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EDITOR'S COMMENTS

This 1975-1976 Survey of Developments in West Virginia Law is in the format of a student note. This note discusses the significant decisions handed down by the West Virginia Supreme Court of Appeals in 1975-1976. This is the first article of this nature to be published in the West Virginia Law Review. If your response to this article is favorable, we hope to include in subsequent issues federal district court and circuit court cases, as well as significant enactments of the West Virginia Legislature.

This survey serves primarily as a reporting system, and we leave an in-depth discussion of these cases to case comments and student notes. Unreported cases will be listed in footnotes at the beginning of each section. Cases with multiple issues will be dealt with under the major issue, and minor issues may not be discussed. For greater convenience in comparing developments of the law in each area, this survey is organized into categories. The categories under which the developments are treated, in order of presentation, are:

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ADMINISTRATIVE LAW

The cases decided in the area of administrative law involved judicial review of administrative fact findings and construction of statutes.

I. CONDEMNATION PROCEEDINGS

Monongahela Power Co. v. Gerard held that a commissioner who participated in a prior eminent domain proceeding to award compensation is absolutely disqualified to give evidence of just compensation at a subsequent jury trial when the same issues are involved.

II. JUDICIAL REVIEW

In re Rate Filing of Blue Cross Hospital Service involved an appeal by the West Virginia Insurance Commissioner from a final order of the Kanawha County Circuit Court which had reversed the Commissioner's decision denying a rate increase to Blue Cross Hospital Service, Inc. The case is controversial since the majority, in affirming the trial court decision, ignored the standard for reviewing administrative decisions as set out in the State Administrative Procedure Act. Chief Justice Haden, in a strong dissenting opinion, pointed out, and the majority agreed, that the trial court was wrong in its legal conclusion that the Commissioner had exceeded the delegated authority given him by the legislature in making his decision refusing the rate increase. The trial court had concluded that the Commissioner could not inquire into underlying causes that had prompted the rate application and then use

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3 W. VA. CODE ANN. § 54-2-10 (Cum. Supp. 1975) cited by the court, reads in part:

   The cause shall be tried as other causes in such court, except that any person who served as a condemnation commissioner in the proceeding shall not be examined as a witness in regard to just compensation or any damages.


5 W. VA. CODE ANN. § 29A-5-4(g) (1971 Replacement Volume) provides in part that a decision will be reversed if the decision is in excess of statutory authority of the agency or is clearly wrong in view of substantial evidence on the whole record.

those causes for an administrative finding that the rates were excessive. Because of this erroneous legal conclusion, the trial court found that the rate application was not excessive, refusing to consider the factual findings of the Commissioner and stating that "While the Commissioner's reasoning in this regard is persuasive, I do not believe that it was the intent of the Legislature, under West Virginia Code, 33-24-6(c), to have the Commissioner correct such abuses upon a rate filing application." The majority concluded that the Commissioner did have the authority to inquire into the factors causing Blue Cross to seek a rate increase, yet did not reverse the trial court and reinstate the Commissioner's findings. The dissent emphasized that the court gave "no persuasive weight" to the factual findings of the Commissioner, which is in direct conflict with West Virginia law requiring a court to find an administrative agency's factual findings "clearly wrong" to warrant judicial interference. By not applying the standard for judicial review of administrative factual findings to the Commissioner's decision to deny the rate increase, the court has seemingly undermined the Commissioner's authority to make such decisions.

Kanawha Valley Transp. Co. v. Public Service Commission correctly applied the standard of judicial review of administrative fact findings. The court held that findings of the Public Service Commission will not be reversed unless such findings are contrary to the evidence. This was the holding after the Kanawha Valley Transportation Company appealed from an order of the Public Service Commission revoking certificates of convenience and necessity authorizing it to operate as a common carrier by taxicab service. Sixteen months elapsed between the fact finding by the Public Service Commission and the time when the final order was entered. The court reaffirmed the concept that a decision unduly delayed will not vitiate the order or judgment, but a proceeding in

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7 214 S.E.2d at 346.
*Id.* at 347.
mandamus may be brought to compel a decision. In light of the Public Service Commission's failure to include in the record an item of evidence presented to it, the court held by way of dictum that where an agency considers both proper and improper evidence and the proper evidence is enough to sustain the order, the reviewing court will not reverse unless the order was based on the improper evidence.

III. Statutes

The case of State v. Riley held that "where a statute is plain and unambiguous, a court has a duty to apply and not to construe its provisions." Therefore the court, in determining who is a carrier under statutory law, held that mere employees do not come within the definition of "motor carrier." An employee driving a truck could not be fined for failure to have a license required only of "motor carriers".

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13 219 S.E.2d at 340.
A foreign corporation must have certain minimum contracts with the state of West Virginia before a state court obtains jurisdiction over such corporation. The minimum contacts must be such that the maintenance of the action in the state does not offend notions of fair play and substantial justice.\(^7\) In *Chase v. Greyhound Lines, Inc.*,\(^9\) plaintiff's decedent was riding in a truck-mounted camper that had been purchased from defendant *A*, who had purchased it from defendant *B*, the manufacturer. Plaintiff's decedent was killed in a collision, and the plaintiff alleged that death was caused by a defective door on the camper. Defendant *B* filed a third-party complaint against *C* who constructed the door and sold it to *B*.

The court was faced with a certified question which contained the following matters concerning the foreign corporation *C*:

1. it was not licensed to do business in West Virginia;
2. it was not doing business in this state;
3. it had made no contracts to be performed in whole or in part in this state;
4. it had committed no tort in whole or in part in this state;
5. it had no servants, agents or employees in this state;
6. it owned no property in this state;
7. it had appointed no one as its attorney in fact for acceptance of process in this state;
8. it had not manufactured, sold, offered for sale or supplied a product which caused injury to person or property in this state;
9. the only contact *C* had with the state, if any, was that its product came into this state as a component part of the third-party plaintiff's product.\(^2\)

Although the court might have obtained jurisdiction under the West Virginia long-arm statute\(^21\) since the foreign corporation had manufactured, sold and supplied an allegedly defective product which caused injury to a person, the *Chase* court held that the facts were insufficient to establish the minimum contacts required to satisfy the standard of jurisdictional due process. Other jurisdictio-

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\(^9\) 211 S.E.2d 673 (W. Va. 1975). The court noted that *Hodge* presented a question identical to that raised in *Chase*.

\(^2\) Id. at 276.

tions have found the necessary minimum contacts in cases with facts quite similar to those in Chase.22

The statute was applied in another 1975 decision to defeat jurisdiction. In Schweppes U.S.C. Ltd. v. Kiger,23 a West Virginia resident bought tonic water bottled by Schweppes. The purchase was made in Maryland, and the tonic water was subsequently taken to Virginia where the cap blew off of a bottle striking the plaintiff in the eye injuring her. The plaintiff then brought an action against Schweppes in the Circuit Court of Monongalia County, West Virginia seeking damages for her injuries. For the purpose of obtaining service on Schweppes, the plaintiff served process on the state auditor.24 Schweppes failed to defend the action, and the circuit court entered a default judgment against the defendant for $300,000.

On appeal, the sole question was whether the circuit court had obtained personal jurisdiction over Schweppes by service of process upon the state auditor. The plaintiff contended that jurisdiction25 was obtained under the long-arm statute, but the court noted that this statute provided for service of process on a foreign corporation in only three situations,26 none of which applied to the facts in this case; therefore, the circuit court did not obtain jurisdiction over the defendant.

24 W. VA. CODE ANN. § 31-1-15 (1975 Replacement Volume) amended W. VA. CODE ANN. § 31-1-71 (1972 Replacement Volume) and substituted the secretary of state for the state auditor as the attorney-in-fact for corporations.
25 A court must have jurisdiction over both the parties and the subject matter to render a valid judgment; any judgment rendered without such jurisdiction is void. State ex rel. Smith v. Bosworth, 145 W. Va. 753, 117 S.E.2d 610 (1960).
26 A foreign corporation will be deemed to be doing business in West Virginia: (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. W. VA. CODE ANN. § 31-1-15 (1975 REPLACEMENT VOLUME).
Strictly construing the West Virginia long-arm statute, the court noted that since none of the events in the case occurred in West Virginia, the statute did not apply; thus, the state auditor could not accept service so as to confer jurisdiction on the circuit court. The court left any changes in this area up to the legislature by noting that "[e]ven if there were sufficient minimum contacts to hold that Schweppes was doing business in this state, which we do not determine here, no method of service of process is provided."2

2 214 S.E.2d at 871.
CONSTITUTIONAL LAW

In 1975, the West Virginia Supreme Court of Appeals dealt with a broad spectrum of constitutional disputes. At least four of the decisions discussed below will have a significant state-wide impact in the near future. The well reasoned progressivism of the Haden Court is evident throughout the decisions; yet, each step forward is couched in terms of realistic application rather than ill-considered policy statements.

I. DISCRIMINATION

Perhaps the most significant decision by the Supreme Court of Appeals in 1975 in the area of constitutional interpretation dealt, not with the determination of a constitutional issue, but rather with the question of whether the West Virginia Human Rights Commission is statutorily empowered to grant monetary relief to victims of illegal discrimination. The court readily admitted that the power sought by the Human Rights Commission was not expressly authorized by statute. Nevertheless, in light of the avowed legislative intent of the present Human Rights Act, the existent power, expressly given to the Commission, to grant monetary relief in certain instances including, but not limited to back pay, and the realization that without the weapon of damages to give an adequate legal remedy to the victims of discrimination, the Commission could not hope to reduce the harmful incidences of prejudice, the court held that for purposes of compensation the Commission can grant monetary damages.

28 The below designated cases, although dealing tangentially with issues of a constitutional nature, will not be referred to in this survey other than in this footnote as their significance to future decisions, will at best, be minimal: Beaverlin v. Board of Educ. of Lewis County, 216 S.E.2d 554 (W. Va. 1975)(suspension of a public school instructor) and, Sisler v. Hawkins, 217 S.E.2d 60 (W. Va. 1975)(incarceration of party for failure to have legal representation is impermissible).

Similarly, the case of Sprouse v. Clay Communication Inc., 211 S.E.2d 674 (W. Va. 1975), will not be discussed in this section. For a full discussion of Sprouse, see Comment, 78 W. Va. L. Rev. (1976). Also, the two following cases, both dealing with budgetary disputes concerning the Legislature, will not be discussed as their effect will be strictly confined to future budgetary problems: State ex rel. Moore v. Blankenship, 217 S.E.2d 232 (W. Va. 1975) and State ex rel. Brotherton v. Blankenship, 214 S.E.2d 467 (W. Va. 1975).

30 Id. at 78.
31 Id. at 79.
33 Id. at 79.
The facts giving rise to the case were not complicated. Charles Robinson, after reading a newspaper advertisement, contacted Edith Pauley in hopes of renting an apartment. Pauley informed Robinson and his wife that they could have the apartment, but that she would first have to check their references before making a final decision. Later, Pauley contacted Robinson's wife and told her that she could no longer consider them as prospective tenants. Pauley refused to rent to the Robinsons because Charles Robinson was black and his wife was white. Pursuant to the provisions of the West Virginia Human Rights Act, the Robinsons filed a complaint with the Commission charging Pauley with illegal discrimination. The Commission conducted an investigatory hearing, found Pauley guilty as charged, and assessed damages in the amount of $680. On appeal, the Circuit Court of Kanawha County affirmed the finding of the Commission with respect to the illegal discrimination, but held that the Commission had no statutory authority to grant monetary awards. Finally, in State Human Rights Commission v. Pauley, the Supreme Court of Appeals was given an opportunity to express its viewpoint on the subject.

In deciding whether the legislature had intended that the Human Rights Commission be able to award the victims of discrimination with pecuniary relief, Justice Caplan delved deeply into the history of the Human Rights Act. The Commission created by the Act has been in existence since 1961. The original Act charged the Commission with the power to "encourage and endeavor to bring about mutual understanding and respect among all racial, religious and ethnic groups within the state and [to] strive to eliminate all discrimination in employment and places of public accommodation . . . ." The court characterized the original Act as "a token expression of disapproval of unfair discrimination" since the Commission was given no enforcement power. The authority of the Commission was steadily increased, however, with amendments in 1967, 1971, and 1973. Today the Human Rights Act contains a comprehensive list of illegal discriminatory prac-

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21 W. Va. Code Ann. § 5-11-1 et seq. (1971 Replacement Volume). (During the Legislature's first extra-ordinary session of 1973 the article was heavily amended.)


24 212 S.E.2d at 79.
tices and empowers the Commission to investigate, hold hearings, seek cease and desist orders and, in instances of discriminatory housing practices, apply to the circuit courts for injunctions. All of the aforementioned remedies are made available to the public to fulfill the Act's mandate that equal opportunity in a "civil right" and discrimination "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society."

A question that has remained unanswered until Pauley, though, is the extent to which the Human Rights Commission is empowered to compensate individuals victimized by discrimination. As the court pointed out, the purpose of the Human Rights Act manifests a legislative intent for liberal interpretation. Section ten of the Act grants the Commission, after a violation is found, the power to "take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay . . . as in the judgment of the commission, will effectuate the purposes of this article . . . ." Section eight directs the Commission "[t]o do all acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by . . . this article." Even the most liberal reading does not divulge an express argument for compensatory damages. But as the court noted, a "sound principle of law" in West Virginia is that administrative agencies possess "in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act." In quest of the proper logic, the court relied heavily on a 1969 decision by the New Jersey Supreme Court, Jackson v. Concord Company.

The New Jersey statute dealt with in Jackson was worded precisely as the one before the West Virginia court in Pauley. The

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25 Id. § 5-11-18 (1971 Replacement Volume).
26 Id. § 5-11-2 (1971 Replacement Volume).
27 212 S.E.2d at 79.
29 § 5-11-8(h) (1971 Replacement Volume).
Jackson court held that the words "including but not limited to" are words of enlargement rather than of limitation or exclusion of non-stated powers.\(^7\) Hence, to adequately fulfill its mission, the New Jersey Human Right's Commission's power to give compensatory damages was inferred from the statute's language.\(^8\)

The West Virginia court agreed with this reasoning, but also considered and accepted a more significant policy argument as justification for the final decision. As Justice Caplan stated:

If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. The forceful language used by the Legislature mandates the eradication of unlawful discrimination. If this mandate is to be carried into fruition, the provisions of the 1967 Human Rights Act must be given the significance intended so as to provide for meaningful enforcement.\(^6\)

Although the court held that the Commission could grant monetary relief in the future, it denied such relief in this case, since the record revealed that no specific monetary loss was incurred by the plaintiffs. The Human Rights Commission, while empowered to grant monetary damages, must limit these to proven actual loss.\(^5\)

\(^7\) Id. at 123, 253 A.2d at 800.

\(^8\) The purpose of the New Jersey court's upholding the awarding monetary damages went beyond a mere desire to award the victim of discrimination an adequate legal remedy. "[T]he law seeks not only to give redress to the individual who complains, but moreover to eliminate and prevent all such future conduct . . . by enjoining further discriminatory practices as to all persons, as well as to deter others similarly situated from engaging or continuing to engage in such courses of conduct." 54 N.J. at 122, 253 A.2d at 799.

\(^6\) 212 S.E.2d at 79. The court's rationale is thoroughly logical. Absent the power to grant monetary relief, the Human Rights Commission, try as it might, could not possibly succeed in its war against prejudice. To a person denied a home or a job solely because of his race, religion or on some other illegal justification, a monetary remedy is perhaps the only adequate relief. No matter what non-monetary relief could be given, by the time the Commission reached its final decision the job would already be filled or the home sold. The violators of the Act would have no incentive to comply with the orders of the Commission if only a warning was issued as punishment. Hence, to promote equal treatment, monetary damages are a virtual necessity.

\(^5\) Id. at 81.
II. Peace Bonds

"Peace bond" proceedings have been criticized as being "anachronism[s] in a setting of expanding constitutional rights." In 1975 the West Virginia Supreme Court of Appeals significantly restricted the application of this idiosyncrasy of American jurisprudence in Kolvek v. Napple.

Andy Kolvek appeared before a Marion County justice of the peace and, under oath, expressed fear that his son was about to cause him physical harm. The justice issued a warrant for Joseph Kolvek's arrest and asked for a $500 bond pending a two-week delay in final adjudication. Joseph asserted that he was financially unable to post bond, but, nevertheless, he was jailed until the hearing date. At the ensuing hearing, the justice determined that the senior Kolvek's fears were substantiated by good cause and demanded a $500 "peace bond" as security that Joseph would keep the peace for one year. Again Joseph Kolvek plead indigency and again he was incarcerated for his inability to pay the required recognizance. After an unsuccessful application for habeas corpus relief to the Marion County Circuit Court, Joseph Kolvek's plight came before the Supreme Court of Appeals.

Kolvek mounted a dual constitutional attack on West Virginia's peace bond procedures. Initially, he challenged whether, consistent with the fourteenth amendment to the United States Constitution, he could be incarcerated solely because of his indigency while a wealthier defendant, charged under the same statute, could "buy his freedom." Next, he challenged the proposition that peace bonds can be used to imprison individuals who have not been proven guilty by proof beyond a reasonable doubt.

Peace bond proceedings in West Virginia are commenced by registering a complaint with a justice of the peace that another

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33 A third constitutional challenge, that the statute violated the eighth amendment's ban against cruel and unusual punishment was summarily dismissed by the court. "[T]he sentence provided for in the statute, if the person willfully refuses to give a recognizance, is not shocking to the conscience, does not amount to torture, is not grossly excessive, inherently unfair or unnecessarily degrading." 212 S.E.2d at 619.
34 U.S. Const. amend. XIV, § 1 provides that: "No state shall... deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."
person intends to commit an offense against the person or property of the complainant. The justice is then empowered to issue a warrant for the arrest of the complainant’s alleged antagonist. If the justice determines that good cause exists to verify the complainant’s fear of imminent disruption, he may require the accused to post security in whatever amount he deems sufficient to deter the defendant from violating the peace of all the people of the state, and particularly that of the complainant. Should the defendant fail to come forward with the demanded fee, regardless of the circumstances, the justice can then commit the accused to jail for up to one year. Appeals from these proceedings are strictly limited to only those defendants who post bond.

The court recognized, with slight discussion, that the principles of equal protection in criminal proceedings, originally formulated by the United States Supreme Court in *Griffin v. Illinois*, prohibit discrimination based on indigency. *Griffin*, in striking down an Illinois rule that allowed appeals only upon the purchase of a transcript, stated that “the ability to pay costs . . . bears no rational relationship to a defendant’s guilt or innocence . . .” and that “[t]here can be no equal justice where the kind of a trial a man gets depends on the amount of money he has.” Under the *Griffin* analysis, the West Virginia peace bond statute clearly contradicted the equal protection clause. The court, therefore, declared unconstitutional the provision of chapter sixty-two, article ten, section three of the West Virginia Code permitting

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56 W. Va. Code Ann. § 62-10-3 (1966) provides that:
When such person appears, if the justice . . . considers there in good cause [for the complaint], he may require a recognizance of the person against whom it is, and give judgment against him for the costs of the prosecution, or any part thereof; and, unless such recognizance be given, he shall commit him to jail, by a warrant, stating the sum the time for and in which the recognizance is directed. . . . A person from whom such recognizance is required may, on giving it, appeal to the circuit court of the county; and in such case the justice from whose judgment the appeal is taken shall recognize such of the witnesses as he may deem proper.
Every justice of the peace shall have the power to require, from persons not of good fame, security for their good behavior and to keep the peace, for a term not exceeding one year.
59 Id. at 17-18.
60 Id. at 19.
incarceration for failure to post bond, where applied to an individual incapable of paying the demanded security.\footnote{Kolvek v. Napple, 212 S.E.2d at 617.}

Joseph Kolvek's victory over the statute on equal protection grounds did not mean, however, that he had totally conquered the effects of his peace bond. Contending that the West Virginia peace bond proceeding is a criminal action, Kolvek argued that the statutory penalty of either bond or imprisonment upon a showing of "good cause" alone violated his due process right to be proven guilty beyond a reasonable doubt.\footnote{For a discussion of a defendant's "constitutional right" to be proven guilty beyond a reasonable doubt under W. VA. CODE ANN. § 61-6-7 (1966) (the 'Red Men's Act'), see Pinkerton v. Farr, 220 S.E.2d 682 (W. Va. 1975). See note 127 and accompanying text supra.} This argument was based primarily on interpretations holding that the "bedrock axiomatic and elementary"\footnote{In re Winship, 397 U.S. 358, 363 (1970).} principle of proof beyond a reasonable doubt is a burden the prosecution must meet in all criminal proceedings. Kolvek argued that as peace bonds are unquestionably criminal in nature, the due process clause of the fourteenth amendment is offended by imprisonment or a fine, even in the nature of a recognizance bond, under any less demanding burden of proof. Such was the finding in \textit{Santos v. Nahiwa},\footnote{53 Haw. 40, 487 P.2d 283 (1971).} where the Supreme Court of Hawaii declared unconstitutional a peace bond statute identical in procedure and effect to West Virginia's. The Hawaii court reasoned that the possibility of imprisonment alone was indication that the statute imposed a criminal burden on the defendant and was enough to justify having the state prove guilt beyond a reasonable doubt. In essence, the Hawaii Supreme Court found unconstitutional any statute designed to prevent future illegalities, by the imposition of present burdens in the absence of conclusive proof. There is, of course, small likelihood, if any, that a complainant could prove the future beyond a reasonable doubt unless blessed with extraordinary talents.

The West Virginia Attorney General challenged this reasoning claiming that the peace bond is more closely akin to the posting of bail\footnote{W. Va. Code Ann. § 62-1C-4 (1966).} than to a criminal statute. This comparison is readily discernible. Both the peace bond and bail provisions are directed to the performance of a specific future duty—keeping the peace for one year and appearing at trial. Further, both statutes rely on

\footnote{\textbf{Note:} This footnote is not mentioned in the original text but is added here for completeness.}
probable cause for their legal effectiveness, and both permit an
indigent defendant to be released rather than imprisoned for his
pecuniary defect.

The court agreed with the state's argument that the peace
bond statute is not a criminal proceeding and held that a determi-
nation of probable cause is sufficient to demand either a monetary
recognizance from one who can afford it or a promise to keep the
peace from one who cannot. In finding the statute legitimate by
due process standards, the court noted that a peace bond, or a
recognizance bond as it now seems to be called, becomes criminal
only when a defendant, after notice and hearing, "willfully refuses
to give a recognizance."

Certain contradictions in the court's analysis in Kolvex must
be pointed out. The court ruled that procedural due process protec-
tions other than notice and hearing are inapplicable since the stat-
ute does not charge a defendant with a crime. However, in finding
the statute unconstitutional on equal protection grounds in per-
mitting incarceration of an indigent defendant, the court relied on
United States Supreme Court rulings in criminal cases. Similarly,
prior West Virginia courts have recognized that the burden
of the recognizance alone gives the statute a criminal effect. In
discussing the criminal nature of requiring recognizance, Judge
Poffenbarger in State v. Gilliland stated that "[i]t would be
difficult to class it as anything other than punishment. When bond
is required and not given, the consequence is imprisonment. It is
required under pain of punishment. How could it be anything else
than punishment?" In State v. Scouszzie, a later court acknowl-
enced that "[t]he requiring of security to be of good behavior and
to keep the peace is more in the nature of criminal, or quasi-
criminal, rather than civil, procedure." Finally, as the United
States Supreme Court in In re Gault stated, that "labels attached

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66 212 S.E.2d at 618.
67 Id.
68 Id. at 618-19.
69 The court cited Tate v. Short, 401 U.S. 395 (1971) (indigent convicted of an
offense punishable by fine only cannot be incarcerated to replace the fine as punish-
ment) and Williams v. Illinois, 399 U.S. 235 (1970)(defendant convicted under
statute permitting sentence imposing fine and imprisonment cannot be sent to
prison for longer than statutory maximum for failure to afford the fine). Both Tate
and Williams were directly based on Griffin v. Illinois, 351 U.S. 12 (1956).
70 51 W. Va. 278, 281, 41 S.E. 131, 132 (1902).
can not defeat the requirements of the fourteenth amendment."\textsuperscript{72}

While \textit{Kolvek} leaves open instances in which peace bonds can be imposed, the future of this action may not be very secure. The court was hesitant in sustaining the peace bond proceedings on due process grounds. Special consideration was given to the fact that Joseph Kolvek's freedom was reinstated by the destruction of the statute's equal protection bias.\textsuperscript{73} But the problem with awaiting a judicial denunciation of peace bonds for all purposes, is that the statute, although widely used, seldomly reaches the appellate stage: It seems unlikely that the wheels of justice would run any less smoothly should peace bond proceedings in West Virginia totally disappear.

\section{Preliminary Injunctions}

During the height of the Arab oil embargo in the early spring of 1974, Governor Arch Moore issued a controversial decree designated as the "quarter-tank rule." Essentially, the plan attempted to curb fuel consumption by permitting service stations to sell gasoline to only those motorists with less than a quarter tank in reserve. Statewide, general dissatisfaction was expressed with this remedy to the fuel shortage. In an attempt to have the plan rescinded, several individuals began picketing coal mines in southern West Virginia. To rectify the work stoppage at one of its mines, Eastern Associated Coal Corporation obtained a preliminary injunction from the McDowell County Circuit Court. The court order was ignored. Four days later Eastern Associated requested the court to issue an order requiring the pickets to show cause why they should not be held in contempt. After hearing arguments, the trial court found the demonstrators in contempt for violating the injunction, fined one demonstrator $500 and sentenced him to six months in jail and fined six others $250 and gave them each thirty days in jail. Upon agreement to pay the fines and discontinue future picketing, all seven were released from custody. On appeal, in \textit{Eastern Associated Coal Corp. v. Doe},\textsuperscript{74} the Supreme Court of Appeals phrased the issue as being whether "the validity of a preliminary injunction may be collaterally attacked in an action in

\textsuperscript{72} 387 U.S. 1, 27-28 (1967).
\textsuperscript{73} 212 S.E.2d at 618-19.
\textsuperscript{74} 220 S.E.2d 672 (W. Va. 1975); see, Note, \textit{Preliminary Injunctions in West Virginia—Discretionary Notice and Due Process}, 78 W. Va. L. Rev. 113 (1975).
criminal contempt by asserting the unconstitutionality of the injunction.\textsuperscript{73}

The court recognized that in an \textit{ex parte} motion for a preliminary injunction many competing considerations must be taken into account. On the one hand are individuals, engaged in what may well be a lawful activity, who are barred by court order from continuing that activity without the benefit of a hearing to debate the order.\textsuperscript{74} On the other hand, however, the order granted "assures the continued good order of society by giving an immediate remedy to persons suffering from unlawful interference with the exercise of their rights."\textsuperscript{75}

The preliminary injunction procedure is most vulnerable in its \textit{ex parte} aspect. Many orders are improvidently granted with little or no investigation made by the court.\textsuperscript{76} The problem is further exacerbated by the possibility that a court may issue a preliminary injunction though it lacks the jurisdictional capacity to do so. To demand obeyance of an injunction, void for jurisdictional defects, and later punish violators of the defective court order by finding them in contempt, seems a particularly harsh remedy. In recognition of these conflicting interests, a "balance must be struck with the inherent power and duty of courts to enforce their orders and the concomitant necessity of preventing citizens from ignoring authoritative pronouncements of courts on mere chance that the order will be subsequently invalidated."\textsuperscript{77}

The pickets in \textit{Eastern Associated} argued that the circuit court could not enjoin them from a lawful political demonstration and, hence, could not punish them for disobeyance of the order. The weakness of this position is that the pickets failed to challenge the court order through the available appellate process and instead, willfully disobeyed the court order. The court found that the judiciary has always assumed the power of maintaining a status quo while the available procedures are used to sort out the opposing contentions and either verify or declare void earlier pronouncements.\textsuperscript{78} In seeking the proper rationale, the court quoted at length from a United States Supreme Court decision, \textit{Howat v. Kansas}:

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\item \textsuperscript{73} 220 S.E.2d at 677.
\item \textsuperscript{74} W. VA. CODE ANN. § 53-5-8 (1966).
\item \textsuperscript{75} 220 S.E.2d at 677.
\item \textsuperscript{76} \textit{Id.} at 677-78.
\item \textsuperscript{77} \textit{Id.} at 678.
\item \textsuperscript{78} \textit{Id. citing} United States v. U.M.W., 330 U.S. 258 (1947), wherein the United
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An injunction duly issuing out of a court of general jurisdiction . . . and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be . . . . It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed . . . either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.84

Armed with this principle, the court found that a West Virginia court is empowered to enjoin supposedly illegal activities if the court is possessed with the power to grant the desired relief, the plaintiffs have demonstrated a set of facts which "arguably invoke the court's jurisdiction"82 and "the allegations both with regard to the facts and the applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction."83

The court readily acknowledged that the above standards could lead to unconstitutionally issued preliminary injunctions. To remedy this unsought, but nevertheless likely occurrence, a court must investigate its jurisdiction immediately and, upon a finding that it has exceeded its power, dissolve the injunction without delay.84 More importantly, if an individual ignores the court order for any reason, regardless of whether the court is later found to have exceeded its jurisdiction, contempt is proper unless the enjoined party can demonstrate that the court acted in bad faith.85 Under these standards, the pickets in question were justifiably found in contempt of a lawfully executed preliminary injunction.

The defendants next argued that, as they were found guilty of criminal contempt, they were entitled to, but had been denied, the full panorama of protections under the due process clause.86 Under current law, a court which finds its sanctity disturbed can summa-

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81 258 U.S. 181, 189-90 (1922).
82 220 S.E.2d at 679.
83 Id.
84 Id. at 680.
85 Id.
86 Although the pickets were given ample notice, and were informed of their right to be represented by counsel at their contempt hearing, the defendants appeared without legal assistance.
rily impose contempt penalties trivial in nature. “Trivial” has been defined as a jail sentence of less than six months. As for monetary fines, an area thus far not addressed by the Supreme Court, the West Virginia court advised that each particular factual setting must determine whether the fine imposed is substantial or trivial. Since the pickets enjoined from disrupting work had been sentenced to less than six months in jail, and their fines were deemed trivial, the Court affirmed in all respects the contempt order of the lower court.

IV. SALARY INCREASES FOR COUNTY OFFICIALS

Since 1971 the West Virginia Legislature has struggled to establish a comprehensive and uniform method of compensating the state’s county officials. The 1971 Legislature found that “the present system of providing compensation for these officials is antiquated and not conducive to attracting and holding the best qualified people in government service.” To rectify the outmoded pay scale, the Legislature created an entirely new compensatory scheme. Statewide, each county official’s salary was made dependent upon the position held and the assessed property value of the county of employment. The result was a general increase in the salaries of all county officials. Perhaps in recognition of article VI, section 38 of the West Virginia Constitution, which forbids

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89 220 S.E.2d at 682.
90 To the extent that the court’s ruling on the constitutionality of preliminary injunctions contradicts the following cases, they were overruled: White v. County Court, 99 W. Va. 504, 129 S.E. 401 (1925); State ex rel. Fortney Lumber & Hardware Co. v. B. & O. Ry. Co., 73 W. Va. 1, 79 S.E. 834 (1913); Powhatan v. Ritz, 60 W. Va. 395, 56 S.E. 257 (1906); Morgan v. County Court, 53 W. Va. 372, 44 S.E. 182 (1903); Laidley v. Jaspar, 49 W. Va. 526, 39 S.E. 169 (1901); Hebb v. County Court, 48 W. Va. 279, 37 S.E. 676 (1900); State ex rel. Trudgeon v. Blair, 39 W. Va. 704, 20 S.E. 658 (1894); State v. Cunningham, 33 W. Va. 607, 11 S.E. 76 (1890); State ex rel. Mason v. Harper’s Ferry Bridge Co., 16 W. Va. 864 (1879).
91 W. VA. CODE ANN. § 7-7-1, as amended, W. VA. CODE ANN. § 7-7-1 (1976 Replacement Volume).
92 W. VA. CODE ANN. § 7-7-4 to -6, as amended, W. VA. CODE ANN. § 7-7-4 to -6 (1976 Replacement Volume).
93 W. VA. CODE ANN. § 7-7-3, as amended, W. VA. CODE ANN. § 7-7-3 (1976 Replacement Volume). The fifty-five West Virginia counties were divided into seven categories.
94 W. VA. CONST. art. VI, § 38 provides in part: “Nor shall the salary of any public officer be increased or diminished during his term of office . . . .”
alterations in the salaries of public officials during their term of office except upon assumption of newly assigned duties.\textsuperscript{95} the Legislature specified that all county officials were to engage in "in-service training programs" to "modernize and improve the services of their respective offices."\textsuperscript{96}

Pursuant to the newly created statutory pay schedule, the County Commissioners of Monongalia County increased their salaries from $400 to $500 per month beginning July 1 of 1971. In an action brought by a Morgantown resident, \textit{Delardas v. County Court},\textsuperscript{97} these salary increases were declared unconstitutional under article VI, section 38, by the Supreme Court of Appeals. Although the court recognized that the constitutional provision in question permits increased salaries where "[t]he legislature imposes upon the office new and additional duties . . . which embrace a new field, beyond the scope and range of the office as it theretofore had existed and functioned,"\textsuperscript{98} the court did not feel that the "in-service training programs" constituted sufficient grounds to justify the salary increase.

In answer to \textit{Delardas}, the Legislature rewrote the portions of the statutes ruled unconstitutional.\textsuperscript{99} Rather than requiring officials to attend "in-service training programs," the new provisions required each county official to assume membership on one of two newly created governmental agencies. Pursuant to the modified statutes, each county was directed to establish a Commission on Intergovernmental Relations and a Commission on Crime, Delinquency and Correction.\textsuperscript{100} Except for this variation in required du-

\textsuperscript{95} Harbert v. County Court, 129 W. Va. 54, 39 S.E.2d 177 (1946); Springer v. Board of Educ., 117 W. Va. 413, 185 S.E. 692 (1936). In \textit{Springer} the court defined newly assigned duties as more than "mere incidents of the office [which the official holds], but [duties which] embrace a new field, and are beyond the scope or range of the office as it theretofore had existed and functioned . . . ." 117 W. Va. at 417, 185 S.E. at 694.

\textsuperscript{96} W. VA. CODE ANN. § 7-7-2, as amended, W. VA. CODE ANN. § 7-7-2 (1976 Replacement Volume).

\textsuperscript{97} 186 S.E.2d 847 (W. Va. 1972).

\textsuperscript{98} Id. at 851.


\textsuperscript{100} The Commission on Intergovernmental Relations is composed of the members of the county court, all citizens appointed by them, with the clerk of the county court sitting as executive secretary. W. VA. CODE ANN. § 7-1-3(q) (1976 Replacement Volume), specifies that the commission "[a]ssemble and disseminate information concerning federal programs which provide financial assistance to the residents of their county."
ties, the amended statutes closely reflected the content of their predecessors. Again, though, the salary of virtually very county official was increased by the new statutes.

In 1975, the statutes again come under constitutional attack in *State ex rel. Goodwin v. Rogers.*[^1] The issue now was whether the newly acquired duties of Commissioner Goodwin, as a member of both the Intergovernmental Relations Commission and the Commission on Crime, Delinquency and Correction of Boone County, were more than mere incidents of his job and constitutionally justified his salary increase. The court, after an exhaustive analysis of the amended statutes, ruled that the modified provisions required county officials to assume "new, additional and substantially different duties"[^2] thereby constitutionally warranting the pay increases.

The 1972 legislative actions did not, however, escape unscathed from constitutional challenge. Incorporated into the 1972 amendments was a statutory pay escalator clause. As previously discussed, each county in West Virginia was placed into one of seven classifications depending on the assessed value of real property. Chapter seven, article seven, section three of the West Virginia code provided that beginning in March of 1976, and every four years thereafter, the county court of each county would re-determine into which of the seven classes the county fell. Should the county be reclassified into a higher valued category, the salaries of all county officials would correspondingly increase.[^3] As was contended in *Delardas v. County Court,*[^4] "normal fluctuations in assessed valuations of property within a given county will cause changes which, if the statute were to be applied as written, would

[^2]: Id. at 73.
[^3]: W. VA. CODE ANN. § 7-7-3 (1976 Replacement Volume). Any reclassification directed by a county court is subject to review by the state tax commissioner.
result in automatic salary increases for incumbent county officials in a manner prohibited by West Virginia Constitution, Article VI, Section 38." The court sustained this argument on the basis that mid-term salary increases are legitimate only if accompanied by parallel increases in duties.

105 Id. at 78.
106 Id. at 78-79.
CONTRACTS

I. ASSIGNMENT

In *Cox v. Galigher Motor Sales Co.* the plaintiff bought a Ford truck under a retail installment contract from Galigher. The contract was then assigned to Ford Motor Credit Company, a wholly owned subsidiary of Ford Motor Company. The truck proved unsatisfactory for its intended purpose from the time it was purchased, and numerous repairs were made under the Ford warranty. Upon Ford's refusal to make later repairs, the plaintiff withheld further payments on the installment contract. A credit company representative asked permission to take the truck in for the repairs. After the truck was taken away, the plaintiff received a notice from Ford Credit Company that the truck had been repossessed and would be sold at auction.

The installment contract provided that the buyer (plaintiff) would not assert any claim or defense against a subsequent holder of the contract. The court noted that if the credit company was an assignee for value, the matter would be controlled by statute which provides that an assignee who takes an assignment for value, in good faith and without notice of a claim or defense can enforce the agreement by the buyer not to assert a claim or defense. The court had to decide who had the burden of proving that the assignee took the assignment for value, in good faith and without notice of the claim. The *Cox* court, applying principles of the law of negotiable instruments, held that the person who executed the installment contract (plaintiff) had the burden of proof. The court also held that the plaintiff could not assert the defects in the truck as a defense to the credit company's claim, as this must be asserted against the seller (Galigher).

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110 Mere possession of a negotiable instrument by an assignee is prima facie proof that he acquired it bona fide. The burden of proving that a holder did not acquire it bona fide is on the maker. Marshall County Bank v. Citizens Mutual Trust Co., 114 W. Va. 791, 174 S.E. 556 (1934).
Although the plaintiff alleged that the repossession of the truck was accomplished through deceit, the court, while stating that such practices were not favored, upheld the repossession since the controlling statute authorized repossession without judicial process as long as no breach of the peace occurred.

II. Arbitration

In Board of Education v. W. Harley Miller, Inc., the West Virginia Supreme Court of Appeals dealt with a standard arbitration clause contained in a construction contract. Following a contractual dispute, the board obtained an injunction restraining the construction company from proceeding with arbitration pending the outcome of a declaratory judgment action. The question presented was "whether the parties have a contractual obligation to submit the dispute to arbitration before either may resort to court action."

The court noted that the common law permitted arbitration but allowed revocation of the promise to submit to arbitration at any time prior to the award "because of that principle of law that parties could not, by agreement, oust the courts of their jurisdiction assigned them by law . . . ." The court also noted that statutory arbitration applies only to existing controversies and supplements, but does not replace, common law arbitration. Therefore, a suit could still be maintained where the agreement provided for arbitration as to "future" or "all" disputes.

The court noted an exception to the common law, however, which states that "an agreement to arbitrate future controversies is not revocable where it has been made a condition precedent to a right of action." Applying this exception to the arbitration
clause in *Board of Education*, the court found that arbitration was mandatory and a condition precedent to any right of action arising under the contract. The court stated that the common law rationale that arbitration ousted courts of jurisdiction was "archaic," and that statutory arbitration "inhibits rather than encourages the arbitration mechanism. It would appear that a modern and comprehensive statute on the subject of arbitration is sorely needed."
CRIMINAL LAW AND PROCEDURE

As in the past, the West Virginia court dealt with more criminal cases than any other subject in 1975. In nearly every decision discussed below, the Supreme Court of Appeals rewrote a significant area of the law. The liberal attitude of the Court reached its high point in 1975. It can only be hoped that Chief Justice Haden's appointment to the federal bench will not deter the court from its recent trend of progressive interpretation.

I. CONSPIRACY

In Pinkerton v. Farr the West Virginia Supreme Court of Appeals held unconstitutional a statute that ninety years earlier a prior court had characterized as a "'desperate remedy' to combat "lawless bands of men, known as 'Red Men', 'Regulators', 'Vigilance Committees'" and others, who persistantly inflicted punishment upon and destroyed property of innocent people."

Six defendants were indicted for felonious assault and conspiracy to inflict bodily injury. Prior to their trials, four of the six so charged sought two separate writs of prohibition from the Supreme Court of Appeals challenging as unconstitutional West Virginia's "Red Men's Act."

The "Red Men's Act" is West Virginia Code Ann. § 61-6-7 (1966). The following cases were decided by the West Virginia Supreme Court of Appeals on the subject of criminal procedure during 1975, but will not be discussed in this survey: State v. Arnold, 219 S.E.2d 922 (W. Va. 1975) (determination of abuse of discretion); State ex rel. Postelwaite v. Bechtold, 212 S.E.2d 69 (W. Va. 1975) (conflicts in dual representation); State v. Riley, 215 S.E.2d 460 (W. Va. 1975) (operating vehicle without Public Service Commission identification card). Two other cases will not be discussed since they deal with evidentiary rather than purely criminal topics; State v. Ramey, 212 S.E.2d 737 (W. Va. 1975); State v. Spadafore, 220 S.E.2d 655 (W. Va. 1975). Also, see Note, Due Process—Right to Counsel at Pretrial Identifications, 78 W. Va. L. Rev. 84, 90 (1975), for a discussion of State v. Moore, 212 S.E.2d 608 (W. Va. 1975) and State v. Stollings, 212 S.E.2d 745 (W. Va. 1975), both cases discussing whether or not a preindictment lineup or "show-up" requires the assistance of counsel.

Lycans v. Bordenkircher, 220 S.E.2d 14 (W. Va. 1975), although a 1975 decision involving important criminal procedure issues, was published subsequent to our deadline, and hence, will not be discussed in this volume.

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Smith v. Oakley, 220 S.E.2d 689 (1975) was decided in a memorandum opinion and relied totally on Pinkerton. No reference to Smith will be made other than to say that the petitioner Smith was indicted as a co-defendant of Pinkerton.

W. Va. Code Ann. § 61-6-7 (1966)(the 'Red Men's Act') provides that:
Virginia's conspiracy statute. This statute provides that it is a misdemeanor for one person to "conspire or combine" with another for the purpose of inflicting bodily injury or defacing public property. Should the conspirators actually commit the planned assault or defacement, they may be found guilty of a felony and subject to ten years imprisonment. Most significantly, however, if the defendant was present and aided and abetted any others in the commission of a crime, the law presumes that the parties were conspirators. Consequently, should the defendant be charged with conspiracy under the "Red Men's Act," he then, interestingly enough, has the burden of persuading the jury of his innocence. Obviously, the "Red Men's Act" was a powerful weapon in the hands of the mine operators in their attempts to destroy the United Mine Workers in the late nineteenth and early twentieth century.

The defendants raised three constitutional challenges to the statute's validity. First, they asserted that because the act allows the prosecution to prove each defendant individually guilty of assault and then shifts the burden to each defendant to exonerate himself from the charge of conspiracy, the statute violates the right of an accused to be free from self-incrimination. In other words, the statute provides that once the state has established each defendant guilty of assault, the guilty party's only available avenue to prove that he was not a conspirator is to take the stand in his own

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If two or more persons . . . combine or conspire together for the purpose of inflicting any punishment or bodily injury upon any other person or persons, or for the purpose of destroying, injuring, defacing, or taking and carrying away any property . . . , every such person, whether he has done any act in pursuance of such combination or conspiracy or not, shall be guilty of a misdemeanor. . . .

If any person, in pursuance of such combination or conspiracy, shall inflict any punishment or bodily injury upon another person, or shall destroy, injure, deface, or take and carry away, any property . . . not his own, he shall be guilty of a felony . . . , and if the death of any person shall result from the commission of such offense, every person engaged in the commission thereof shall be guilty of murder of the first degree . . . . If, upon the trial of an indictment hereunder, it be proved that two or more persons . . . were present, aiding and abetting in the commission of the offense charged therein, it shall be presumed that such offense was committed in pursuance of such combination or conspiracy, in the absence of satisfactory proof to the contrary. And all persons who were present, aiding and abetting, at the commission of any offense mentioned herein, shall be deemed conspirators within the meaning hereof . . . .

U.S. Const. amend. V provides in pertinent part that: "No person . . . may be compelled in any criminal case to be a witness against himself . . . ."
defense. Hence, merely by charging the defendant with the crime, the prosecution compels him either to testify in his own behalf or to remain silent and suffer the consequences of his presumed guilt. Unlike the typical criminal charge, the "Red Men's Act" converts the right of an accused to remain silent into an incriminating act. Since the constitutional protection of freedom from self-incrimination encompasses the defendant's right to remain silent, the court found the "Red Men's Act" unconstitutional, at least to the extent that it requires the defendant to come forth with evidence to establish his innocence.

The defendants next attacked the statute's proclamation that once the state has proven assault and the fact that at least one other person was present and engaged in the act, "it shall be presumed that such offense was committed in pursuance of such combination or conspiracy . . . ." This provision is obviously contrary to perhaps the most elementary facet of American criminal justice—the defendant's right to a presumption of innocence. Though not an express constitutional right, this fundamental presumption is nonetheless embodied in the due process clause of both the state and federal constitutions. Justice Caplan quoted an 1817 English case for the proposition that "this presumption of innocence is to be found in every code of law which has reason, and. religion, and humanity, for a foundation."

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133 See W. VA. CODE ANN. § 57-3-6 (1966) as discussed in State v. Taylor, 57 W. Va. 228, 234-35, 50 S.E. 247, 249 (1905); it is designed to enforce the common law maxim . . . which protects the citizen from being required in any criminal case to be a witness against himself. One of the most excellent principles of the common law was that the state took upon itself the burden of proving the guilt of the prisoner . . . . So the law, having brought the prisoner into court against his will, did not permit his silence to be treated or used as evidence against him.
135 U.S. CONST. amend. XIV provides that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." The same language is found in the West Virginia Constitution, Art. III, § 10. For the proposition that a defendant is guaranteed a presumption of innocence, the court quoted Coffin v. United States, 156 U.S. 432 (1895): "The principle that there is a presumption of innocence in favor of the accused is the undisputed law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Id. at 439. See, e.g., State v. Pietranton, 140 W. Va. 444, 84 S.E.2d 774 (1954).
136 220 S.E.2d at 686-87.
Not only does the statute offend the due process clause in failing to comprehend the accused’s right to a presumption of innocence, but it ignores the principle that in all criminal cases the state has the burden of proving the defendant’s guilt beyond a reasonable doubt. Although the right of a defendant to have the state prove his guilt beyond a reasonable doubt is nowhere expressly granted as a constitutional right, the due process clause has been held to contain this fundamental principle “deemed essential for the protection of life and liberty.”

The defendants combined their second attack, that the statute violates the constitutional right to a presumption of innocence, with the contention that the evidentiary effect of a presumption of guilt is conviction by presumption rather than by conclusive proof. Again, the court declared that any statute permitting guilt to be proven by presumption is “patently contrary to the basic concepts of criminal justice” and hence, constitutionally unacceptable.

The state defended the “Red Men’s Act” by contending that, if an assault is carried out by two or more persons “it is more likely than not that some form of agreement for concerted action existed.” Thus, the state argued, the statute legitimately expresses a “rational connection” between the fact proved and the fact presumed. The United States Supreme Court has held that to be constitutional, a “rational connection” must be supported by “substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” Applying the “rational connection” test to the “Red Men’s Act,” the court was unable to state with “substantial assurance,” that assault by two or more individuals is the likely result of a conspiracy. Thus the statute, rather than rational, was declared to be irrational and unconstitutional.

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138 220 S.E.2d at 688.
139 Id. at 687-88.
140 Id. at 688.
142 220 S.E.2d at 689.
Although little remained of the “Red Men’s Act,” the court had not fully dealt with the concluding sentence of the statute. The provision making all persons present, aiding and abetting, conspirators, was, in the court’s words, an “unequivocal declaration of guilt.” This provision meant that the state need not prove anything other than presence and assault; that as a matter of law the defendants were guilty if charged. Like the rest of the statute, this element was stricken as being unconstitutional. Other than as a bad memory, it is unlikely that the “Red Men’s Act” will long be missed when finally erased from the Code.

II. DEFENDANT’S RIGHT OF PRESENCE

The right of the criminal defendant in felony cases in West Virginia to be personally present “from the inception of the trial upon the indictment to the final judgment inclusive when anything is done affecting him” has, at various times in the history of the state, been termed a “constitutional right” or an “inalienable right.” The common law rule of presence was incorporated into the Virginia Codes of 1849 and 1860 and has remained a part of West Virginia statutory law since 1868. In a long line of cases, with only a few isolated and inconsistent exceptions, the right of presence has been deemed mandatory and incapable of being waived by the defendant. The unwavering application of the presence rule has caused numerous retrials, even though the defendants could not possibly have been prejudiced by their temporary absence from the proceedings.

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143 Id.
144 Id.
146 State v. Sheppard, 49 W. Va. 582, 39 S.E. 676 (1901).
147 State v. Grove, 74 W. Va. 702, 82 S.E. 1019 (1914).
150 E.g. State v. Sheppard, 49 W. Va. 582, 39 S.E. 676 (1901).
151 Perhaps the most extreme example of the rigidity of the presence doctrine occurred in State v. Shepperd, 49 W. Va. 582, 39 S.E. 676 (1901). During the defendant’s absence from the courtroom, a prosecution witness was asked her name
The demise of the presence doctrine was initiated in a stirring dissent by Judge Calhoun in *State v. Vance.* In *Vance,* the majority reversed a conviction because the defendant had voluntarily absented himself from the court for four or five minutes. Calhoun disagreed and advocated that in future decisions the court view each absence of presence through the lens of a harmless error standard. Calhoun's plea was finally adopted by the Supreme Court of Appeals last year in the companion cases, *State ex rel. Grob v. Blair* and *State v. Slie.*

In *Grob,* the defendant was identified at trial by an eyewitness as one of two men who had assaulted and killed a man in Ohio County. On the day after her incriminating recognition, the witness contacted her attorney and stated that she now wished to recant her prior testimony. The trial judge, prosecutor, and defense counsel then met with the eyewitness and her lawyer in the judge's quarters, only to learn that the witness no longer desired to withdraw her identification. During the examination of the witness the defendant was confined in jail, but his attorney raised no objection to his absence. At no time was the witness recalled to the stand and, because the witness' hesitancy had been based, not on faulty recollection, but upon fear of retribution, her indecision was kept from the jury. A verdict of guilty was later returned to the charge of first degree murder.

The defendant in *Slie* was twice absent during his trial. On the first occasion, his lawyer, the judge, and the prosecutor met outside the courtroom to review the trial transcript. No ruling was made as a result of this meeting. The defendant, however, was absent, as was his lawyer, when the judge and prosecutor later met to discuss instructions. *Slie* was subsequently convicted of kidnapping.

and that of her husband. When the defendant was brought before the court, only moments after the examination, the same question and answers were repeated for his benefit. The court readily admitted that the defendant could not possibly have been detrimentally affected by his absence. Nevertheless, the court applied unquestioningly the strict rule of presence, determined that prejudicial error had occurred and remanded for a new trial.


146 W. Va. at 942, 124 S.E.2d at 261.


213 S.E.2d 109 (W. Va. 1975). Although *Grob* and *Slie* were decided on the same day, *Grob* discusses in detail the historical discussion of presence and the modification brought about by the two cases, *Slie* relies wholly on *Grob* for its rationale.
To gain a clear picture of the new presence rule, a distinction must first be drawn between the constitutional requirement of confrontation and the statutory doctrine of presence. Both the United States and West Virginia Constitutions assert that in all criminal prosecutions "the accused shall . . . be confronted with the witnesses against him . . . ." The object of this provision is:

- to prevent deposition or *ex parte* affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.  

While numerous exceptions have been carved out of the confrontation clause, this provision clearly indicates that cross-examination is a vital need of any defendant and cannot be evaded by the prosecution if any viable alternative to the attempted infringement exists.

Presence, unlike confrontation, pertains not only during the introduction of testimony, but at all stages of the proceedings. The doctrine of presence seeks to avoid any decision by the state without the physical cognizance of the accused. Yet the typical criminal defendant has little familiarity with the subtle intricacies of our criminal processes. Hence, the Supreme Court has fashioned a lengthy list of "critical stages" in any criminal proceeding, all of which require the guiding hand and legally educated mind of a lawyer. Generally, it is not the defendant's presence, but rather that of his lawyer which is essential for the fair treatment of the accused. The United States Constitution requires the presence of the defendant only when such presence "has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."

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158 See Pointer v. Texas, 380 U.S. 400 (1965) for certain constitutionally permissible exceptions to the confrontation clause.
160 Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934). Mr. Justice Cardozo stated in *Snyder*: "[I]f so far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just
The West Virginia Court had recognized this prior to Grob and Slie on only rare occasions. The trouble was that these exceptions could not be squared with the vast majority of the case law. To eliminate these inconsistencies the court stated that "[h]enceforth, before an accused will be entitled to count his absence at a critical stage of the trial proceeding as reversible error, he must demonstrate a possibility of prejudice in the occurrence."\(^{169}\)

Although the new standard was adopted in Grob and Slie, both defendants persuaded the court that the "possibility of prejudice" existed from their absence. The analysis by Chief Justice Haden in Grob deserves special mention. Haden recognized that confrontation and presence are not mutually exclusive and that in certain circumstances, the defendant's presence is so relevant to the proper adjudication of his case that his absence would not only violate his statutory right to presence, but his constitutional right to confront his accusers as well.\(^{61}\) If, then, as in Grob, a key prosecution witness is examined by the court, particularly one whose story has suddenly changed, the "confrontation right converges with the presence right, if the accused was absent when the prosecution witness was questioned."\(^{162}\)

As a further index of what the court will look to in the future to judge if a defendant has been prejudiced by his absence at a particular moment, Haden stated that at any "critical stage in the criminal proceeding" the accused has a right to be present.\(^{163}\) Thus in Slie, since the defendant was unaffected by the review of the record outside the courtroom by the judge, prosecutor, and defense counsel, the court ruled that his absence did not constitute preju-

\(^{169}\) Id. at 107-08.

Confusion of thought will result if we fail to mark the distinction between requirements in respect of presence that have their source in the common law, and requirements that have their source, either expressly or by implication, in the federal constitution. Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of trial when there are witnesses to be questioned.

\(^{214}\) 214 S.E.2d at 337.

\(^{61}\) Id. at 337-38.

\(^{162}\) Id. at 338.

\(^{163}\) Id.
It is unclear, though, whether this absence was construed to be harmless error because at a critical stage nothing was done that affected the defendant, or because the consultation of the record did not involve a critical stage. The court did find, however, that prejudicial error had occurred when the judge and prosecutor, without either the defendant or his counsel, later secluded themselves to consider instructions. 6

III. DISCOVERY

"Liberal procedures for discovery in preparation for trial are essential to any modern judicial system in which the search for truth in aid of justice is paramount and in which concealment and surprise are not to be tolerated." 7 The above standard reflects the belief that our judicial system functions at its optimum when the vestiges of trial by ambush are eliminated in civil litigation. While the modern rules of discovery have brought clarity and efficiency into court in civil cases, the criminal defendant, by comparison, often must enter the arena not knowing at what moment the prosecution may spring an unforeseen trap. The need for extensive defense discovery in criminal trials is sharply brought into focus in the case of an indigent defendant. Lacking the funds to adequately develop his proof, such a defendant can only formulate his pretrial strategy in the dark, whereas the prosecution can activate national, state and local police forces, armed with limitless resources and complex investigatory tools, in an attempt to win its case. In 1975 the West Virginia court in *State v. Dudick* 8 took a significant step to more evenly balance the scales in criminal trials.

Metro Dudick was convicted of possession of marijuana. One of two policemen who conducted the incriminating search of Dudick's apartment, testified that the odor of marijuana was noticeable and a burning cigarette believed to contain the illegal substance was found. Refreshing his memory from a police report of which defense counsel was denied inspection, the officer further testified that the cigarette was seized, analyzed, and found to contain marijuana. Subsequent to conviction, the defense counsel was permitted to examine the police report where he discovered that the state's analysis of the burning cigarette had in fact returned

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6 Id. at 117.
7 Id. at 116-17.
negative results. Although the defense brought this information to the trial court's attention in a motion for a new trial, the conviction was allowed to stand. On appeal, Justice Neely, though noting that scant authority in prior decisions supported the holding, ruled that it was reversible error to deny defense counsel the opportunity to inspect the police records used by the witnesses to aid their recollections.

West Virginia has long clung to the common law rule that discovery in a criminal case rests almost exclusively within the discretion of the trial court; the notable exception being clearly exculpatory evidence or information held by the state. By statute, West Virginia defendants have recently been entitled to receive from the state any written or recorded statements or confessions made by the prisoner, results of any physical or mental examinations and scientific tests made in connection with the case and inspection rights to any tangible objects seized from the defendant. And only three years ago the Supreme Court of Appeals gave its permission to defense counsel, with approval of the trial judge, to view the portions of notes taken to the stand that are actually used by the witness.

*Dudick* is clearly a significant case. Although the trial judge will continue to exercise great discretion in decisions on pretrial discovery, *Dudick* can be cited for the proposition that:

> [O]nce a prosecution witness has testified from notes used to refresh his recollection, the defense is absolutely entitled to look at the notes from which he testified and must be given a reasonable opportunity to study the material and to prepare cross-examination. When a police report encompasses additional information which is not the subject of direct examination, the defense is entitled to inspect it as well, unless the judge determines in an *in camera* proceeding that the material is in no way relevant to the defendant's case and disclosure of the material (for example, the names of confidential informants) would endanger police activities in the future.

Although unclear from the decision, it appears as if defense counsel still cannot demand inspection of documents or memoranda not

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172 213 S.E.2d at 464.
brought to the witness stand, though used by the state to establish its case.

The question that must be asked, though, is whether *Dudick* goes far enough to eliminate the antiquated theatrical element of unfair surprise in criminal proceedings. In defense of limited discovery in criminal cases Judge Learned Hand once stated that "[o]ur dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." But in answer to Judge Hand, it should be remembered that the object of the prosecution is fulfilled, not when the charged defendant is convicted, but rather when the guilty party is convicted. As stated by the United States Supreme Court, the interest of the prosecution in a criminal trial "is not that it shall win a case, but that justice shall be done."

In tracing the precedent for the court's decision in *Dudick*, Justice Neely cited the leading federal case on discovery, *Jencks v. United States*. In *Jencks* the United States Supreme Court ruled, not as a matter of constitutional necessity, but as a guide for federal criminal proceedings, that justice demands that defense attorneys be allowed to examine all notes brought to the witness stand by witnesses for the government. In this respect, *Dudick* echoes *Jencks*. Since *Jencks*, however, many jurisdictions, particularly federal, have greatly expanded the rights of defendants to know *in advance* what the prosecution will try to prove and what basis in evidence supports that aim. The genesis of this recent movement was the publication of the American Bar Association's Standards of Discovery and Procedure Before Trial. The Standards require that the prosecutor furnish defense counsel with: the names and addresses of persons the prosecutor will call as witnesses, together with any relevant pretrial statements they may have made; any portion of grand jury minutes containing testi-

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133 353 U.S. 657 (1956).
16 Id. 2.1(j).
17 Id. 2.1(j).
mony of the defendant or the prosecution's witnesses; and any record of prior criminal convictions of persons the prosecutor intends to call as witnesses. As a measure of reciprocity, the Standards also provide that "[s]ubject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom the defense counsel intends to call as witnesses in support thereof."

Although the Standards go far beyond present pretrial criminal discovery rules in West Virginia, it is interesting to note that since 1960, similar standards have governed the civil side of the docket. Justice Neely, in defending the court's decision to hold the line on pretrial discovery, expressed the arguments advanced by most American courts. First, it is generally contended that "the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense." Second, it is feared that the intimidation or elimination of hostile witnesses might occur. Third, discovery cannot be a one-way street, and since the defendant does not have to reciprocate, he will gain an unfair advantage over the prosecution. The underlying premise of this argument is that the privilege against self-incrimination prevents criminal discovery from ever being a two-way street. Finally, unfairness is the result when the prosecutor

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180 Id. 2.1(iii)
181 Id. 2.1(vi).
182 Id. 3.3.
184 213 S.E.2d at 463.
186 The four justifications on limited discovery mentioned by the court have been attacked by many commentators in recent years. The leading article criticizing narrow discovery rules as contrary to the presumption of innocence is one written by Mr. Justice Brennan, then a member of the New Jersey Supreme Court. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 WASH. U. L. Q. 279.

The most often stated defense to restrictive discovery is that liberalization will lead to perjury. Of course, this objection is merely hypothetical given that the door to such discovery has generally remained firmly shut. Also, it is questionable that the severity of criminal prosecutions so exceeds the penalties of similar civil actions that perjury would occur only in the civil case. E.g., Why might a criminal trial involving a charge of tax evasion produce perjury while a civil trial for such a violation remain free of such abuse? Finally, if we are concerned that a criminal defendant will learn too much of the case against him, we are actually hurting only the innocent defendant. If a defendant is truly guilty as charged, it would seem that he already possesses the requisite knowledge to formulate a false defense. See
is forced to investigate his case and then turn the work product over to the accused. Although a full analysis of the above points is far beyond the scope of this article, it is sufficient to say that the present trend is toward ABA-like discovery rules in most states, and little adverse reaction to their implementation has surfaced as of yet.

IV. DISQUALIFICATION OF JUDGE

In State v. Sams the defendant appealed his conviction for breaking and entering, asserting that the special judge before whom his trial was conducted should have disqualified himself because he was pecuniarily interested in the outcome of the case. At the time of the crime and of the trial, the judge was a member of the Elks Club that the defendant was charged with breaking and entering. In effect a partial owner of the premises, the defense argued that the judge was financially interested in the outcome of the case and therefore should have disqualified himself.

As to whether membership in the Elks was reason enough for disqualification of the judge in this case, the court stated as the general rule that any pecuniary interest in the trial, however slight, is grounds for reversal. Typically, disqualification for this reason occurs when the judge stands to benefit in some manner by the outcome of the case. Disqualification might also be proper where the trial judge can be shown to have an interest in retribution against the defendant. Examples of the latter would be if the defendant had assaulted a member of the judge's family or stolen his car.

In Sams, defense counsel chose only to attack the possible pecuniary interest the judge might have had in the defendant's conviction. But as the Supreme Court of Appeals pointed out, a special judge's salary is provided for by statute in West Virginia, and regardless of the outcome, no direct monetary benefit would flow to the judge. While any monetary benefit is grounds for dis-

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qualification, this benefit "must be direct; it must be real and certain, and not one which is merely incidental, remote, contingent, or possible." Hence, as no court official integrally involved in the litigation stood to gain by the defendant's conviction, the court held the special judge's membership in the Elks insufficient ground for disqualification.

V. Guilty Pleas

In Call v. McKenzie, an indigent prisoner sought a writ of habeas corpus on the grounds that the Circuit Court of Marshall County had denied him the equal protection of the laws by refusing to provide him with a transcript of the proceedings surrounding his guilty plea. In State ex rel. Wright v. Boles the principle was established that an indigent defendant who pleads not guilty is always entitled to a free transcript of his trial. Wright established a corollary principle, however, that an accused who pleads guilty, if represented by counsel, may only obtain a free transcript if he can demonstrate some constitutional irregularity surrounding the circumstances of his plea. But as the court recognized in Call, thereby overruling Wright, it is a contradiction in terms to ask a prisoner to set forth irregularities in his guilty plea if he is not first provided with a transcript to ascertain whether or not error was committed by the sentencing court. Further, the court recognized that in the continuing series of cases following Griffin v. Illinois, the United States Supreme Court has demonstrated that the equal protection clause of the fourteenth amendment will not tolerate any disparity based on pecuniary excuses in the functioning of our criminal processes.

In awarding the petitioner in Call his transcript, the court also set forth in extraordinary detail guidelines for trial courts to engage in prior to the acceptance of future guilty pleas. The impact of Call on the procedures preliminary to acceptance of guilty pleas must be properly qualified. As the court readily admitted, future ignorance of the decision will not invalidate a guilty plea other than for failure to abide by presently existing standards. The

190 210 S.E.2d at 917.
194 220 S.E.2d 668.
195 Id. at 669-71.
196 Id. at 671.
question that must be asked, then, is why were the procedures in Call set forth in such great detail if they are to have no future effect?

In the past decade the number of habeas corpus petitions has grown at an alarming rate. At the present time, habeas corpus decisions occupy more space on the civil dockets of federal and state courts than any other type of proceeding. Unless some remedy is found soon, many commentators fear the burden may well become too much to bear. The problem is particularly acute if the subject of the petition is a challenge to a previously given guilty plea. After the plea is tendered, often to a lesser included offense or upon a promise not to enforce an habitual criminal statute, the state has waived much of its power to enforce the original charge should the plea prove defective. Similarly, should a habeas corpus petition prove successful, the prosecution may be unable to establish a case from evidence gone stale by passage of time. Thus, it may be strategically wise to bargain for a lighter sentence than the crime justifies and then to attack the plea collaterally. As recognized in Call, the greatest volume of habeas corpus litigation concerns whether a plea was intelligently and voluntarily given.

Suggested remedies to the habeas corpus problem have ranged from the creation of new courts to an abandonment of our present standards and a return to the time when habeas corpus was limited solely to jurisdictional defects. Justice Neely in Call points out another possible remedy that has perhaps been overlooked in our


201 220 S.E.2d at 669-70.

202 Ex Parte Lange, 86 U.S. (18 Wall.) 163 (1873).
rush to create new and innovative rules of law. He argues that, consistent with present considerations of due process, we cannot establish technical bars to forbid writs of habeas corpus. We can however, greatly facilitate our present review standard of these writs by insuring that when something is done to a criminal defendant, it is done correctly and within the scope of the Constitution. Once a procedure is properly performed, a habeas corpus petition can be summarily reviewed and dismissed.

A lurking question though, is whether our trial courts are capable of properly discharging their duties within the framework of the Constitution so as to leave no room for errors demanding reversal on appeal. Clearly, this should not be too much to expect from the courts, though the volume of appeals seems to suggest otherwise. It seems more consistent with fundamental considerations of due process to demand perfection on the part of courts rather than expertise on the part of defendants in wandering through a maze of technicalities in search of the Constitution.

Justice Neeley's contention is that if trial courts fully explain to a defendant what he is waiving when he pleads guilty, what he stands to lose by his plea, what he could gain or lose by an opposite plea, and the simple fundamentals of our criminal system, then the same courts could escape redetermining the issue on a writ of habeas corpus.

To further this aim the West Virginia court has set forth, almost in textbook fashion, a complete list of rudimentary operations in which trial courts should engage prior to the acceptance of a guilty plea. The United States Supreme Court has stated that guilty pleas must be accepted only if voluntarily and intelligently made. To expedite this, the West Virginia court suggests that the defendant be advised in simple, non-technical language of exactly what is occurring. Much too often the trial judge discusses the case with the defendant's lawyer rather than the defendant. Since it is the defendant's understanding of the
situation that is required, a judge should, if possible, involve the defendant in a discussion of the proceedings before him. More specifically, a judge should inform the defendant of those rights he waives once he pleads guilty:

1) the right to retain counsel of his choice, and if indigent, the right to court-appointed counsel;
2) the right to consult with counsel and to have counsel prepare the defense;
3) the right to a public trial by an impartial jury of twelve persons;
4) the right to have the state prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings;
5) the right to confront and cross-examine his accusers;
6) the right to present witnesses in his own defense and to testify himself in his own defense;
7) the right to appeal the conviction for any errors of law;
8) the right to move to suppress illegally obtained evidence and illegally obtained confessions; and,
9) the right to challenge in the trial court and on appeal all pretrial proceedings.207

Should the above standards be followed by criminal courts, it seems very likely that the additional time spent before acceptance of a guilty plea would be more than compensated for by a greater savings from the reduction of lengthy habeas corpus hearings.

VI. LESSER INCLUDED OFFENSES

In State v. Bailey208 the defendant was charged with grand larceny of an automobile. As a defense, Bailey claimed that he was intoxicated209 on the night of the theft for the purpose of showing that he lacked the requisite mental capacity to formulate a plan to permanently deprive the owner of his automobile. Accordingly, defense counsel requested an instruction by the court that would

207 220 S.E.2d at 667 (syl. pt. 3).
209 The prosecution produced six witnesses, including the two arresting officers, all of whom testified that not only did the accused appear to be sober at the time of his arrest, but that no trace of alcohol could be detected on his person. Apparently, no chemical test was given in an attempt to substantiate this testimony although the defendant was hospitalized for injuries received from the rigors of his escape attempt, thus, affording ample time for any such test. A fellow jailmate did testify, though, that he did recognize the scent of alcohol, but that the defendant did not appear to be intoxicated.
allow the jury to find the defendant guilty of joyriding\textsuperscript{210} rather than larceny.\textsuperscript{211} The trial court refused to give the joyriding instruction, however, and the Supreme Court of Appeals affirmed, stating that as joyriding is not a lesser included offense of grand larceny, the instruction could not be given.

As to what constitutes a lesser included offense, Justice Flowers, writing for a majority of three, stated as the general rule: "[i]f the lesser offense requires the inclusion of an element not required in the greater offense, the lesser is not necessarily included in the greater."\textsuperscript{212} Since larceny requires the intent to permanently deprive the owner of his property and joyriding the intent to temporarily deprive the owner, "‘joyriding’ requires the inclusion of an element not required in the greater offense of larceny and cannot be regarded as a ‘lesser included offense’ to larceny."\textsuperscript{213} The court acknowledged that several states do consider joyriding a lesser included offense of larceny of an automobile. This difference in definition was attributed to the fact that the minority states define joyriding as the absence of intent to permanently deprive,\textsuperscript{214} while the West Virginia statute calls for the presence of intent to tempo-

\textsuperscript{210} W. Va. Code Ann. § 17A-8-4 (1974 Replacement Volume) is the "joyriding" statute. It provides that:

Any person who drives a vehicle, not his own, without consent of the owner thereof, and with intent temporarily to deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor.

\textsuperscript{211} W. Va. Code Ann. § 61-3-13 (1966) provides that:

If any person commit simple larceny of goods or chattels, he shall, if they be of the value of fifty dollars or more, be deemed guilty of grand larceny, and, upon conviction thereof, shall be confined in the penitentiary not less than one nor more than ten years.

Larceny is defined as the taking and carrying away of the goods and chattels of another, with the intent to deprive the owner of his property permanently. Crow v. Coiner, 323 F. Supp. 555 (N.D.W. Va. 1971); State v. Pietranton, 137 W. Va. 477, 72 S.E.2d 617 (1952).

\textsuperscript{212} 220 S.E.2d at 437.


\textsuperscript{214} E.g., Spencer v. State, 501 S.W.2d 799 (Tenn. 1973), states that Tenn. Code Ann. § 59-504 (1968), which provides that the taking of a vehicle unlawfully, but without the intent to permanently deprive, permits the trial court to instruct the jury on the possibility of finding the defendant guilty of either joyriding or larceny.
rarily deprive. Justice Flowers admitted the merit of the minority interpretation, but stated that our statute forbids such interpretation.

Chief Justice Haden and Justice Neely disagreed with the reasoning of the majority, though Justice Neely stated that the facts of this particular case did not warrant an instruction of joyriding. In retrospect, the dissent seems to have the better argument. Chief Justice Haden pointed out that as the issue of intoxication was at least a question of fact, the trial judge should not have ruled as a matter of law that the defendant could not possibly have been intoxicated. Although the only evidence as to the accused's intoxication was given by the defendant, certainly the ultimate decision of this factual question resides primarily with the jury. The majority defended its decision by stating that disallowing the joyriding instruction "left the state with the more onerous burden of proving grand larceny and, therewith, a higher attendant risk of the defendant's exoneration." Although this is obviously correct, it seems to place too much emphasis on strategic guessing games that the prosecution must play when seeking an indictment. A more objective approach would be to allow the jury to view all of the evidence and then choose from all of the verdicts that the facts might reasonably infer. While a jury faced with mountains of conflicting evidence may opt for the middle ground of joyriding rather than larceny, if only two choices are given, the jury may feel that the defendant, while not guilty of grand larceny, is certainly guilty of something and return a verdict of guilty totally unsupported by the evidence. The concluding statement of Justice Haden expresses the general criticism of the majority position: "The quality of justice would not be strained if the law should benefit from more realistic application."

VII. Preliminary Hearings

In Spaulding v. Warden, West Virginia State Penitentiary, the Supreme Court of Appeals was asked to decide whether the preliminary hearing procedure in West Virginia is a "critical stage" in the prosecution of a criminal defendant. The "critical

215 220 S.E.2d at 439 (Neely, J., concurring in part and dissenting in part).
214 Id. at 438.
213 Id.
212 Id. at 439.
The "state" test has consistently been applied by the United States Supreme Court in deciding whether, in a non-trial proceeding, the denial of counsel would "derogate from the accused's right to a fair trial." The leading case on the right to counsel at pretrial adjudications of probable cause is Coleman v. Alabama. In Coleman, the Supreme Court observed, after careful scrutiny of Alabama's preliminary hearing requirements, that regardless of whether the defendant would be denied the opportunity to later assert any defense, the right of Alabama defendants to cross-examine prosecution witnesses at the hearing, meant that substantial prejudice could occur should defendants be denied the assistance of counsel at this stage. By later decisions, however, particularly the Supreme Court's 1975 ruling in Gerstein v. Pugh, it is clear that a formal adversarial preliminary hearing is not a constitutional right and that not all preliminary hearings create a "critical stage." Hence, in hearings less formal than those envisioned by the Alabama statutes, a denial of counsel might not necessitate reversal should the

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United States v. Wade, 388 U.S. 218, 226 (1967). In Wade, the United States Supreme Court required that courts:

[S]crutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. 388 U.S. at 227.

"Critical stages" have been found in the following cases: Argersinger v. Hamlin, 407 U.S. 25 (1972)(preparation for trial in misdemeanor cases where imprisonment is a possibility); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings at which the defendant is given the right to cross examine); United States v. Wade, 388 U.S. 218 (1967)(post-indictment lineups); Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogations); Massiah v. United States, 377 U.S. 201 (1964)(post-indictment confrontations at which police have access to the conversation); Hamilton v. Alabama, 368 U.S. 52 (1961)(arraignment where right to present certain defenses is waived if not asserted).


See note 232 and accompanying text infra.

420 U.S. 103 (1975). In Gerstein the Court ruled that some form of probable cause hearing must precede incarceration pending trial. The Court held, however, that the probable cause hearing need not, under the fourth amendment, take the form of an adversarial procedure. This standard was justified because a probable cause determination "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." 420 U.S. at 721.
defendant “go it alone.” Underlying this structure is the fact that, even should the hearing be deemed critical, denial of counsel is reversible error only if the state fails to demonstrate beyond a reasonable doubt that such denial was harmless.\textsuperscript{221}

Against this rather complex background, the West Virginia court was presented with the habeas corpus appeal of Roy Spaulding. Warrants had been issued for the arrest of Spaulding and two others on a charge of breaking and entering. After being arrested and handcuffed, Spaulding escaped and eluded his pursuers for five hours. Apprehended once again, Spaulding was apparently “roughed up” by the arresting officers,\textsuperscript{222} then taken to the police station where he was advised of his constitutional rights. On the following day Spaulding supposedly signed a confession to which defense counsel objected at trial on the grounds that it was a forgery. The objection overruled, the confession was admitted into evidence though no prior hearing was held to determine either the voluntariness of the confession or the authenticity of the handwriting.\textsuperscript{226} One day after his alleged confession, Spaulding was taken before a justice of the peace where he was again read his rights, including the opportunity to waive counsel which he supposedly chose to do. At this time, bail was set at $30,000. On review, the Supreme Court of Appeals admitted that, from the date bail was set, the record as to pretrial proceedings, if any, was confusing.

At the habeas corpus hearing the justice of the peace testified that she could not remember and had no record as to whether a preliminary hearing had occurred or whether the defendant had waived his right to this procedure. Faced with this confusion, as well as the defendant's statutory right to a preliminary hearing,\textsuperscript{227} the Court had to assume either that the defendant had appeared

\textsuperscript{221} Coleman v. Alabama, 399 U.S. 1, 10-11 (1970).

\textsuperscript{222} The arresting officer testified at trial that when he apprehended Spaulding he “knocked the defendant to the ground” in an attempt to apprehend him. At the habeas corpus hearing, however, the same officer admitted that the defendant had been kicked and beaten to such an extent that he was unable to walk.

\textsuperscript{226} The issue of the denial of a pretrial hearing to determine the voluntariness of the confession allegedly made by the defendant is considered elsewhere in this survey. See notes 254 to 271 and accompanying text infra.

\textsuperscript{227} W. VA. CODE ANN. § 62-1-6 (1966) provides that: “The justice shall in plain terms inform the defendant of the nature of the complaint against him, of his right to counsel, and, if the offense is to be presented for indictment, of his right to have a preliminary examination.”
at a hearing without the assistance of counsel, or that he had been denied his right to a hearing — either choice necessitating reversal. The court chose the former option. Justice Sprouse, writing for a unanimous court, held that, although a preliminary hearing is not a constitutional right, *Coleman v. Alabama* mandates the assistance of counsel if a hearing is given. Assuming a hearing was granted in this case, the court further noted that:

> [I]t is difficult to conceive of more appropriate circumstances for requiring the assistance of counsel. The defendant had been beaten by the arresting officers. . . . The manner in which the defendant resisted arrest could have indicated to trained counsel the presence of psychiatric problems, and the question of excessive bail could have been resolved.228

Yet the court then found, relying solely on a decision by the Circuit Court of Appeals for the Ninth Circuit,229 that as the defendant was adequately represented at his trial, any need for counsel at the preliminary hearing was fulfilled by this subsequent representation.230

While an extensive analysis of the court’s reasoning in *Spaulding* is beyond the scope of this survey, two considerations deserve comment. The court decided that West Virginia’s preliminary hearing requirements are a “critical stage” in the prosecution.231 This is clearly seen by analyzing chapter sixty-two, article one, section eight of the West Virginia Code232 and comparing it to

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228 212 S.E.2d at 625.
229 *Schnepp v. Hocker*, 429 F.2d 1096 (9th Cir. 1970).
230 212 S.E.2d at 625.
231 *Id.*
232 W. VA. CODE ANN. § 62-1-8 (1966) provides that:
> If the offense is to be presented for indictment, the preliminary examination shall be conducted by a justice of the county in which the offense was committed within a reasonable time after the defendant is arrested, unless the defendant waives examination. The defendant shall not be called upon to plead. Witnesses shall be examined and evidence introduced for the State under the rules of evidence prevailing in criminal trials generally. The defendant or his attorney may cross-examine witnesses against him and may introduce evidence in his own behalf. . . . If the defendant waives preliminary examination or if, after hearing, it appears from the evidence that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the justice shall forthwith hold him to answer in the court having jurisdiction to try criminal cases. If the evidence does not establish probable cause, the defendant shall be discharged.

* Ala. Code tit. 15 §§ 133-40 (1959) provides for virtually the same type of preliminary examination as that afforded the defendant under West Virginia law.
comparable statutes ruled upon in Coleman v. Alabama. Both West Virginia and Alabama grant the defendant the right of cross-examination at his preliminary hearing. The United States Supreme Court in Coleman pointed out that through cross-examination, the defendant, if assisted by counsel, could perhaps establish a lack of probable cause forcing the prosecution to terminate custody, gather evidence to later impeach an inconsistent witness, begin to develop a defense once the prosecution’s case is presented, serve the function of having bail set at a reasonable level, as well as deciding whether the defendant is in need of psychiatric care. Since West Virginia provides for the same features as those required in Alabama preliminary hearings, a critical stage in the prosecution is present and counsel is required to assist the defendant.

Since the preliminary hearing was a “critical stage” in the prosecution of Spaulding, the denial of his right to counsel was clearly prejudicial error. Coleman suggested that if the possibility of prejudice from a denial of counsel was clear from the record, or if the record was unclear as to possible error, the proper decision would be to remand to the lower court for a determination of the extent to which the defendant was detrimentally affected. On remand, the State would have to demonstrate “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” The West Virginia court held that the subsequent trial at which Spaulding was represented by counsel had obviated any possible constitutional error. This assertion, however, is erroneous.

As precedent for the above contention the court cited Schnepp v. Hocker. In Schnepp, even though the Nevada preliminary hearing statute in question was deemed critical, the Court of Appeals for the Ninth Circuit was confident in stating, based on a review of the record, “beyond a reasonable doubt . . . the denial of the assistance of counsel at Schnepp’s preliminary hearing was harmless error.” But as the Schnepp court noted, only after a clear determination of harmless error from the record can the deci-

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231 399 U.S. at 11.
233 429 F.2d 1096 (9th Cir. 1970).
234 Id. at 1101.
sion to remand be halted.\footnote{Id.} In \textit{Spaulding}, the West Virginia court could not state whether or not a preliminary hearing had in fact ever been held.\footnote{212 S.E.2d at 624-25.} Clearly then, it was impossible for the Supreme Court of Appeals to determine "that the error complained of did not contribute to the verdict obtained."

The possibility of prejudice to Roy Spaulding was acute. Without the assistance of counsel or even a transcript of the proceedings to inform his counsel of the evidence introduced, Spaulding certainly could not have "discovered" the state's case and prepared an adequate defense. A subsequent trial after a defective preliminary hearing is harmless error only if the record shows that the defendant was not possibly prejudiced. Accordingly, the proper ruling in \textit{Spaulding} should have been a remand to the circuit court for further investigation into the facts surrounding the pretrial proceedings. Any other ruling acts as an open invitation to the magistrates of West Virginia to not only deny counsel at preliminary hearings, but to avoid the hearings altogether. Although the court did remand to clarify the use of the alleged forged confession,\footnote{See note 264 and accompanying text \textit{infra}.} should Roy Spaulding appear before the court again, he should not be denied the opportunity to once again raise the issue of his preliminary hearing.

\textbf{VIII. Prosecutor's Misstatement}

Ralph Starr was indicted by a Harrison County grand jury for being an accessory before the fact to the crime of robbery by force. After the jury received its instructions, the prosecutor stated in his final argument that:

\begin{quote}

We don't have to show that Ralph Starr knew what he was doing, because that is not a part of the indictment . . . . We have to show what the facts are. We don't have to show by our evidence that Starr knew what he was doing. We have to show what Starr did, what the evidence was and the result of that . . . .\footnote{State v. Starr, 216 S.E.2d 242, 245 (W. Va. 1975).}
\end{quote}

Defense counsel objected to this explanation, but his motion was ignored by the judge. On appeal of his conviction to the Supreme Court of Appeals, Starr challenged as reversible error the
prosecutor's obvious misstatement of the intent element required for conviction.²¹²

The question before the court in *State v. Starr* was acknowledged to be one of first impression in West Virginia. The court therefore adopted the general standard imposed by other jurisdictions that, although a prosecutor's misstatement of the law in his closing argument is unquestionably improper, it is not reversible error unless the defendant can demonstrate a possibility or prejudice.²¹³ An assertion by the state contradicting the law on an essential element of the crime would definitely seem prejudicial. Nevertheless, the Attorney General argued that the prosecutor's statement that intent need not be proven was merely an attempt to inform the jury that they were permitted to infer knowledge from the proven actions of the defendant. While such inferences are of course permissible, the court pointed out that the prosecutor had not qualified his statements in any manner, thereby possibly confusing the jurors as to the proper interpretation of the law. The proper method of attack for the prosecutor would have been first, to admit that intent was a required element of the crime, and then to state that intent could be based on reasonable inferences drawn from the facts.

The state's final contention, that the prosecutor's error was harmless beyond a reasonable doubt as the jury had previously been instructed as to the proper law, was summarily dismissed by the court. As Chief Justice Haden stated in writing for a unanimous court, it would be difficult to conceive of a more harmful error than telling the jury that the defendant could be convicted without a showing that he had intended to commit the charged crime.²¹⁴ Only if the trial court had responded to defense counsel's objection and corrected the prosecutor's misstatement when made, would there have existed the possibility that the error was truly harmless.

²¹² *Id.* The court stated that:

It is indisputable that knowledge is an essential element of the crime charged. The element of knowledge is implicit in every circumstance defining the crime: "An accessory before the fact is a person who being absent at the time and place of the crime, procures, counsels, commands, incites, assists, or abets another person to commit the crime. . . ."

*State ex rel. Brown v. Thompson, 149 W. Va. 649, 142 S.E.2d 711 (1965).*

²¹³ *Id.* at 246.

²¹⁴ *Id.*
IX. Speedy Trial

The petitioner in *State ex rel. Stines v. Locke* sought a writ of prohibition from the Supreme Court of Appeals forbidding the Raleigh County Circuit Court from trying him for the crime of robbery. Stines asserted that he had been denied his right to a speedy trial since he had been in custody for four terms of court after his indictment, and was therefore "forever discharged from prosecution." Indicated during the January 1973 term of court, Stines was extradicted to Michigan shortly thereafter where he was convicted and sentenced to prison. In March of 1974 he was returned to Raleigh County where trial was finally set to commence during the April term of 1975. Stines then sought the writ that was the issue of this case.

The right of a defendant to a speedy trial is provided for in both the West Virginia and United States Constitutions. A speedy trial is defined by statute in West Virginia as one given before the passage of three terms of court after the term of indictment. To facilitate the three-term rule, the Legislature in 1971 enacted the Agreement on Detainers, described by the court to be "a two-pronged instrument, designed to implement the speedy trial concept by either the accused or the state." The Agreement,

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216 This terminology is found in W. VA. CODE ANN. § 62-3-21 (1966) which provides in pertinent part that:

> Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial . . .

217 U.S. CONST. amend. VI provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." W. VA. CONST. art. III, § 14 provides that: "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay . . . ."


> [T]he purpose of the pertinent statute is to assure a defendant a speedy trial. It is the legislative adoption or declaration of what, ordinarily, at least, constitutes a speedy trial within the meaning of Article III, Section 14 of the State Constitution, and of the Sixth Amendment to the Federal Constitution, and, of course, for the purpose intended should be liberally construed.

220 220 S.E.2d at 446.
a reciprocal pact between subscribing states, allows a prisoner who learns of a charge against him in another state to request his transportation to that state to defend against the charge.\textsuperscript{21} Also, any member state can request the presence of a prisoner from another member state in order to try him on a waiting indictment.\textsuperscript{22}

The specific issue confronting the court in \textit{Stines} was whether the state must be charged with the time the prisoner spent while in custody in Michigan. The court first noted that the Agreement on Detainers provides a ready tool for West Virginia prosecutors to fulfill the defendant's right to a speedy trial. Since the Raleigh County Circuit Court made no attempt to use the Agreement to regain custody of Stines while he was incarcerated in Michigan, that time was held to count against his prosecutors. With the addition of the time spent in Michigan, the defendant had been in custody and available to the Raleigh County Circuit Court in excess of the statutory limit and was thus entitled to his writ of prohibition.

In deciding \textit{Stines} the Court distinguished \textit{State ex rel. Smith v. DeBerry}.\textsuperscript{23} The petitioner in \textit{Smith} had been imprisoned in Tyler County under indictment. The prosecutor of Pleasants County requested but was denied custody of the prisoner to try him on a separate indictment. Smith was denied a writ to prohibit the Pleasants County Court from trying him because the request for his presence was held to toll the running of the three-term rule. From the court's interpretation of the Agreement on Detainers in \textit{Stines}, it is clear that, should the prosecution fail to take into account the three-term provision, it must have compelling reasons to overcome the neglected defendant's right to a speedy trial.

\textbf{X. Voluntariness of Incriminating Statements}

Although it has been settled since the United States Supreme Court's 1964 ruling in \textit{Jackson v. Denno}\textsuperscript{24} that a criminal defendant has "a constitutional right at some stage in the proceedings to object to the use of his confession and to have a fair hearing and a reliable determination of the issue of voluntariness,"\textsuperscript{25} the West Virginia Supreme Court of Appeals in 1975 was compelled to

\textsuperscript{23} 146 W. Va. 534, 120 S.E.2d 504 (1961).
\textsuperscript{24} 378 U.S. 368 (1964).
\textsuperscript{25} Id. at 376.
reverse three convictions for failure to abide by the *Jackson* mandate.

The interest at stake in determining the voluntariness of a confession before it can be considered as evidence by the jury is the fifth amendment's guarantee that no person may be compelled to testify against himself. In *Jackson*, the Supreme Court held unconstitutional a New York procedure which allowed the jury to determine the admissibility of a confession. While the Court acknowledged that it is generally the jury’s responsibility to determine the truth from conflicting evidence, it felt the truth could better be found if the issues were not clouded by the possibility of police coercion. Hence, before the prosecution may inform the jury of incriminating statements made by the defendant, the trial judge must determine, out of the presence of the jury, whether the confession was freely given. As a facet of this determination, a legal presumption exists that a confession is coerced if given by a defendant before he is advised that he need not do so. The state may overcome this presumption with evidence that the confession was voluntarily given.

In its initial recognition of *Jackson*, the West Virginia court set forth in *State v. Fortner* the procedures to be followed by the state's criminal courts prior to the introduction of confessions:

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.

Although the standards announced in *Fortner* are clear, in *Spaulding v. Warden, West Virginia Penitentiary*, *State v. Smith* and *State v. Starr*, the Supreme Court of Appeals dealt

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256 U.S. Const. amend. V provides in part that: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."


260 Id. (syl. pt. 1).


with three different problems arising in the determination of the admissibility of incriminating statements made by defendants.

*Spaulding* is the best example of the necessity of the *Jackson-Fortner* rule. Defense counsel obtained the following response from the defendant to the question of why he signed a confession on the day following his arrest:

Well I was punched around, roughed around and a man asked me if I didn’t want to sign a confession. Well I didn’t want to sign one, but I assumed that I was going to get forced to sign one. After I got smacked a couple of times I signed it . . . .

Although Spaulding’s attorney did not request a pretrial determination of the voluntariness of the confession and raised no specific objection to its use at trial, *Fortner* specifically dictates that a trial court must, on its own motion, examine all confessions prior to their introduction into evidence. The Supreme Court of Appeals, therefore, granted Spaulding a writ of habeas corpus and remanded the case for investigation into the facts surrounding the confession.

*State v. Smith* presented a slightly more complex problem than that discussed in *Spaulding*. The confession in *Spaulding* was a written document prepared by the police and signed by the defendant. In *Smith*, however, the state also attempted to use statements made by the defendant to the arresting officer. While no particular statement was tantamount to a confession, a recitation of the conversation between the officer and the defendant to the jury offered little support to the defendant’s claim of innocence. The prosecution attempted to characterize the statements of the defendant as admissions rather than as a confession so that the strict standards of *Jackson* and *Fortner* would be inapplicable. The court chose, however, to ignore this emphasis on phrasing rather than substance and concluded that the defendant’s statements were clearly as incriminating as a confession. Hence, their legitimacy as evidence should have been determined at a special hearing. This conclusion was buttressed by the court’s reading of *Miranda v. Arizona*, which stands for the proposition that emphasis should not be placed on the distinctions between confessions and admissions in determining the admissibility of a state-

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241 212 S.E.2d at 623.

242 See note 260 and accompanying text supra.

ment, but rather on how the statement was obtained. Statements seemingly freely given can be excluded from trial if they resulted from a hostile atmosphere or undue influence. Smith, then, guarantees a defendant the right to challenge the evidentiary use of any statement he might have made on the grounds that it was involuntarily given.

Finally, in State v. Starr, the court was asked to decide the burden of proof the state must demonstrate at the in camera hearing before evidence of a confession or incriminating statements will be allowed to be considered by the jury. In Starr, as opposed to Spaulding and Smith, a pretrial in camera hearing was given to determine the voluntariness of statements made by the accused. Prior to the use of these statements the trial court found that "there had been a prima facie showing of voluntariness of the statement made by the defendant . . . ." Specifically, the issue in Starr was whether a "prima facie" showing of voluntariness was sufficient to defeat the presumption that the defendant was forced to incriminate himself. The question was easily answered by combining the ruling in State v. Smith, that distinctions should not be made between confessions and admissions as long as they tend to incriminate, and a 1971 decision, State v. Plantz. Plantz held that the state must, at the in camera hearing, demonstrate by a preponderance of the evidence that the confession sought to be

\[216\text{ S.E.2d at 248-49.}\]

\[180\text{ S.E.2d 614 (W. Va. 1971).}\]
admitted was voluntarily given. One year later, in Lego v. Twomey, the United States Supreme Court substantiated the preponderance standard as the constitutionally correct formula. Although the Starr court felt the trial court's reliance on a prima facie showing of voluntariness was probably only inadvertent error, it concluded that the Plantz-Lego rulings, which specifically require proof by a preponderance of the evidence, must control.

Spaulding, Smith and Starr have gone a long way to clarify the use of incriminating statements at trial. Of particular significance in this trilogy is the court's realistic recognition that no distinction should be drawn between a confession and isolated incriminating statements where the evidence was elicited by the possibility of coercive police practices.

n 404 U.S. 477 (1972).
DOMESTIC RELATIONS

This section discusses the various topics classified under the broad heading of domestic relations. In 1975 the Supreme Court of Appeals decided four major cases, two in the area of child custody and two in the area of child support.

I. CHILD CUSTODY

A. Awarding Custody

In *Funkhouser v. Funkhouser*, the court made a distinction between a change of child custody, and the original award of child custody after temporary custody had previously been granted one parent pending a final determination on custody. The mother in *Funkhouser* had sued for divorce, and at a preliminary hearing the father was granted temporary custody of the child because the mother's mental ability and capacity were challenged. The court awarded the father temporary custody pending mental examination of the mother, which subsequently revealed that she was mentally normal. The mother thereafter applied for custody of the child at the final hearing on the divorce. In denying the mother's request, the trial court applied the standard used in awarding a change of custody, and held that the mother had not met the burden of showing that a change of custody would materially promote the moral and physical welfare of the child.

The Supreme Court of Appeals reversed on the basis that this was not a change of custody case, but rather was an original determination of custody, notwithstanding the father's prior temporary custody of the child. The court held that the application of the standard for a change of custody to a case where final custody is first awarded, is reversible error.

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272 The following case involved issues in the field of domestic relations but was not reported in this section: Young v. Young, 212 S.E.2d 310 (W. Va. 1975) (indigent party).


274 The mother had been involved in a car accident, had been incapacitated for six months, and had been through a long period of recuperation. This prompted the trial court to direct an examination of the mother in response to her claim for child custody.

275 In *Holstein v. Holstein*, 152 W. Va. 119, 160 S.E.2d 177 (1968), the court held that a mere change of circumstances is not sufficient ground to change an award of child custody. The burden is on the petitioning parent to show that a change of custody would materially promote the welfare of the child. *Id.* at 122, 160 S.E.2d at 180.

276 216 S.E.2d at 574.
In another portion of the opinion the court reaffirmed its position that "with reference to the custody of a very young child, the law favors the mother if she is a fit person, other things being equal."

B. Illegitimate Children

In Hammack v. Wise, the issue was whether the maternal grandmother, whose daughter had died in childbirth, or the putative father of the illegitimate child had the legal right to the child's custody. The court held that even though the child was born out of wedlock, the treatment of the father of an illegitimate child is the same as if the child had been legitimate and "the right of a parent to have custody of his or her child, while not absolute, will not be taken away unless the parent has committed an act or is guilty of an omission which proves his or her unfitness." Therefore, as between the maternal grandmother and the putative father of an illegitimate child, the court found the father is entitled to custody where there was no showing of unfitness.

II. Child Support

A. Change in the Age of Majority

Dimintroff v. Dimintroff involved the effect of the reduction in the age of majority on child support provisions of divorce decrees. In the instant case, a divorce decree awarded the mother custody of her two minor children, and ordered the father to pay fifty dollars per month child support per child under the following terms:

[U]ntil the further order of this Court, and so long as each child is under the age of 21 years, unmarried and not emancipated . . . said monthly payment as to each child is to cease and discontinue when that child becomes 21 years of age, is married, or during the period said child is in active military service, and then without requirement of further order of this Court.

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277 Id. at 573; accord, Settle v. Settle, 117 W. Va. 476, 185 S.E. 859 (1936); Hughes v. Hughes, 113 W. Va. 698, 169 S.E. 403 (1933).
278 211 S.E.2d 118 (W. Va. 1975).
279 Id. at 120, citing Stanley v. Illinois, 405 U.S. 645 (1972).
282 Id. at 744.
On June 9, 1972, the legislature changed the age of majority from 21 to 18 years of age. However, that change included a clause designed to save pre-existing obligations which were dependent on age requirements.

On October 6, 1972, one of the children reached 18 years of age and the father stopped his payment of child support for that child. The mother initiated contempt proceedings in the Domestic Relations Court of Kanawha County, but the court upheld the discontinuation of child support payments on the ground that the child, "having reached majority, was an adult and was emancipated and that the [father] was no longer liable for her support and maintenance." The Circuit Court of Kanawha County reversed, being of the opinion that the savings clause in the statute preserved the child support obligations under the divorce decree. The Supreme Court of Appeals affirmed the circuit court ruling. The court recognized the "substantial diversity of opinion" on the effect of a statutory change of the age of majority on support obligations, but held that the savings clause in the West Virginia statute prevents any modification of the instant child support decree if based solely on the grounds of a change in the majority age.

Notably, subsequent to the decision by the Domestic Relations Court, the West Virginia Legislature amended the statute relating to the age of majority as follows:

Provided further, that any order or mandate providing for payment of child support for any person up to the age of twenty-one years contained in any decree or order of divorce or separate maintenance [agreement] . . . which decree or order was entered prior to June nine, one thousand nine hundred seventy-two, may by order of the court be terminated as to such person upon such person attaining the age of eighteen years.

The court in Dimintroff held this provision inapplicable since it became effective after the ruling of the Domestic Relations Court. The application of this provision to similar cases could create a different result. Nevertheless, the court interpreted this provision in Corbin v. Corbin holding that the law was permissive, not

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284 Id.
286 218 S.E.2d at 745.
mandatory, and that the matter rested within the sound discretion of the trial court.\footnote{289}

B. Retention of Jurisdiction by the Court

In \textit{Trembly v. Whiston},\footnote{290} the Supreme Court of Appeals was asked to decide whether the circuit court retained jurisdiction to alter a provision for child support contained in the property settlement agreement and as adopted in the divorce decree. The relator in \textit{Trembly} was originally directed to pay $200 per month child support and to "aid and assist the said infant child in paying her tuition, books and other necessary expenses\footnote{291} at an institution of higher learning. The relator made the required monthly payments but, in 1975, his former wife petitioned the circuit court to require the relator to pay for tuition, books and other necessary expenses for the child's attendance at a college. The court granted the petitioner's request and ordered the relator to pay the sum of $996.50 per semester for his daughter's education, in addition to $199.50 for her college testing and application fees. Furthermore, the relator was to continue to pay the original grant of $200 per month. The relator failed to make the additional payments and was sentenced to jail for contempt, and subsequently brought a proceeding in habeas corpus.

The Supreme Court of Appeals stated that notwithstanding the arrangement of the parties in the property settlement agreement and ratification thereof by the court in a divorce decree, the circuit court retained jurisdiction to modify the order for support and maintenance of the minor child.\footnote{292} The court further noted that in matters of child support, the judgment of the trial court will not be disturbed without a showing of abuse of discretion.\footnote{293} The relator was able to prove that his monthly income only exceeded

\footnote{289} \textit{Id}. at 907.
\footnote{290} 220 S.E.2d 690 (W. Va. 1975).
\footnote{291} \textit{Id}. at 692.
\footnote{292} W. VA. CODE ANN. § 48-2-15 (Cum. Supp. 1975) provides:

[And] upon ordering the annulment of a marriage, or a divorce, the court may make such further order as it shall deem expedient, concerning the care, custody, education and maintenance of the minor children . . . ; and the court may, also from time to time afterwards, on the verified petition of either of the parties . . . revise or alter such order concerning the care, custody, education and maintenance of the children . . . .

his monthly expenses by $190.00, and, that to meet the additional obligation imposed by the court, he would have to have a monthly excess of $365.00. Relying on these facts, the Supreme Court of Appeals found that the trial court had abused its discretion and therefore discharged the prisoner.\textsuperscript{294}

\begin{footnote}
\textsuperscript{294} "The remedy of imprisonment for failure to pay child support should not be enforced except where it appears that the defendant is contumacious." 220 S.E.2d at 695, citing State ex rel. Varner v. Janco, 191 S.E.2d 504 (W. Va. 1972) and Ex Parte Beavers, 80 W. Va. 34, 91 S.E. 1076 (1917).
\end{footnote}
In 1975, the West Virginia Supreme Court of Appeals resolved two new issues dealing with elections: (1) what voters are entitled to assistance by election officials when casting ballots, and (2) whether otherwise legal votes are voided when election officials assist persons not qualified for such assistance. Both of these issues were decided in *Brooks v. Crum.*

Who may receive assistance by election officials when casting votes and under what conditions they may receive assistance are controlled by statute. There are separate statutes dealing with votes cast by written ballots and votes cast by voting machines. The court has held the requirements contained in the statute dealing with written ballots to be mandatory and thus, its provisions could not be rendered ineffective by the ignorance, inadvertence or actual fraud of election officials. In *Brooks,* ballots were cast by voting machines, and the court held the requirements of the voting machine statute to be mandatory. Under both statutes voters may not be given assistance unless they are listed as illiterate on the face of the voters' registration. No discretion is given election officials where there is no recording of illiteracy and where there is no obvious physical disability which would prevent the voter from operating the voting machine; the election officials are without authority to enter the voting machine with the voter or to assist the voter in casting his vote.

In *Brooks* the election officials stated that their assistance did not affect the voters. The court said that the plaintiff did not have to overcome the burden of this testimony because the conditions in the statute were mandatory, and, thus, the act of assistance by itself was unlawful. The court held that a vote cast by a physi-

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216 S.E.2d 220 (W. Va. 1975). The case also restated prior law on certain election violations. Where it clearly appears in an election contest that persons were allowed to vote after seven-thirty o'clock in the evening, prescribed by W. Va. Code Ann. § 3-1-31 (1971 Replacement Volume) as the time the polls will be closed, such votes shall be illegal and void. Terry *v.* Sencindiver, 153 W. Va. 651, 171 S.E.2d 480 (1969). Where illegal votes have been commingled with valid votes in a precinct making it impossible to purge such illegal votes, the entire vote of such precinct must be rejected if sufficient illegal votes were cast to affect the result of the election. *Id.*


*Id.* § 3-4-21 (1971 Replacement Volume).


216 S.E.2d at 225.

216 S.E.2d at 228.
cally able voter who has obtained assistance in casting his ballot without first qualifying under the statute is void. The court also held that "mere unfamiliarity with the use of voting machine procedures is not a physical disability which invokes a statutory right in the election official to render assistance to the voter."
In *First National Bank of Roncerverte v. Bell*, the administrator of a decedent's estate sought to recover assets in the possession of the decedent's relatives who claimed the assets as donees of a causa mortis gift. The plaintiff propounded interrogatories to the defendants concerning the alleged gift, and based upon the defendants' answers, moved for summary judgment on the ground that any subsequent testimony by the defendants would be incompetent under the West Virginia Dead Man's Statute. The motion for summary judgment was denied, and an exception was granted.

During trial, the defendants testified as to their transactions with the decedent without objection by the plaintiff. On appeal from a judgment for the defendant, the plaintiff asserted that the denial of its motion for summary judgment was reversible error since the defense was based on incompetent evidence.

Citing a previous case, the court held that the settled rule was that incompetency of a witness under the "dead man's statute" must be raised in the trial court by objection before an appellate court may consider the question. The court also cited another decision that held that an objection to the competency of a witness must be made and the point saved before the jury retires. The court concluded that even though tested by a summary judgment motion, the admissibility of evidence under the "dead man's statute" is to be determined when offered at trial.

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304 W. VA. CODE ANN. § 57-3-1 (1966).
306 Cunningham v. Porterfield, 2 W. Va. 447 (1868).
Several important cases were decided in the area of local government. They dealt with a variety of issues involving municipal contracts, municipal labor relations, municipal notice requirements, school districts, and zoning variances.

I. MUNICIPALITIES

A. Contracts

In *Pioneer Co. v. Hutchison*, Pioneer was the low bidder on a sewer project in Charleston. A municipal ordinance provided that the city council could reject "any and all bids," but the contract had to be awarded to the "lowest responsible bidder." The city awarded the contract to the second lowest bidder because Pioneer was involved in a lawsuit which possibly could result in a change in management. The trial court reversed city council's finding that Pioneer was not "responsible." The Supreme Court of Appeals of West Virginia stated that the trial court had no authority to substitute its judgment for that of the city council. It was the function of the council and not the trial court to decide whether or not Pioneer was "responsible." The determination of responsibility involves the question of whether the contract would be completed in an efficient manner and is not limited to a determination of financial and moral responsibility.

B. Labor Relations

*Kucera v. City of Wheeling* held that a release of overtime pay by an employee violates the public policy of the state. The City of Wheeling had previously refused to pay firemen overtime compensation pursuant to the minimum wage law, claiming the city was an agency of the state and therefore exempt from the wage law statute. In the earlier case of *Kucera v. City of Wheeling*, a 1969 case, the court held that the City of Wheeling was not an agency of the state, and therefore was subject to the minimum wage law.
wage law. During the interim of the case, however, the City of Wheeling had granted a pay raise to all employees but withheld the increase from the firemen pending the outcome. After the ruling that the firemen were covered by the minimum wage law, the city presented to them a release agreement whereby they would receive their back pay, without overtime compensation, for the period commencing July 1, 1969, and ending November 1, 1969. After signing the release, the firemen contended that it was null and void. The court, in overruling the circuit court, held that such a release is indeed null and void as being against public policy as provided by statute.\footnote{W. Va. Code Ann. § 21-5C-8a (Cum. Supp. 1975) reads:
Any employer who pays an employee less than the applicable wage rate to which such employee is entitled under or by virtue of this article shall be liable to such employee for the unpaid wages: an agreement by an employee to work for less than the applicable wage rate is hereby declared by the legislature of West Virginia to be against public policy and unenforceable (emphasis added).}

C. Notice

Simmons v. City of Bluefield\footnote{No. 13557 (W. Va. Sup. Ct. App., filed Nov. 18, 1975).} reaffirmed the position that substantial compliance with the West Virginia requirement that notice be given a municipality before bringing a negligence action against it\footnote{W. Va. Code Ann. § 8-12-20 (1976 Replacement Volume).} is sufficient, if the city is thereby afforded a complete and timely opportunity to explore the circumstances and formulate its defense.

II. School Districts

Evans v. Hutchison\footnote{214 S.E.2d 453 (W. Va. 1975).} involved an action to remove certain board of education members and one member-elect from office for alleged official misconduct. Defining official misconduct as "any unlawful behavior 'in relation to' the duties of the office,"\footnote{Id. at 459. Accord, Kesling v. Moore, 102 W. Va. 251, 135 S.E. 246 (1926).} the court held that using the county school bus garage to paint privately owned motor vehicles was official misconduct, and also in violation of the permissible extra-educational uses of school board facilities.\footnote{W. Va. Code Ann. § 18-5-19 (1971 Replacement Volume).}
III. ZONING VARIANCES

Harding v. City of Morgantown, 320 overruled the case of Miernyk v. Board of Zoning Appeals, 321 which had held that a variance and a conditional use were synonymous. The court in Harding recognized that a conditional use is another term for a "special exception," as set forth indirectly by statute. 322 "A special exception or conditional use, unlike a variance, does not involve the varying of the ordinance, but rather compliance with it . . . ." 323 This distinction is of vital importance since more stringent standards are needed to satisfy a variance finding than a conditional use finding. 324

Variances were also at issue in Wolfe v. Forbes. 325 The case involved the Board of Zoning Appeals of the City of Moundsville and its attempt to grant a use variance from the terms of the city's zoning ordinance. The board granted a variance for a use prohibited under the city zoning ordinance, but the court reversed, stating that the board did not have the authority to issue a variance in a prohibited area unless that variance fell directly under a situation approved by the Moundsville City Council in its zoning ordinance. 326 The Moundsville City Council adopted the statutory language of the West Virginia Code relating to variances. 327 However, neither the West Virginia Code nor the Moundsville city ordinance

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322 W. VA. CODE ANN. § 8-24-55(3), (4) (1976 Replacement Volume) gives boards of zoning appeals separate authority to:

(3) Hear and decide special exceptions to the terms of the ordinance upon which the board is required to act under the ordinance; and
(4) Authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

323 Syl. pt. 1, 219 S.E.2d at 325.
324 Id. at 329.
326 Moundsville City Council had set out twelve situations under which a variance could be authorized by the board. In Wolfe, operating a rest home in a residential section was not included in any of the twelve situations.
defines the term "variance," necessitating the court's determining its meaning by construing the ordinance. By considering the limited authority of the board in light of the instances in which a variance could be permitted, the court held that granting a variance such as that requested would in effect be allowing the board to amend the ordinance enacted by the city. The court cited with approval the rationale of a North Carolina case that "no variance is lawful which does precisely what a change of map would accomplish."
PRACTICE AND PROCEDURE

The Supreme Court of Appeals established several important procedural points during 1975. Most of the cases dealt with application of the West Virginia Rules of Civil Procedure or interpretation of statutory provisions.

I. Appeals

*Parkway Fuel Service, Inc. v. Pauley* illustrated that the court speaks only through the record, and, if the record contains no more than a conclusory statement that arguments of counsel were heard by the trial court, then on appeal the case will be reversed and remanded for a new trial.

*Simmons v. City of Bluefield* dealt with reservations of decisions on motions. The court outlined the steps necessary under rule 59 to move for judgment in accordance with the original motion within ten days of judgment being entered, after a motion for a directed verdict had been made and denied. Although "a motion for judgment notwithstanding the verdict is not a condition precedent to an appeal from a final order," the appellee may not be entitled to an order directing judgment in its favor if a motion to set aside the judgment and have judgment entered in accordance with the original motion was not made at trial level within ten days.

An important point concerning rule 59(e) was touched on in *Kentucky Fried Chicken of Morgantown v. Sellaro*. The case involved construction of a lease agreement and, specifically, which party was to bear the costs of grading and paving the leased premises. The judgment at the trial disposed of multiple claims, and appellants timely requested a new trial on the issue of damages. The request was denied, and on appeal the appellees counter-assigned error on issues other than damages, but the appellants contended that the counter-assignments should be dismissed be-

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334 Id. at 9.
cause they were not seasonably asserted. The court held that since neither of the parties had filed a timely post-trial motion or appealed the judgment from the trial court concerning the counter-assigned errors, and eight months had passed from the entry of the final judgment disposing of such claims, then judgment on those claims was final and unappealable.\textsuperscript{338}

II. DIRECTED VERDICTS

\textit{Kingdon v. Stanley}\textsuperscript{337} involved an action arising out of an automobile accident in which the appellee received multiple injuries. A verdict was rendered for the appellee, but the trial court set aside the verdict on the motion of the appellee for a new trial citing its failure to direct a verdict for the appellee on the issue of liability. The appellee requested a new trial because he felt that a compromise verdict had been rendered by the jury on the issue of damages. Reinstating the jury verdict, the Supreme Court of Appeals ruled that where evidence supported the verdict, and the issues had been submitted under proper instructions by the trial court, the verdict should not be set aside for failure of the trial court to direct a verdict for the party the jury verdict favored.

III. MANDAMUS

\textit{State ex rel. Blankenship v. McHugh},\textsuperscript{338} involved the question of whether a circuit court could entertain a mandamus provision subsequent to the West Virginia Supreme Court of Appeals having denied an identical petition. The court noted that it had earlier refused a mandamus petition in which Senator Judith A. Herndon questioned the constitutionality of certain revenue measures. Senator Herndon then brought an identical petition in the Circuit Court of Kanawha County, again seeking relief in mandamus. The Constitution of West Virginia grants original and concurrent jurisdiction in mandamus and prohibition to the Supreme Court of Appeals and all circuit courts.\textsuperscript{339} However, Rule XVIII of the Rules of Practice in the Supreme Court of Appeals of West Virginia\textsuperscript{340}

\textsuperscript{337} 215 S.E.2d 462 (W. Va. 1975).
\textsuperscript{338} 217 S.E.2d 49 (W. Va. 1975).
\textsuperscript{339} \textit{W. VA. CONST.} art. VIII, § 3.
\textsuperscript{340} \textit{W. VA. R. PRAC. SUP. CT. OF APP. XVIII} (1974).

Rule XVIII provides in part:

Original jurisdiction in this court should not be invoked if adequate
PRACTICE AND PROCEDURE

provides that its original jurisdiction in mandamus actions should not be invoked if a court having concurrent jurisdiction can provide adequate relief. Further, if the Supreme Court of Appeals of West Virginia decides to refuse to issue a writ without prejudice, it must be so noted on the face of the petition.\(^{31}\) This is called a "Rule XVIII" notation. The question raised by the circuit court was whether the mandamus provision of the West Virginia Code\(^{312}\) merely defines the nature of extraordinary remedies in accordance with the state constitution or deprives the circuit courts of their constitutional jurisdiction. Citing Boggess v. Buxton,\(^{313}\) which established legislative authority to enlarge mandamus subject matter, the court held that the mandamus provisions\(^{314}\) deal only with procedural aspects and both are constitutional. Therefore, the court concluded that a refusal to issue a writ of mandamus, combined with the absence of a "Rule XVIII" notation, constitutes a decision on the merits, and a circuit court is without authority to consider the same petition.

IV. PRE-TRIAL CONFERENCES

At issue in Roark v. Dempsey\(^{315}\) was whether a trial court's direction for the parties to exchange witness lists ten days in ad-

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relief appears to be available in a court of concurrent jurisdiction. If the application might have been lawfully made to a lower court in the first instance, the petition, in addition to the matters required by law to support the application, shall also set forth the circumstances which in the opinion of the applicant render it proper that the writ or rule should issue originally from this court and not from such lower court. If the court finds such circumstances insufficient, the court may on that ground refuse to issue the writ or rule prayed for without prejudice to the presentation thereof to a proper court having jurisdiction. Such refusal, without prejudice, to issue the writ or rule for this reason shall be noted upon the face of the petition.


\(^{31}\) Id.


\(^{313}\) § 53-1-5 reads in part as follows:

The court or judge to whom the petition in mandamus or prohibition is presented shall, if the petition makes a prima facie case, issue a rule against the defendant to show cause why the writ prayed for should not be awarded.


\(^{316}\) 217 S.E.2d 913 (W. Va. 1975).
vance of trial is conclusive on what witnesses may actually be introduced at trial. A pre-trial conference had been conducted in which the trial court made such a direction and which was agreed upon by the parties. The trial court did not, however, enter a pre-trial order pursuant to rule 16 of the West Virginia Rules of Civil Procedure. A federal case directly on point stated that where witness lists had been exchanged pursuant to a pre-trial proceeding and no pre-trial order was entered as required by rule 16 of the Federal Rules of Civil Procedure, then such an exchange of witnesses does not limit the number of witnesses who may testify at trial. The West Virginia court did not choose to adopt this broad a rule, however, stating that it would unduly restrict the discretion of the trial court. Instead, the court held that the trial court may exclude a witness offered for testimony who was not on the list of trial witnesses exchanged by counsel, but the exclusion would constitute reversible error if it created an undue hardship or restricted the development of facts for the jury. The court concluded that where an eyewitness to an accident was not discovered until the day of trial, it was abuse of discretion and reversible error for the trial court to disallow that witness' testimony when a continuance would have justly answered the defendant's claim of surprise.

V. Process and Service

Stevens v. Saunders reaffirmed the principle that the signing of a summons by the clerk does not, in itself, constitute an issuance. Process is not issued until the summons is sent from the clerk's office under his authority and direction for the purpose of service. Stevens involved a personal injury action arising from an automobile accident involving a non-resident defendant. Plaintiff filed a complaint two days before the expiration of the statute of limitations, but failed to execute the statutorily required cost bond until two days after the statute of limitations had run, due to the clerk's failure to obtain or prepare a bond form. In determin-

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220 W. Va. CODE ANN. § 56-3-31(a) (Cum. Supp. 1975) requires that a cost bond of one hundred dollars be executed with the clerk by the party bringing the action.
ing whether the statute of limitations was tolled by proper filing of the complaint and issuance of a summons, the court construed rule 3\textsuperscript{331} in conjunction with the non-resident motorist statute,\textsuperscript{332} which requires a bond of one hundred dollars to be executed with the clerk at the time of filing and before a summons is issued. The court concluded that a summons could not have been issued from the clerk's office until bond was executed, and thus, the two-year statute of limitations barred the action. In addition, rule 4(a)\textsuperscript{333} did not change the general rule defining what acts constitute an issuance, but merely recognized that someone other than the sheriff could permissibly serve process. Lastly, the court reiterated the rule "that the plaintiff or his attorney bears the responsibility to see that an action is properly instituted and that bonds are properly filed."\textsuperscript{334}

VI. Rule 12

A. Dismissal of Actions

The Supreme Court of Appeals in \textit{Sprouse v. Clay Communications, Inc.},\textsuperscript{335} decided that a rule 12(b)(6) dismissal of an action for failure to state a claim is a final appealable judgment on the merits and serves as res judicata. Confusion had previously reigned in this area with the court having never dealt directly with the issue.

In the 1961 case of \textit{Petros v. Kellas}, the court observed that a judgment of dismissal of an action under rule 12(b)(6) is reviewable only upon appropriate appellate process.\textsuperscript{336} By making the dismissal under rule 12(b)(6) a final appealable order not subject

\begin{itemize}
  \item \textsuperscript{331} W. Va. R. Civ. P. 3 reads as follows: "A civil action is commenced by filing a complaint with the court and the issuance of a summons or the entry of an order of publication."
  \item \textsuperscript{333} W. Va. R. Civ. P. 4(a) reads in part as follows:
    \begin{quote}
      \textit{Summons: Issuance:} Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service to the sheriff or as otherwise directed by the plaintiff.
    \end{quote}
    The plaintiff in \textit{Stevens} contended that this passage describes separate acts of issuance of summons and delivery for service. He therefore argued by implication that the summons was properly issued when the bond had been executed. The court rejected this proposition.
  \item \textsuperscript{334} 220 S.E.2d at 892.
  \item \textsuperscript{335} 211 S.E.2d 674 (W. Va. 1975). This case is also discussed in the Constitutional Law section of this survey.
  \item \textsuperscript{336} 146 W. Va. 619, 635, 122 S.E.2d 177, 186 (1961).
\end{itemize}
to review upon certificate, and later stating that a motion dismissal under rule 12(b)(6) is not a dismissal with prejudice, the court created confusion and uncertainty in the area. Although a final appealable order, it must logically have been assumed that since the dismissal under rule 12(b)(6) was without prejudice, another action could have been started at the trial court level. However, this result would have been in direct conflict with rule 41(b) dealing with involuntary dismissals stating that "a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." Because of rule 41(b), the court in Sprouse realized that a 12(b)(6) dismissal of an action could not be a dismissal without prejudice unless so noted by the trial court. Therefore the court adopted the view that a rule 12(b)(6) dismissal is a determination on the merits and with prejudice.

B. Jurisdiction

Another important aspect of rule 12 was decided in Teachout v. Larry Sherman's Bakery, Inc. In Teachout, an order of publication was used in an attempt to obtain jurisdiction over a non-resident defendant. The defendant filed a motion to have the action against him dismissed for lack of jurisdiction. He later entered into a stipulation extending the time period in which to answer the complaint. The Supreme Court of Appeals held that the trial court did not have jurisdiction over him merely because of the stipulation and dismissed the complaint. Rule 12(b) provides that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." This provision had not previously been considered by the court in relation to whether having once raised timely objection to the jurisdiction of the trial court, the defendant may then take part in the trial without waiving his objection. A federal case construing F.R.C.P. 12 held that the distinction between special and general appearances was abolished and a defendant could thus appear in court raising jurisdictional objections as well as answering the

359 Id. at 892.
complaint. Citing this federal case, the court held that a defendant may now raise jurisdictional objections by motion or in his answer as provided by rule 12(b), and such objection is not waived even to the extent that he participates in the trial and defends on the merits. This ruling abolishes any distinction as to special and general appearances that may previously have existed in relation to jurisdictional objections.

VII. RULE 14 IMPLEADER

Bluefield Sash & Door Co. v. Corte Construction Co. involved construction of rule 14(a), which deals with the issue of when a defendant may bring in a third party who may be liable to him for all or part of the plaintiff's claim. The court reiterated the proposition that impleader is not mandatory under rule 14(a) but is within the sound discretion of the trial court to allow. In Bluefield Sash & Door, the Supreme Court of Appeals held that the circuit court did not abuse its discretion in dismissing a claim making a certain person a third party defendant, when such impleading would result in confusion of issues and cause undue implication of the litigation involving separate and distinct issues. An interesting sidenote in this case was a point made by the majority that under rule 14(a) "[a] joint tort-feasor cannot implead a third party defendant who is a joint tortfeasor." The court cites several cases in support of this conclusion, and also W. Va. CODE ANN. § 55-7-13 (1966), under which there is no right of contribution between joint tort-feasors in the absence of a joint judgment. Chief Justice Haden, in a concurring opinion, disagreed with the proposition that one joint tort-feasor cannot implead another joint tort-feasor, citing as authority the case of Goldring v. Ashland Oil & Refining Co., which allowed a cross claim against an alleged joint tort-feasor because of the West Virginia common law right of indemnity between joint tort-feasors. How far indemnity principles would extend in allowing the impleading of a joint tort-feasor is not clear. The majority relies on W. Va. CODE ANN. § 55-7-13 (1966), denying contribution from one joint tort-feasor to another in ab-

350 Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir. 1944).
352 Id. at 218.
353 Id.
354 216 S.E.2d at 219.
sence of a joint judgment, in reaching its conclusion that one joint tort-feasor cannot impead another joint tort-feasor under rule 14(a).\textsuperscript{316} That conclusion is misleading if indemnity, and not contribution, is the basis of joining the joint tort-feasor.

VIII. Venue

In \textit{Phares v. Ritchie},\textsuperscript{367} the court held that in actions brought against state officials, proper venue lay only in the Circuit Court of Kanawha County. An action was brought in Randolph County to compel the Commissioner of Highways to maintain a public road. The Randolph County Circuit Court held that venue was proper in that county, relying on W. VA. CODE ANN. § 14-2-2(b) (1974), which deals with mandamus actions to require condemnation proceedings. Since this case involved an action to compel road maintenance and not condemnation proceedings, venue was proper only in the Circuit Court of Kanawha County.

\textsuperscript{316} For an analysis of Rule 14(a) see \textit{Lugar & Silvestein, W. Va. Rules 125} (1960).

\textsuperscript{367} 219 S.E.2d 698 (W. Va. 1975).
I. CLAIMS AGAINST ESTATES

Chapter forty-four, article two, section five of the West Virginia Code provides in part:

Every claim against the estate of a decedent shall be itemized, accompanied by proper vouchers, and verified by the affidavit of the creditor. The vouchers for a judgment or decree shall be an abstract thereof.

In In re Estate of Hardin, the issue was whether a copy of a Florida divorce decree, certified by the clerk of that court, constituted a proper voucher upon which a claim against decedent's estate could be based.

The decedent died in West Virginia and appellant, decedent's former wife, filed a claim against the estate for alimony and child support due her, based on a Florida divorce decree. The administratrix denied the claim, and it thereafter became the burden of appellant to prove her claim.

As a purported voucher for her claim, appellant filed a copy of the Florida divorce decree, certified by the Clerk of the Circuit Court of the Eleventh Judicial Circuit of Florida. The claim was denied by the commissioner of accounts, whose decision was affirmed by the Circuit Court of Kanawha County, on the basis of chapter fifty-seven, article one, section twelve of the West Virginia Code which provides in part:

The records of the judicial proceedings of any court of any state shall be proved or admitted in any court in this State, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form.

The following property cases were not included in this section: Wheeling Dollar Savings & Trust Co. v. Leedy, 216 S.E.2d 560 (W. Va. 1975) (future interests); Women's Club v. James, 213 S.E.2d 469 (W. Va. 1975) (wills).

The basis of the administratrix's denial was W. Va. Code Ann. § 44-2-6 (1966), which provides:

Every claim shall be taken as proven and shall be allowed, unless before the commissioner shall make his report of claims the personal representative shall file before the commissioner a counter affidavit, denying the claim in whole or in part.
The Supreme Court of Appeals affirmed the denial of appellant's claim holding that a copy of a divorce decree of a foreign court, certified only by the clerk of that court, does not meet the requirements for authentication under the quoted code section, and therefore is not a proper voucher of a claim against an estate. If defectively attested, records of a foreign court will not prevail as evidence in West Virginia, and the failure of the judge of a foreign court to certify the clerk's attestation creates a defective attestation.

II. Deeds

A. Maintenance and Support Agreement as Consideration

The Supreme Court of Appeals in Farrar v. Young considered the sufficiency of consideration in a deed where maintenance and support of the grantor was the consideration. After ruling that there was not a failure of consideration in the present case, the court noted two important principles involving deeds which are given in exchange for maintenance and support. The court reaffirmed the general rule that "[m]ere inadequacy of consideration is not in itself sufficient to justify a court of equity in setting aside a deed" and qualified that rule by noting that "courts of equity tend to afford the grantor relief when the consideration for the conveyance is maintenance and support of the grantor and the grantee fails or refuses to furnish such support."

Upon a failure of consideration in a maintenance and support deed, the question arises whether the heirs or devisees of a deceased grantor have a right of cancellation. On this point the court held that the intention of the parties control, and if the language of the deed states an intent to create a personal obligation, as it did in Farrar, the language will be so construed, and the right of cancellation will not be transferred to the heirs or devisees.

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372 Id. at 753.
373 Id.
377 216 S.E.2d at 580, citing Krahn v. Goodrich, 164 Wis. 600, 160 N.W. 1072 (1917).
B. Multiple Grantors

In Parrish v. Pancake, the threshold issue was what interests shall pass, if any, when less than all multiple grantors sign a deed. Parrish involved a situation where a husband and wife purported to convey an easement, and although both were named as grantors in the granting clause, only the husband signed the deed. Thereafter, the grantors, and others, instituted an action to have the deed declared void.

To decide the validity of the deed, the court dealt with two apparently conflicting holdings. In Adams v. Medsker a deed was prepared purporting to convey all the undivided interests of a group of heirs. However, one of the heirs who signed the deed was not mentioned in the granting clause, and one of the heirs who was mentioned in the granting clause refused to sign the deed. The court held that this deed was effective to pass only the interests of those whose names were in the granting clause and who also signed the deed. The deed did not pass the interests of those who failed to meet both of these requirements. However, in the case of Bennett v. Neff, the parties entered into an agreement to convey their seven undivided interests in a tract of land to a third party, who in turn was to reconvey the land in seven separate and equal portions. Seven deeds were prepared, but only five were signed, two of the parties refusing to sign. The court in Bennett held that none of the deeds passed any interest since all deeds were not signed.

The court in Parrish resolved these apparently contradictory cases by finding that it was the intent of the individuals in Adams to convey their own undivided interests, whether or not the other grantors so conveyed. However, the court decided that in Bennett, the intent of the individual grantors was not to convey their own interests unless all conveyed. Therefore, in the absence of any express language in the deed to the contrary, the court will look to the intent of the grantors in deciding what interests shall pass, if any, when less than all multiple grantors sign a deed.

25 W. Va. 127 (1884).
Id. at 130-31.
130 W. Va. 121, 42 S.E.2d 793 (1947).
Id. at 138-39, 42 S.E.2d at 802-03.
III. Gifts

A. Delivery

*Tomkies v. Tomkies*[^383] involved the factual issue of what constitutes a valid delivery of an inter vivos gift. The court defined an inter vivos gift as follows:

To constitute . . . [an inter vivos] gift the donor must be divested of, and the donee invested with the right of property in the subject of the gift; it must be absolute, irrevocable; without any reference to its taking effect at some future period. The donor must deliver the property and part with all present and future dominion over it.^[384^]

In the instant case the donor of stock retained possession and record ownership of the stock, voted the stock, received the dividends from the stock, and served on a board of directors as a holder of the stock. The court, from these facts, concluded that the purported gift did not meet the delivery requirements necessary to constitute an inter vivos gift.^[385^]

B. Joint Bank Accounts

The Supreme Court of Appeals in *Wilkes v. Summerfield*[^386^] reaffirmed the proposition that the donor depositor of a joint and survivorship bank account is conclusively presumed to have intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant.^[387^] However, the court noted that deposits made by an agent of the donor after the donor's death would not be a part of the gift.^[388^]

IV. Leases

In *Moore v. Johnson Service Co.*[^389^] the court interpreted am-
biguous language in a lease. After resolving the ambiguity and affirming the trial court as to this aspect of the case, the court considered a provision in the lease which provided for recovery of reasonable attorney fees for the successful party in an action to enforce the lease or recover for breach.\footnote{390}

The trial court had refused to enforce the attorney fee provision based on the authority of a 1914 case, \textit{Raleigh County Bank v. Poteet},\footnote{391} in which the court had invalidated a stipulated attorney fee provision in a negotiable instrument for the following reasons: 1) lack of consideration; 2) usury; 3) oppression; 4) statutory preemption; and 5) encouragement of litigation.

The court in \textit{Moore} dismissed the validity of lack of consideration, usury and oppression, as bars to enforcement of the clause, holding these items applied only to negotiable instruments and not to mutually-agreed-to and freely-bargained-for leases.\footnote{392} The court dismissed the element of encouragement of litigation as not valid.

The prior holding in \textit{Poteet}, that stipulated attorney fees were preempted by statute, presented a more difficult problem to the \textit{Moore} court. In \textit{Poteet} the court had held that chapter fifty-nine, article two, section fourteen of the code disallowed stipulated attorney fees in excess of ten dollars. Although \textit{Moore} did not explicitly overrule \textit{Poteet} or give reasons why the statute was applicable in \textit{Poteet} and not in \textit{Moore}, the court did hold that public policy today\footnote{393} favors mutual covenants in leases for the recovery of reasonable attorney fees and expense of litigation. Because the court found public policy supporting the attorney fees provision, recovery was allowed in the instant case.\footnote{394}

\footnote{390} "In the lease contract, the parties mutually agreed the successful party in an action to enforce the lease or to recover for a breach of the lease should recover from the unsuccessful party, in addition to other appropriate relief, 'the reasonable expense and attorneys' fees as a part of the judgment.' 219 S.E.2d at 322.\
\footnote{391} 74 W. Va. 511, 82 S.E. 322 (1914).\
\footnote{392} 219 S.E.2d at 322.\
\footnote{393} See Annot., 77 A.L.R.2d 735 (1961).\
\footnote{394} It should be noted that the exact holding of the court was limited to stipulated attorney fees in leases. The court stated:

\begin{quote}
A mutual covenant contained in a commercial lease agreement, providing for the recovery of reasonable attorneys' fees and expense of litigation, available to either party who successfully recovers for breach of the lease contract or enforces its provisions, is valid and enforceable in the courts of this State.
\end{quote}

219 S.E.2d at 324.
V. LIENS

Fruehauf v. Huntington Moving and Storage\(^3\) raised the issue of whether a perfected security interest in specific property has priority over a subsequent repairman's lien, created by statute or by rule of law, on the same property. Plaintiff sold a trailer to a third party, the transaction occurring in Virginia. To secure payments on the property, plaintiff followed the proper procedure to perfect a security interest in the trailer. Thereafter, the third party took the trailer to defendant in West Virginia for repairs and improvements, but never returned to reacquire the trailer or pay the bill.\(^3\) When the third party defaulted in his payments to plaintiff, plaintiff sued defendant for possession of the trailer or, in the alternative, a judgment for its value plus interest and costs. Defendant answered that he had obtained a statutory lien on the trailer by reason of repairs, and that his lien was paramount to plaintiff's security interest.

Noting that plaintiff's security interest was valid\(^3\) and that West Virginia would recognize it,\(^3\) the Supreme Court of Appeals turned to a section in the Uniform Commercial Code, as adopted in West Virginia, which controlled the priority of liens in this case. The statute provided that the defendant, a person who, in the ordinary course of business, furnished services with respect to the goods, possessed a lien upon the goods in his possession (the trailer). Such lien, according to the statute had priority over a perfected security interest unless the lien was statutory and the statute expressly provided otherwise.\(^3\)

The issue of whether the defendant's lien took priority over the plaintiff's security interest was therefore dependent on the express language of the statute creating and defining the repairman's lien.\(^3\) The court found that the article which creates and explains the lien, and its remedies,\(^3\) expressly makes the repairman's lien

\(^3\) 17 S.E.2d 907 (W. Va. 1975).
\(^3\) The charges claimed by defendant totalled $3,719.55. 217 S.E.2d at 909.
\(^3\) See W. Va. Code Ann. § 46-9-103(4) (1966). This section was rewritten in 1974, but the validity of the instant security interest would not be affected.
\(^3\) Id. § 38-11-1 et seq. (1966).
subordinate to a properly filed security interest.402

In addition to the statutory lien which defendant relied upon, West Virginia has recognized a repairman's lien created at common law.403 The nature of that lien was the right of the repairman to retain possession of the property;404 however, only a right of possession was created and a sale of the property was wrongful.405 Had the lien which defendant relied upon been this common law lien, then section 9-310 of the UCC would not have altered the superiority of defendant's repairman's lien because the priority provision excepted only statutory liens.406

In determining whether the common law lien or the statutory lien should apply, the general rule is that:

[A] lien provided for by a statute which is merely declaratory of the common law must be interpreted in conformity with its principles, but where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter the exercise of the powers of the courts with respect to such lien must be consistent with the legislative definition.407

The court went on to acknowledge the broadening of the common law lien by the legislature through the addition of various remedies, and held that such an enlargement bound the court to follow the statutory definition. Therefore, the repairman's lien was brought within the purview of section 9-310 and by express statutory language was made subordinate to plaintiff's security interest.

Any lienor shall take such rights as a purchaser of the property deposited with him would take, and shall take subject to other titles, liens or charges in the same manner that a purchaser would take (emphasis added).


405 Id.

406 According to the provisions of § 46-9-310, a repairman's lien is superior to a security interest unless the statute creating the lien expressly provides otherwise. If the lien in this case were found to be created at common law, then § 46-9-310 would not alter its superiority. 217 S.E.2d at 910.

VI. Taxation

A. Estate Taxes and Inheritance Taxes

In *Dilmore v. Heflin*, the court recognized that the laws of West Virginia now provide that both the federal estate tax and the West Virginia inheritance and transfer tax be prorated among the persons to whom property is to be transferred from the decedent’s estate. However, this procedure may be abrogated by the clearly expressed intent of the testator in his will.

In the present case, the court found that the testator executed two types of gifts, those to named individuals, called non-residuary legatees, and those to the residuary legatees. The court concluded that it was the testator’s intent to relieve the non-residuary legatees of any tax liability, but the testator did not clearly state who should pay the taxes. In this situation the court held that “where legacies are bequeathed tax-free, and no special fund is created by the testamentary instrument to satisfy the burden of taxation, the taxes are payable from the residuary estate, if sufficient, as the only other available fund for that purpose.”

B. Sale of Land for the School Fund—Notice

The issues in *Pearson v. Dodd* revolved around a sale of land for the school fund. The facts revealed that plaintiff acquired the property in question in 1937, but did not enter her name upon the land books. Nevertheless, the property remained on the books in her grantor’s name and the taxes were paid each year until 1961. In 1961 the taxes went unpaid and the property was sold to the state for delinquency. Thereafter, the process for the eventual sale of forfeited and delinquent lands was followed, and defendant

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109 Cuppett v. Neilly, 143 W. Va. 845, 105 S.E.2d 548 (1958) held that, in the absence of any intent expressed by the testator, the federal estate tax was payable out of the residuary estate and that the West Virginia inheritance and transfer tax was payable out of each particular share or interest bequeathed or devised. The legislature changed the rule relating to the federal estate tax by providing that it too should be paid out of each particular share or interest bequeathed or devised. W. VA. CODE ANN. § 44-2-16a (1966).
111 218 S.E.2d at 894.
112 221 S.E.2d 171 (W. Va. 1975).
acquired a tax deed to the property from the deputy commissioner of forfeited and delinquent lands.\textsuperscript{414} The only notice given plaintiff of the sale of the land to defendant was by publication on April 16 and 23. The published notice of sale erroneously described the property, misstated the size thereof, and ran in the name of plaintiff's grantor as the owner.

The first issue the court discussed was whether the property passed to the state by forfeiture for non-entry or by delinquency due to nonpayment of taxes. The court defined delinquent lands as those upon which the owner fails to pay taxes causing the land to be listed as delinquent and sold to the state or to individuals at public sale.\textsuperscript{415} However, lands become forfeited when the owners fail to enter them for taxation on the land books of the proper counties and no taxes are paid on them for five consecutive years.\textsuperscript{416} Thus, there is a difference between delinquent and forfeited lands, the former meaning that the owner has failed to pay taxes due on his land, and in consequence, the land has been returned delinquent, is subject to the state's lien for taxes, and is liable to be sold therefore. But, by forfeiture, the former owner is entirely divested of all his interest in the land and the title thereto becomes absolutely vested in the state. By reason of delinquency the state may sell the property under her lien for taxes, while a forfeiture vests absolute title to the state.\textsuperscript{417}

The law greatly disfavors forfeiture as being "a harsh, even a

\textsuperscript{414} In the handling of lands delinquent for the failure to pay taxes, there may actually be two sales, as there was in this case. At the first sale, referred to as the sheriff's sale, the sheriff may sell the land to the highest bidder whose bid will at least pay all the taxes and other costs, or if no such bid is given, the sheriff will purchase the property in the name of the state, as was the case here. W. Va. Code Ann. §§ 11A-3-4, -6 (1974 Replacement Volume). If the state purchases the land, the owner has 18 months within which to redeem from the state. Id. § 11A-3-8. After that period has expired, the land will be certified by the state to the deputy commissioner of forfeited and delinquent lands for a second sale under the auspices of the circuit court. Id. § 11A-4-24. This second sale, referred to as the circuit court sale, is the sale under scrutiny in this case, and is the sale to which the statute quoted in the text applies.


\textsuperscript{417} 221 S.E.2d at 176, citing Waggoner v. Wolfe, 28 W. Va. 820, 1 S.E. 25 (1886).
dreadful remedy" and presumes no forfeiture unless the state rebuts the presumption. In Pearson the taxes were paid on the land until 1961, though the land was listed in the wrong name. The court held that such a situation does not create a forfeiture since the law disfavors forfeiture, and since the legislature has made clear its intent that forfeiture be avoided wherever possible. Therefore, there was no forfeiture and the title to the land remained in the plaintiff until the property was sold, as delinquent, to the state in 1962.

The second issue was whether the errors, which occurred during the sale to defendant voided the tax deed. The defects complained of included: 1) the published notice of sale contained the wrong name for the owner; 2) the notice described the land improperly; 3) the notice listed the size of the property incorrectly; and 4) only ten days' notice of the sale were given instead of the fifteen days' notice required by statute.

The court noted that, by statute, no irregularity, error or mistake, in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed, invalidates the title acquired by such sale if the mistake is nonjurisdictional. The court found the mistakes in this particular case to be nonjurisdictional and held the deed to be valid. The curative statutes rendered the first three mistakes harmless. As to the

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418 State v. Cheney, 45 W. Va. 478, 480, 31 S.E. 920 (1898).
421 The legislature has said that, "no entry shall result in forfeiture 'provided the identity of the land intended by such entry can be ascertained.' This is true despite errors in 'the way in which the name of the owner, the area, the lot or tract number or reference, the local description, the statement of the interest or estate or other particulars are stated.'" 221 S.E.2d at 177, quoting W. Va. Code Ann. § 11A-4-39a (1974 Replacement Volume).
422 The name in the notice was that of H. C. Pearson, Jr., plaintiff's grantor and record owner of the land. 221 S.E.2d 171, 175 (W. Va. 1975).
423 The land was described by size and the amount of interest held, the latter being incorrectly stated as a one-eighth interest, when in fact it was one-fourth. Id. at 174.
424 See note 423 supra.
426 Id. § 11A-4-33.
429 "A misnomer of the former owner did not void the tax sale in Jarrett v.
failure to give notice for the proper length of time, the court found that the primary purpose of the notice requirement was to encourage attendance and bidding at the sale, and not to give notice to the former owner. Therefore, none of the errors which occurred in the procedures surrounding the sale voided the tax deed.

The third issue in Pearson was whether the notice provisions, relating to the circuit court’s sale of delinquent land, requiring publication alone, were deficient under the due process clause of the fourteenth amendment. The notice statute was attacked as unconstitutional in State v. Simmons, but the court in that case upheld the statute declaring it not to be violative of the fourteenth amendment. Nevertheless, plaintiff asserted that a 1950 United States Supreme Court case, Mullane v. Central Hanover Trust Co., when read in conjunction with two other recent Supreme Court cases, requires overruling of the holding in Simmons.

Mullane held that an elementary and fundamental requirement of due process, in any proceeding which was to be accorded finality, included notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.

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Kimbrogh, 87 W. Va. 643, 105 S.E. 918 (1921) . . . a misdescription of a lot was held to be cured in Mathény v. Jackson, 83 W. Va. 553, 98 S.E. 620 (1919), and a misdescription of the amount of land has been said to be cured in Leach v. Weaver, 89 W. Va. 49, 108 S.E. 494 (1921) . . . 221 S.E.2d at 178.

W. VA. CODE ANN. § 11A-4-23 (1974 Replacement Volume) is the section providing the notice and is prefaced by the following phrase: “In order to encourage attendance and bidding at the sale . . . .”


W. VA. CODE ANN. § 11A-4-12 (1974 Replacement Volume) provides:

Upon the institution of a suit as provided . . . the clerk of the circuit court shall enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication . . . shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear . . . .

135 W. Va. 196, 64 S.E.2d 503 (1951).


339 U.S. at 314.
addresses of interested parties are known or easily ascertainable.\footnote{7}

The Supreme Court of Appeals noted, however, that before the tests laid down in \textit{Mullane} come into play, the parties complaining must have some property interest to be protected. The court noted that on this subject the Supreme Court had said that the fourteenth amendment's protection of property had never been interpreted to safeguard only the rights of undisputed ownership, but rather, it had been read broadly to extend protection to any significant property interest, including statutory entitlements.\footnote{8}

The basic question, then, is whether the plaintiff in the instant case had a "significant property interest." Plaintiff claimed that the provision providing for redemption at the circuit court sale\footnote{9} created a significant property interest in him as the former owner, and that, therefore, notice by publication did not meet the standards established by the Supreme Court.

The Supreme Court of Appeals rejected plaintiff's argument on several grounds. First, the court cited the specific statutory language which provides only the opportunity to petition for the privilege of redemption\footnote{10} and leaves the matter in the discretion of the trial court.\footnote{11} Second, the state's title to the property after

\begin{footnotesize}
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\item[\footnote{8}]{Fuentes v. Shevin, 407 U.S. 67, 87 (1972).}
\item[\footnote{9}]{W. VA. CODE ANN. § 11A-4-18 (1974 Replacement Volume) provides in pertinent part:}
\begin{quote}
The former owner of any forfeited or delinquent land, or any other person who was entitled to redeem such land under the provisions of [11A-3-8] may file his petition in such suit with the circuit court . . . at any time before confirmation of sale thereof requesting permission to redeem such land to the extent that title thereto remains in the State. It should be noted that this statute relating to redemption just prior to the circuit court sale is not the same statute which provides for redemption within eighteen months after the purchase of the land by the state at the sheriff's sale. \textit{See} note 441 \textit{infra}.}
\end{quote}
\item[\footnote{10}]{The statute says that "[t]he court . . . may, by proper decree, permit the petitioner to redeem . . . ." W. VA. CODE ANN. § 11A-4-18 (1974 Replacement Volume).}
\item[\footnote{11}]{The court traced the long history of confusion between § 11A-3-8, which provides for redemption within eighteen months of the state's purchase at the sheriff's sale, and § 11A-4-18, which provides for an opportunity to redeem before the circuit court sale. The cases had not clearly distinguished the nature of these two statutes, sometimes holding that the statutes creates a right to redeem, \textit{Work} v. Rogerson, 149 W. Va. 493, 142 S.E.2d 188 (1965), or a privilege to redeem, \textit{Beckley} v. Hatcher, 136 W. Va. 169, 174, 67 S.E.2d 20, 24 (1951), or both rights

\end{itemize}
\end{footnotesize}
purchase at the sheriff's sale weighed against the plaintiff's position. Third, the legislative intent clearly indicated that the opportunity to redeem is "extended . . . by the legislature as an act of grace" and that the legislature intended that "there be no constitutional requirement that the former owner be personally served by process."443

Therefore, the court was of the opinion that a former owner of property to be sold for the benefit of the school fund does not possess a significant property interest which gives rise to the notice standards prescribed by the United States Supreme Court in Mullane, and that notice by publication is sufficient notice of the sale to meet constitutional standards.

VII. WILLS

A. Acceptance of Benefits

Regarding acceptance of benefits under a will, the general rule in West Virginia is that one who accepts a benefit must adopt the whole contents of the will, conforming to all its provisions and renouncing every right inconsistent with the will.445 In Tennant v.
Satterfield, the court undertook to decide what constituted acceptance of a benefit under a will thus estopping a beneficiary from contesting its validity.

In Tennant a mother devised property to her only son on the condition that the son pay $1250 to each of his four sisters. In compliance with the condition the son purchased four cashier's checks in the amount of $1250 and sent one of the checks, by registered mail, to each of his sisters. Three of the sisters signed receipts and took custody of the checks. However, none of the checks were cashed and each sister retained possession until a will contest was instituted, at which time the checks were introduced as evidence. The sisters filed the suit within twenty days of their receipt of the checks.

In determining whether the three sisters actually accepted the checks, the court noted that although technical acceptance is presumed from taking possession of such benefits, the presumption may be rebutted by express rejection of the benefits or by acts inconsistent with their acceptance. Recognizing a paucity in West Virginia law on the question of what actually constitutes acceptance of a benefit under a will, the court looked to other jurisdictions and found that where the legatee or devisee receives a benefit under the will, the receipt will not work a technical acceptance where there has been no unreasonable delay in bringing a will contest and where no person has been prejudiced by any delay.


47 The fourth sister, on the advice of her attorney, refused to sign for the check, and thereafter became a party defendant. Id. at 231.


49 The court cited the following factual situations as examples of a technical acceptance of benefits under a will.

1) Where a beneficiary takes possession of a legacy and puts it to the beneficial use of earning income before the contest, he has made a technical acceptance. Utermehle v. Norment, 197 U.S. 40 (1905).

2) Unreasonably delaying the contest of the will and thereby creating inconvenience and injustice to third parties has been held to create a technical acceptance. Stone v. Cook, 179 Mo. 534, 78 S.W. 801 (1904).

3) Unreasonably delaying the contest of the will and thereby making restitution of benefits under the will impossible has been held to create a technical acceptance. Vance v. Crawford, 4 Ga. 445 (1848).

50 In re Miller's Estate, 159 Pa. 562, 28 A. 441 (1894).

In the instant case the court held that there was not a technical acceptance which would estop the sisters from challenging the will. Supporting this conclusion were the facts that the sisters did not know what they were signing when the mailman brought the registered checks, that the sisters did not act in any way inconsistent with their desire to challenge the will, and, by bringing suit within twenty days, they did not unreasonably delay their challenge of the will, and did not cause any inconvenience or injustice to third parties.

Therefore, taking possession of the checks did not constitute a technical acceptance of benefits under a will which would estop the beneficiaries from challenging the will.\textsuperscript{452}

B. Ambiguities and Omissions

In\textit{ Farmers' and Merchants' Bank v. Farmers' and Merchants' Bank},\textsuperscript{453} the court considered whether extrinsic evidence could properly be used to remedy an omission of words in a will. The instant case presented a situation in which a clerical error caused two lines to be omitted from a bequest in a will. Because of the omission, the bequest contained nothing of the amount to be given. At trial, testatrix's attorney was allowed to testify as to the language which should have appeared in the will, and, based upon this testimony, the trial court interpolated into the will the clause as testified to by the attorney. Judgment was thereby awarded for the legatee.

On appeal, the Supreme Court of Appeals noted that where ambiguity exists, the admissibility of extrinsic evidence is determined by whether the ambiguity is latent or patent. A latent ambiguity is one that is not apparent upon the face of the instrument alone and that is discovered when it is sought to identify such things as the property or the beneficiaries.\textsuperscript{454} A patent ambiguity is one which is apparent upon the face of the instrument, as where in wills, the same tract is disposed of in different clauses to different persons.\textsuperscript{455} As a general rule, where the ambiguity is latent, the extrinsic evidence is admissible to aid in construing the will.\textsuperscript{456}

\begin{footnotes}
\item[452] As in most cases involving intent, Tennant was decided upon a specific factual situation. Nevertheless, the case does establish certain criteria which may be applied to future West Virginia cases.
\item[453] 216 S.E.2d 769 (W. Va. 1975).
\item[454] \textit{Id.} at 772.
\item[455] \textit{Id.}
\end{footnotes}
Conversely, where the ambiguity is patent, extrinsic evidence is not admissible to aid in construing the will.\textsuperscript{457} Since the language in this will was not only patently ambiguous, but totally nonexistent, the court held that the testimony of the attorney who prepared the will was inadmissible to allow the trial court to interpolate into the will a provision of which there was no semblance in the instrument.\textsuperscript{458}

\textsuperscript{457} Couch v. Eastham, 29 W. Va. 784, 3 S.E. 23 (1887).

\textsuperscript{458} To allow extrinsic evidence to interpolate into a will a provision which is totally nonexistent would be speculation and conjecture, which the court has explicitly disallowed. See Harris v. Eskridge, 124 W. Va. 283, 20 S.E.2d 465 (1942).
TORTS

In 1975 there were a number of noteworthy developments in the law of torts in West Virginia. The West Virginia Supreme Court of Appeals abolished established doctrines in municipal governmental tort immunity and privity of contract in products liability cases. Generally, the 1975 decisions of the court reflected a more liberal and well-reasoned attitude toward the tort victim.

I. AUTOMOBILE ACCIDENTS

In *Clements v. Stephens* a guest passenger was killed when the automobile in which he was riding struck a hillside. Although the accident was allegedly caused by the driver having fallen asleep at the wheel, there was no evidence at trial to support this allegation.

Under these circumstances, it is inevitable that the defense of assumption of risk will be raised, but to invoke the defense, the defendant must show that the plaintiff knowingly and voluntarily exposed himself to the danger. Thus, a passenger assumes the risk when a driver of an automobile falls asleep when the passenger knows or reasonably should know that the driver is driving without his customary sleep; but where the passenger, through actual knowledge or the use of ordinary care, is unaware of the condition of the driver he does not assume the risk. Before an instruction on assumption of risk is justified, "the defendant should have offered proof that the injured party knew or should have known that the driver of the automobile was so fatigued or sleepy that his driving ability might thereby be impaired, and second, proof that after learning of or after having reasonable opportunity to learn of the situation, he voluntarily continued as a passenger or failed to take other reasonable precautions for his own safety." The evidence in *Clements* failed both requirements.

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211 S.E.2d 110 (W. Va. 1975).
Id. at 115.
Id.
211 S.E.2d at 116-17.
211 S.E.2d 110 (W. Va. 1975).
Id. at 115.
Id.
211 S.E.2d at 116-17.
211 S.E.2d 110 (W. Va. 1975).
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211 S.E.2d 110 (W. Va. 1975).
Id. at 115.
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211 S.E.2d at 116-17.
211 S.E.2d 110 (W. Va. 1975).
Id. at 115.
Id.
211 S.E.2d at 116-17.
211 S.E.2d 110 (W. Va. 1975).
Id. at 115.
Having decided that the deceased passenger had not assumed the risk, the \emph{Clements} court was faced with language in \emph{Hall v. Groves},\textsuperscript{464} which supported the proposition that the act of falling asleep while driving is negligence as a matter of law and that the injured passenger is entitled to a directed verdict upon the issue of liability of the driver.\textsuperscript{465} The court in \emph{Clements} "regarded as \textit{obiter dicta}"\textsuperscript{466} the statements made in \emph{Hall} and deemed it "inadvisable, if not improper," to follow the \emph{Hall} rationale.\textsuperscript{467} In disagreeing with \emph{Hall}, the court found that falling asleep at the wheel "may be \textit{prima facie} evidence of actionable negligence if it was the proximate cause of the injuries for which plaintiff complains."\textsuperscript{468}

II. Damages

A. Special Damages

Special damages are "[t]hose which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions."\textsuperscript{469} Therefore, any evidence of expenses which are unrelated to the injury complained of should not be admissable at trial.

In \emph{Abdulla v. Pittsburgh & Weirton Bus Co.}\textsuperscript{470} the plaintiff was injured while riding in a bus. While undergoing examination and treatment for back injuries sustained in the accident, it was discovered that he had diabetes. During his stay in the hospital and incidental to the treatment of his back injury, the plaintiff was placed on a special diet for diabetics and given a daily pill to control the diabetes. The special diet and pills were included in the hospital bills introduced into the proof of special damages. The question presented to the court\textsuperscript{471} was whether the hospital bills

\textsuperscript{464} 151 W. Va. 449, 153 S.E.2d 165 (1967).
\textsuperscript{465} Id. at 455-56, 153 S.E.2d at 169.
\textsuperscript{466} Id. at 118.
\textsuperscript{467} Id.
\textsuperscript{468} \textit{Black's Law Dictionary} 469 (rev. 4th ed. 1968).
\textsuperscript{469} 213 S.E.2d 810 (W. Va. 1975).
\textsuperscript{470} The other questions that the court answered are settled (as much as they can be) law in West Virginia. Common carriers owe their passengers the highest degree of care compatible with the practical operation of a vehicle. \emph{Laphew v. Consol. Bus Lines, Inc.}, 133 W. Va. 291, 55 S.E.2d 881 (1949). In a concurrent negligence claim by a passenger against a public carrier, the carrier must be wholly free from negligence. Any showing of negligence on the part of the carrier which
containing these items not connected with the injury sustained could be introduced as evidence to prove special damages.

The West Virginia Supreme Court of Appeals noted that the negligent party does not have to compensate the injured party for damages that were not the proximate result of this tort, and the burden of proving damages is on the injured party; but by the use of its sound discretion, the trial court will decide whether to allow proof of special damages which is “minimally tainted” by extraneous charges. “If such matters may be isolated, they should be removed from the jury’s consideration. If such are so unsubstantial that there is little or no possibility of prejudice, they can be ignored under the salutary protection of harmless error.” The Abdulla court found the diabetes diagnosis and special diet to be “routine hospital practices” necessary for the treatment of plaintiff’s back injury and that the special pills to control diabetes were “too insignificant” to be prejudicial.

B. Wrongful Death Actions

In Kesner v. Trenton, plaintiff brought wrongful death actions against marina operators following the drowning of his two daughters. Plaintiff alleged that defendants were negligent for failing to maintain their land in a reasonably safe condition for invitees.

The West Virginia wrongful death statute provides for separate recoveries for three items; (1) damages for wrongful death not to exceed $10,000; (2) compensatory damages not to exceed $100,000; and (3) special damages which include reasonable funeral, hospital, and medical expenses. In Kesner the jury resolved the question of liability in favor of the plaintiff and awarded proximately contributed to the accident and plaintiff’s injuries is actionable. Brogan v. Union Traction Co., 76 W. Va. 698, 86 S.E. 753 (1915). When it is shown that a person was injured while passively riding as a passenger in a common carrier, a presumption arises that the carrier was negligent, Isabella v. West Virginia Transp. Co., 132 W. Va. 86, 51 S.E.2d 318 (1948); but the presumption disappears after the carrier introduces rebuttal evidence. Mulroy v. Co-Operative Transit Co., 142 W. Va. 165, 95 S.E.2d 63 (1955).

\[213 \text{ S.E.2d at 822.}
\]
\[\text{Id.}
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\[\text{Id.}
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\[216 \text{ S.E.2d 880 (W. Va. 1975).}
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See INVITEES, this section, for a discussion of the invitee issue in this case.

\[\text{W. VA. CODE ANN. } \S 55-7-6 \text{ (Cum. Supp. 1975).}
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damages for funeral expenses but awarded no damages for the wrongful deaths. The court was faced with a "factual situation of first impression" and had to decide whether it was mandatory to award wrongful death damages under the statute if funeral and burial expenses were awarded under the same statute. The trial court found that awarding funeral expenses without also awarding wrongful death damages was inconsistent and awarded plaintiff new trials "on the ground that the verdicts were inadequate as a matter of law."

The West Virginia Supreme Court of Appeals noted that the jury is the absolute judge of the amount of the damages in a wrongful death action, and its findings will not be set aside for inadequacy unless the jury was misled or motivated by passion or prejudice. Thus, mere inadequacy is insufficient to set aside a jury verdict. The jury has absolute discretion to award zero to ten thousand dollars in wrongful death damages when liability is determined, and there is no legal inconsistency in the jury's determination to award funeral expenses but 'No' damages since they are separate recoveries.

III. Invitees

One "who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land" is an invitee. The owner of the premises owes an invitee the duty of exercising ordinary care in maintaining his land in a reasonably safe condition. In West Virginia this duty has been abolished where the landowner invites or permits a person to use the premises for recreational purposes. But there

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174 216 S.E.2d at 886.
175 Id.
177 216 S.E.2d at 886.
180 216 S.E.2d at 887. The judgment of the trial court awarding plaintiff a new trial was affirmed because of the giving of an irrelevant and prejudicial instruction on "unavoidable accident" which misled the jury; negligence was demonstrated on the face of the record. 216 S.E.2d at 888-89.
181 Restatement (Second) of Torts § 332(3) (1965).
are two exceptions which require the landowner to exercise ordinary care to invitees: (1) if he willfully or maliciously fails to warn against a dangerous or hazardous condition, use, structure or activity, and (2) if he makes a charge to a person who enters or goes upon the land. A "charge" is "the amount of money asked in return for an invitation to enter or go upon the land."

In Kesner v. Trenton, the court had to decide whether the defendant marina owners made such a "charge" within the meaning of the statute such that they were required to exercise ordinary care to protect the decedents. The defendants operated the marina on a lake and provided swimming areas adjacent to the marina at no cost.

Using authority from Wisconsin, the court decided that "the defendants in this case reasonably could have expected to attract prospective customers and thus, to increase sales and rentals at the marina by allowing people to swim in the lake at no cost." This expectation was held to be a sufficient "charge" within the meaning of the statute thus obligating the defendants to provide ordinary care.

IV. MUNICIPAL GOVERNMENTAL IMMUNITY

In Long v. City of Weirton, the court held that "[n]ow and hereafter, a municipal corporation shall be liable, as if a private person, for injuries inflicted upon members of the public which are proximately caused by its negligence in the performance of functions assumed by it. The . . . 'governmental-proprietary' distinctions are intended to be abrogated and declared obsolete by the force of this ruling." With these words, the West Virginia Su-

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190 Id. § 19-25-4 (1971 Replacement Volume).
194 216 S.E.2d at 885.
195 See DAMAGES, this section, for a discussion of the wrongful death damages issue in this case.
197 Id. at 859. The case also dealt with other issues. There is concurrent negligence when two or more persons are guilty of negligence which occurs in point of time and place and together proximately cause or contribute to the injuries of another. The injured party may recover against all of them. Lester v. Rose, 147 W. Va. 575, 130 S.E.2d 80 (1963); Butler v. Smith's Transfer Corp., 147 W. Va. 402, 128 S.E.2d 32 (1962). Where one is charged with controlling substances of dangerous character such as natural gas, appropriate and immediate response to gas leaks is
preme Court of Appeals abolished municipal government's immunity in West Virginia and discarded the troublesome governmental-proprietary distinction.

In *Long* a private contractor working for and under the supervision of the city struck a natural gas line. The resulting gas leak was reported to the city manager who, in turn, contacted the gas company. Even though a gas leak was considered an "emergency situation," the gas company did not respond immediately, nor did it turn off the gas or evacuate the area. The leaking gas subsequently exploded, severely injuring plaintiff. In the resulting trial, the jury found against the city and the gas company, but the judge exonerated the city due to municipal governmental immunity.496

In abolishing municipal governmental tort immunity, the West Virginia Supreme Court of Appeals traced the growth of the doctrine and decided that since it was not a part of the common law and was not recognized in Virginia until 1867, the rule of governmental immunity for municipal corporations did not become West Virginia law when West Virginia became a state.497 Thus, the court was free to change the doctrine without the aid of the legislature. Noting the changing social needs and demands of the public, the court recognized that the governmental-proprietary distinction was unworkable and unsatisfactory.498 In abolishing municipal governmental immunity, the court specifically mentioned that its ruling did not abolish the supposed immunities of county governments.499

necessary. Groff v. Charleston-Dunbar Natural Gas Co., 110 W. Va. 54, 156 S.E. 881 (1931). The sovereign immunity granted the state of West Virginia by the West Virginia constitution does not apply to a municipality and does not protect such municipality from suit. Higginbotham v. City of Charleston, 204 S.E.2d 1 (W. Va. 1974). A verdict by which a plaintiff recovers against one or more defendants but which is silent as to others is a verdict in favor of the defendants not named. Facchina v. Richardson, 213 Va. 440, 192 S.E.2d 791 (1972).

496 214 S.E.2d at 839.
497 Id. at 854.
498 Id. at 858. The court also recognized that the distinction ignored the factor of actionable negligence.
499 214 S.E.2d at 860.
V. PRODUCTS LIABILITY

A. Blood Supplied by Hospital

In *Foster v. Memorial Hospital Association of Charleston*, a patient contracted serum hepatitis from a blood transfusion given by the defendant hospital, permanently disabling her. The plaintiff alleged that the hospital impliedly warranted the blood as being fit for the purpose of transfusion. The court was faced with the question, for the first and probably the last time, of whether the transfer of blood was a sale of goods under the law of warranty.

The great weight of authority in the United States holds that a transaction involving blood is a service and not a sale creating an implied warranty of fitness. In West Virginia a warranty is created "if the seller is a merchant with respect to goods of that kind." A hospital or a doctor, like dentists and lawyers, are not "merchants" in the sense of actively promoting and selling a product, but are professionals who provide services to individuals.

The court held that:

where an individual contracts for professional services involving an incidental transfer of personal property as a necessary part of such service, and where the appropriate use of such personal property depends primarily upon the skill and judgment of the person rendering the service, such a transfer of personal property by the professional is not within the contemplation of W. Va. Code, 46-2-314 [1963] or 46-2-315 [1963] and any injury or damage resulting from such transferred property must be

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W. VA. CODE ANN. § 16-23-1 (1972 Replacement Volume) now provides that furnishing blood for transfusion is a service and not a sale and no warranties are applicable. The statute was enacted in 1971, but the facts in *Foster* arose in 1968; thus, the statute was not determinative of the action. The court noted that the decision in this case may have continuing importance in analogous situations. 219 S.E.2d at 918.

Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954).


The court noted that if a doctor or hospital negligently cared for a patient, the plaintiff could bring an action in tort; but an action in warranty is not available to a plaintiff who received contaminated blood in a hospital because blood is not a standard commercial product within the meaning of the law of warranty. 219
recovered by an action grounded in negligence and not by an action grounded in warranty.\textsuperscript{505}

In so holding, the court greatly limited actions of implied warranty against professionals.

\section{B. Privity Abolished}

Prior to 1975, persons who were injured by defective products could not recover against the manufacturers and sellers of such products unless privity existed between them. In \textit{Dawson v. Canteen Corp.}\textsuperscript{506} the court broadly stated that “the requirement of privity of contract in actions grounded in breach of express or implied warranty is abolished in West Virginia . . . .”\textsuperscript{507} In \textit{Dawson} the plaintiff purchased a cheeseburger on a contaminated bun from a vending machine that was operated by a retail seller who purchased the bun from the defendant. The plaintiff alleged that the defendant breached the implied warranty of fitness for human consumption, but the trial court dismissed the action for lack of privity between the plaintiff and the defendant.

The facts clearly show that the court was dealing with a problem of “vertical” privity as distinguished from “horizontal” privity.\textsuperscript{508} The court noted that the privity requirement for warranty actions in “horizontal” questions was eliminated by statute.\textsuperscript{509} The court further stated that statute also eliminated “vertical” privity for “consumer” transactions.\textsuperscript{510} Thus, the statutes had eroded the common law doctrine prior to \textit{Dawson}. In noting the trend in other

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S.E.2d at 921. “If, however, the medicine itself is a standard product, and is defective in the sense that it deviates from the accepted standard, then the law of warranty would apply." \textit{Id.}
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\textsuperscript{505} 219 S.E.2d at 921-22.
\textsuperscript{506} 212 S.E.2d 82 (W. Va. 1975).
\textsuperscript{507} \textit{Id.} at 82-83.
\textsuperscript{508} "‘Horizontal privity' limits the extent that third parties benefit from the warranties buyers receive from sellers. . . . ‘Vertical privity' refers to the typical manufacturer-distributor-retailer situation and involves the question of whether a seller's warranty, given to his buyer, extends to one who purchases from this buyer." Note, Products Liability—West Virginia Consumer Credit and Protection Act—Definitional Inadequacies, 77 W. Va. L. Rev. 328, 336 (1975).
\textsuperscript{509} W. Va. Code Ann. § 46-2-318 (1966). The statute does not eliminate privity in all “horizontal” cases; it only applies to those in the family or household of the buyer and to guests in the buyer's home.
jurisdictions and the trend of the recent acts of the West Virginia Legislature, the court stated that "[i]t is sufficient merely to hold that lack of privity alone is no longer a defense to a warranty action in West Virginia." While the case, if read literally, may be broader than the court probably intended, it is still a significant case and represents a new and major departure from prior decisions.

VI. Releases

At common law an injured party may have only one full recovery, and complete satisfaction from any tort-feasor is satisfaction of the total damages suffered by the injured party. If the injured party uses ordinary care in choosing a physician, the law regards an injury caused by the physician's mistakes or his want of skill as part of the damages which naturally flow from the original injury. Thus, the original tort-feasor is liable for all damages including those for injuries later inflicted by the physician. If the injured party releases the original tort-feasor, are the physicians and hospital who negligently provided medical care which aggravated the original injuries also released?

Prior to 1975, an injured person's unqualified release of the original tort-feasor from liability for personal injuries barred recovery against successive tort-feasors for acts of malpractice or negligent hospital treatment. Thornton v. Charleston Area Medical Center overruled this by holding:

the execution of a general release in favor of the original tort-feasor or dismissal with prejudice of a civil action against such tort-feasor is prima facie evidence of the intention of the injured party to accept the same as full satisfaction of all damages which naturally flow from the original injury, in the absence of language or circumstances in the release or dismissal indicating

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212 S.E.2d at 84.


a contrary intention of the parties; but whether such release or dismissal is a bar to further action for malpractice against the treating physician or hospital providing care is a question of fact to be answered from the intention of the parties.\textsuperscript{517}

Thus, the prior law in West Virginia was changed from a conclusive presumption to a rebuttable presumption, and the injured party could now introduce parol evidence to explain the terms of the release in favor of the original tort-feasor.\textsuperscript{518} With this decision, West Virginia adopted the more "modern" approach and rejected the former one which worked to the benefit of negligent parties.\textsuperscript{519}

VII. \textsc{Res Ipsa Loquitur}

In Walton v. Given,\textsuperscript{520} A, the defendant, sold and delivered a mobile home to B, a dealer in mobile homes. B sold the home to C, the plaintiff. B moved the trailer to the plaintiff's lot, installed it on blocks, and connected and tested the water, gas and electrical systems. The valve which regulated the flow of gas into the home was on the outside. There was an explosion which seriously damaged the mobile home. Upon entering the home, it was noticed that the furnace door was blown off. Since the furnace in the mobile home remained unchanged from the time A delivered it to B, the lower court held that the doctrine of \textit{res ipsa loquitur} was available to the plaintiff in providing negligence.

The doctrine of \textit{res ipsa loquitur} relates to the method of proving negligence; the doctrine furnishes a rebuttable presumption of negligence sufficient to permit the jury to find negligence unless the presumption is rebutted.\textsuperscript{521} Before the doctrine can be applied, three essentials must be met: "(1) the instrumentality which causes the injury must be under the exclusive control and management of the defendant; (2) the plaintiff must be without fault; and (3) the injury must be such as in the ordinary course of events it would not have happened had the one in control of the instrumentality used due care."\textsuperscript{1522} Applying the three essentials to the facts

\textsuperscript{517} Id. at 108-09.
\textsuperscript{518} Id.
\textsuperscript{519} 213 S.E.2d at 107.
\textsuperscript{520} 215 S.E.2d 647 (W. Va. 1975).
\textsuperscript{521} Id. at 651.
\textsuperscript{522} Id.
in *Walton*, the court found that the defendant had no control over the mobile home at the time of the explosion, and thus the lower court erred when it applied the doctrine of *res ipsa loquitur* to the facts of the case. Anyone could have turned the gas valve off and then turned it on again allowing gas to accumulate in the home. Also, any negligence on the part of the dealer in installing the mobile home could not be imputed to the defendant because the dealer was not an agent of the defendant.\footnote{The court also stated that the “sealed package” doctrine was not applicable to the facts in the case. 215 S.E.2d at 652. This doctrine presumes that a manufactured product in a sealed package remains unchanged from the manufacturer to the retail purchaser.}
WORKMEN'S COMPENSATION

Because workmen's compensation is a statutorily created right, the major cases in this area involve statutory interpretation. Various statutes have recently been amended and are therefore somewhat different from the statutes applicable to the reported cases. Notwithstanding these changes, none of the alterations appear to affect the holdings in the following cases. For the reader's information, related changes created by recent amendments are cited throughout this article.

I. DATE FOR DETERMINING RIGHTS OF DEATH BENEFIT CLAIMANTS

In Sizemore v. Workmen's Compensation Commissioner, the issue was "whether the workmen's compensation statute in effect on the date of the employee's injury or the one in force at the time of his death governs dependents' claims for death benefits." The language of the statute in effect at the time of injury, if applicable, precluded recovery; however, recovery would be allowed if the statute at the date of death governed.

Sizemore was not a case of first impression. In at least five prior cases the court had dealt with this issue. In both Hardin v. Workmen's Compensation Appeal Board and Lester v. State Com-

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521 The following case contained an issue involving workmen's compensation, but was not reported in this section: Eggleton v. Workmen's Compensation Commissioner, 214 S.E.2d 864 (W. Va. 1975).
523 Id. at 914.
525 Acts of the 58th W. Va. Leg. ch. 205, Reg. Sess. (1967) (repealed 1974). The claimant's husband was injured in 1961 and died as a result thereof in 1970. The 1961 version of § 23-4-10 provided death benefits for the injured employee's dependents if the employee died as a result of his injuries within six years of the date of injury. In 1967 the legislature increased this time period between injury and death to ten years.

It should be noted that § 23-4-10 has since been amended to eliminate the time period between injury and death as a requirement for recovery of death benefits. W. Va. Code Ann. § 23-4-10 (Cum. Supp. 1975). Although this moots one issue in the reported case, other issues, e.g. which level of benefits to award, still are relevant.

the court held that the statute in force at the date of injury governed claims for death benefits. In *Webb v. State Compensation Commissioner* and *Peak v. State Compensation Commissioner* the court reversed, holding that the date of death governed dependents’ claims. In the most recent case, *Maxwell v. State Compensation Director*, the court again reversed itself and chose the date of injury as determinative of dependents’ death benefits.

In *Sizemore* the court recognized two theories as to the source of the dependents’ rights under workmen’s compensation statutes. The date of injury theory is grounded on the view that either the dependents’ rights are strictly derivative of the injured employee’s rights, or that the injured employee’s rights merely survive for the benefit of his dependents. Conversely, the date of death theory is based on the view that the dependents’ rights accrue at the death of the employee and are thus separate and distinct claims by the dependents. By a long line of cases, including *Maxwell*, West Virginia has subscribed to the view that the dependents’ rights are separate and distinct, thus creating a conflict when applying the statute in effect on the date of injury, as was done in *Maxwell*. The Supreme Court of Appeals resolved this inconsistency in *Sizemore* by overruling *Maxwell* and holding that the date of death controls the rights of dependents seeking death benefits because the dependents’ rights accrue upon the death of the employee.

II. SURPLUS FUND

Employers in West Virginia are generally required to participate as subscribers in the workmen’s compensation fund. To support the fund, employers make quarterly payments based on a percentage of the employer’s payroll. Ten per cent of this payment goes into a surplus fund to cover “the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for in [the workmen’s compensation laws].”

One exception to the requirement of participation in the work-

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523 Id. § 23-3-1 (1973 Replacement Volume).
men's compensation fund is the ability of employers with sufficient financial responsibility to become self-insurers. The self-insurer pays its employees directly for their injuries, providing at least the same values of compensation as would be provided under workmen's compensation. The self-insurer can elect either to pay into the surplus fund, or to provide special security or bond in lieu thereof. His payments into the surplus fund are to be used for a catastrophe or a second injury.

The workmen's compensation laws provide that the commissioner shall pay medical expenses for injured employees from a fund supported by the contributions of the subscribers. There is a maximum on the amounts payable from this fund for medical expenses, but should the injured employee's medical expenses exceed the maximum:

[T]he commissioner may pay out of any available funds such additional sum as may be necessary, but such additional sum shall not be charged to the account of the employer.

In Smith v. Workmen's Compensation Commissioner, plaintiff, an employee of a self-insurer, was injured, and his medical expenses exceeded the maximum amount payable by the Commissioner from the subscribers fund for personal injuries. Since the corporate employer was a self-insurer, the corporation was required to pay these expenses. However, since the corporation contributed to the surplus fund, the employer claimed that any excess above the maximum amount which the commissioner would normally pay from the subscribers fund for injuries to employees of subscribers should be paid by the commissioner from the surplus fund. Through statutory interpretation the Supreme Court of Appeals held that the self-employer's contributions into the sur-

532 Id.
533 Id.
534 Id.
536 Id. At the time this case was tried the maximum amount payable was $3000. The amount was increased by the Legislature in 1974 to $7500.
537 Id.
540 The rationale for this argument is that the commissioner does pay the excess medical expenses for subscribers from the surplus fund. Smith v. Workmen's Compensation Comm'r., 219 S.E.2d 361, 367 (W. Va. 1975).
plus fund were to be expended only for catastrophes or second injuries, and not for medical care in excess of the maximum amount set by the applicable statute. Therefore, under Smith, the self-insurer is required to pay all expenses for medical attention incident to a compensable claim, at least to the extent provided by the workmen's compensation fund, without recourse to the surplus fund.

Lloyd George Jackson II  
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Alan Dale Moats  
Thomas A. Vorbach

34 The court found it persuasive that the language relating to the use of the surplus fund by subscribers provided, *inter alia*, for its use to cover "all losses not otherwise specifically provided for in this chapter." W. Va. Code Ann. § 23-3-1 (1973 Replacement Volume). However, the section which created the right of self-insurers to pay into the surplus fund limited its use to situations of catastrophe or second injury. W. Va. Code Ann. § 23-2-9 (Cum. Supp. 1975).