable to the occupational

\textsuperscript{517} \textit{Id.} at 917.

\textsuperscript{518} \textit{Id.} at 918. \textit{See Posey v. SWCC}, 201 S.E.2d 102 (W. Va. 1973).

\textsuperscript{519} 256 S.E.2d 890 (W. Va. 1979).

\textsuperscript{520} \textit{Id.} at 892.

\textsuperscript{521} \textit{Adams v. G.C. Murphy Co.}, 115 W. Va. 122, 174 S.E. 794 (1934).
The question was also raised as to the scope of inquiry once a case has been reopened. The court held that once a reopening has been granted under West Virginia Code section 23-5-1a, any party has the right to contest the modification and to develop fully any issues regarding a progression or aggravation of the claimant's condition or to develop any other facts which were not previously considered by the Commissioner in his original findings.

Roderick Stephen Lewis

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522 256 S.E.2d at 893.