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Survey of Develpoments in West Virginia Law: 1977

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SURVEY OF DEVELOPMENTS IN WEST VIRGINIA LAW: 1977

ADMINISTRATIVE LAW[1]

In *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions,*[2] the Supreme Court of Appeals examined the requirement of the West Virginia Administrative Procedures Act that agency decisions in contested cases be accompanied by findings of fact and conclusions of law.[3] A savings and loan company applied to the Board of Banking and Financial Institutions to change its name and to change the nature of its business to a corporation with general banking powers. The appellant intervened in the matter, protesting the application of the savings and loan company. After investigation and a hearing, the Board approved the savings and loan company's application. The Board's order was affirmed on appeal to the circuit court, but the Supreme Court of Appeals reversed and remanded the case to the Board, holding that the Board's final order did not comply with the findings requirement of the Administrative Procedures Act.

The court noted that "[t]he grand design of administrative law is to guarantee the rationality of the process through which the

[1] Another administrative law case *North v. West Virginia Board of Regents,* 233 S.E.2d 411 (W. Va. 1977), is discussed in the constitutional law section of this survey.

[2] 233 S.E.2d 719 (W. Va. 1977).

[3] W. VA. CODE § 29A-5-3 (1976 Replacement Vol.) provides that:

Every final order or decision rendered by an agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

results are determined, and thereby help guarantee the rationality of the results."[4] To aid reviewing courts in fulfilling their obligation to preserve the rationality of the administrative decision-making process, the Administrative Procedures Act requires that an agency decision in a contested case be accompanied by a statement of the findings of fact and conclusions of law made by the agency in reaching its decision. In the instant case, the Board attempted to comply with the findings requirement by simply restating the statutory language regarding approval of applications for bank charters. The court held the Board's statement to be an insufficient statement of its findings of fact to permit evaluation of the Board's order by a reviewing court, and directed the Board to enter a decision in accordance with the findings requirement.

In setting forth what the Board's order should include to satisfy the requirement, the court said:

> When we are concerned with very complex cases involving evidence which cannot adequately be evaluated by laymen, or when we are concerned with cases involving an intricate interfacing of fact-finding and policy making, the ideal order would set forth: (1) the agency's basic value judgments which are dictated by its interpretation of the statutory purposes; (2) the random facts which have been presented to the agency in support of various positions which the agency determines to be relevant to the agency decision; (3) the methodology by which those facts have been evaluated, i.e., credibility of witnesses, validity of tests and statistical data, accuracy of expert predictions, etc.; (4) an integrating theory which organizes the random evidentiary facts in an intelligent and comprehensible way; and, (5) a conclusion based upon the theory developed, supported by the facts, concerning whether a proposed action is in furtherance of the purposes set forth in the statute, along with an explanation of any change in agency policy from former practice.[5]

While recognizing that the complexity of an agency decision would be determined by the complexity of the issues involved, the court noted that "in every contested case, W. Va. Code, § 29A-5-3[6] contemplates a decision in which the agency sets forth the underlying evidentiary facts which lead the agency to its conclusion, along

[4] 233 S.E.2d at 725.

[5] *Id.* at 726.

[6] W.VA. CODE § 29A-5-3 (1976 Replacement Vol.).

with an explanation of the methodology by which any complex, statistical, or economic evidence was evaluated."[7]

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[7] *Id.* at 727.

CONSTITUTIONAL LAW[8]

State ex rel. Whitman v. Fox[9] involved various constitutional challenges to the West Virginia conspiracy statute,[10] election fraud statute,[11] and the procedure followed by the Logan County Circuit

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[8] Other cases dealing with Constitutional Law decided in 1977 included: State v. Boyd, 233 S.E.2d 710 (W. Va. 1977) (constitutional provisions governing due process and self-incrimination of criminal defendant were infringed by interrogation at trial as to reason defendant had not earlier disclosed a defense); Menon v. Davis Memorial Associates, Inc., 235 S.E.2d 817 (W. Va. 1977) (civil plaintiff's rights to due process violated when trial court ruled on the merits of the case without affording plaintiff an opportunity to present evidence in his behalf); State ex rel. Hutzler v. Dostert, 236 S.E.2d 336 (W. Va. 1977) (bail, which must be determined on a case by case basis, deemed to be excessive as to named defendant and his charged offense, thus violating constitutional prohibition against excessive bail); Smoot v. Dingess, 236 S.E.2d 468 (W. Va. 1977) (defendant may not be incarcerated for either civil or criminal contempt upon unsworn testimony and notice of the contempt hearing should be given to the real party in interest); O'Neil v. Parkersburg and Hendrickson v. Parkersburg, 237 S.E.2d 504 (W. Va. 1977) (notice of claim provision that right of victim of governmental tort feasor to sue is absolutely barred should he not give required notices to municipality within thirty days after his cause of action has accrued, violated equal protection and due process clauses and were unconstitutional); Mason County Board of Education v. State Superintendent of Schools, 234 S.E.2d 321 (W. Va. 1977) (county board of education had standing to obtain judicial review of an order of the State Superintendent of Schools requiring the reinstatement of an employee); State ex rel. Preacher v. Sencindiver, 233 S.E.2d 425 (W. Va. 1977) (upheld constitutionality of W. Va. Code § 61-2-1 (1977 Replacement Vol.), felony murder statute, as not erecting an impermissible inference of motive, willfulness and premeditation); State ex rel. State Building Commission v. Casey, 232 S.E.2d 349 (W. Va. 1977) (statute providing for rent-free use of state property by a private corporation is an unconstitutional grant of the credit of the State to such corporation); State ex rel. Kanawha County Building Commission v. Paterno, 233 S.E.2d 332 (W. Va. 1977) (acquisition and construction by the commission of annex through issuance of bonds payable from severence tax revenues were not violative of constitutional provisions limiting contracting of state debts or those granting the state's credit to a county, or those limiting the contracting of county debts); Anderson v. George, 233 S.E.2d 407 (W. Va. 1977) (declared W. VA. CODE § 7-10-4 (1976 Replacement Vol.) unconstitutional because statute did not provide for pre-seizure or post-seizure hearing on the validity of humane officer's statutory powers); State ex rel. Cogar v. Kidd, 234 S.E.2d 899 (W. Va. 1977) (declared portion of embezzlement statute, W. VA. CODE § 61-3-20 (1977 Replacement Vol.) which caused certain presumptions of guilt to be raised, unconstitutional; statute deemed severable with the rest of it remaining valid); State ex rel. Piccirillo v. Follansbee, 233 S.E.2d 419 (W. Va. 1977) (property qualification for candidacy in municipal elections unconstitutional as violative of equal protection, W. VA. CONST. art. III, § 17).

[9] 236 S.E.2d 565 (W. Va. 1977).

[10] W.VA. CODE § 61-10-31 (1977 Replacement Vol.).

[11] W. VA. CODE § 3-9-1 (1971 Replacement Vol.).

Court. The Supreme Court of Appeals of West Virginia struck down as void for vagueness a portion of W. Va. Code § 61-10-31[12] upheld the indictments based upon the election fraud statute, struck down the joint trial procedure followed by the lower court, and upheld the grand jury selection process followed by the Commissioners of Logan County. The case was based on alleged election irregularities and fraud practiced by the defendants in the 1976 general election.

W. Va. Code § 61-10-31 (2)[13] made it a felony for anyone to attempt to defraud the State, a county, a municipality, or a board of education. The Court struck down this portion of the statute as void for vagueness since it could not possibly apprise a man of what conduct was deemed criminal under this statute. The West Virginia court pointed to its responsibility in upholding individual rights when there was a constitutional infirmity in a statute, regardless of the motive of the Legislature in passing that statute.[14] The Court declared this portion of the statute void even though a similar federal conspiracy statute had long been upheld as constitutional. The West Virginia court noted that due process required that a criminal statute must be sufficiently definite,[15] and part (2) of the West Virginia conspiracy statute was fatally lacking in such definiteness.

However, part (1) was not struck down and was deemed in force so as to support the indictments based upon it. That portion of the conspiracy statute made it a felony to conspire to commit certain offenses which were defined in other sections of the Code. Noting that the statute was severable, that portion of the statute dealing with offenses against the State[16] was valid and continued in effect.

The joint defendants had moved for separate trials in the lower court and the lower court had refused such motion on the grounds of efficiency and economy. The Supreme Court held that individual interests in fairness and justice so far outweighed inter-

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[12] W. VA. CODE § 61-10-31 (1977 Replacement Vol.).

[13] W. VA. CODE § 61-10-31(2) (1977 Replacement Vol.).

[14] 236 S.E.2d 565 at 569.

[15] In *State v. Flinn*, 208 S.E.2d 538 (W. Va. 1974), the Court held that a criminal statute had to be definite enough to give an ordinary person fair notice that contemplated conduct is prohibited and to provide adequate standards for adjudication.

[16] 236 S.E.2d at 571.

ests in economy as to make individual trials constitutionally mandated unless the joint defendants knowingly acquiesce in a joint trial.

The petitioners had alleged that the basis of selection of jurors for the special grand jury to investigate elections did not provide for an adequate representation of a full cross-section of society. The West Virginia Supreme Court of Appeals expressly adopted the *Castaneda*[17] standards for deciding whether a grand jury excluded a minority group. These standards include: the petitioner must establish racial identity or group identity; his group must be proven to have been singled out for different treatment under the laws; and this group must have been under represented on a grand jury (in proportion to representation in the population as a whole) over a significant number of years. By establishing these factors, the burden is shifted to the State to prove that the grand jury selection process is not discriminatory. The petitioners in *Whitman* failed to establish any of these factors and thus a complete hearing on the jury selection process was deemed unnecessary.

In *Moore v. McKenzie,*[18] the West Virginia Supreme Court of Appeals denied a post-conviction habeas corpus writ.[19] The petitioner was a parolee who two years previously had pleaded guilty to attempted rape.[20] The rape statute then in force[21] provided for different terms of imprisonment for males convicted of carnal knowledge of a female under sixteen than for females convicted of carnal knowledge of a male under sixteen. Men convicted of statutory rape could have received a much heavier sentence than women convicted of a similar offense. The *Moore* court upheld the continuing vitality of convictions based upon this since-repealed statute because the gender-based classification served an important and rational governmental objective and was designed to remedy a specific evil.[22] The classification of the former rape statute

[17] Castaneda v. Partida, 97 S.Ct. 1272 (1977).

[18] 236 S.E.2d 342 (W. Va. 1977).

[19] W. VA. CODE § 53-4A-1 (Cum. Supp. 1977) authorizes post-conviction habeas corpus proceedings.

[20] W. VA. CODE § 61-11-8 (1977 Replacement Vol.).

[21] W. VA. CODE § 61-8B-1 to -13 (1977 Replacement Vol.) since repealed and replaced by W. VA. CODE §§ 61-8B-1 to -13 (Cum. Supp. 1977).

[22] For the proper standards in determining whether a classification is valid and rational, *see* Craig v. Boren, 429 U.S. 190 (1976).

was upheld in 1976,[23] and the Court pointed out that no new considerations had arisen since its determination of the *Rasnake* case to cause the Court to strike down convictions under the former statute. The *Moore* case summarily dispensed with petitioner's contention that a bifurcated trial system should be instituted by noting that petitioner had cited no specific abuses within the unitary trial system.

State ex rel. Harris v. Calendine[24] was a habeas corpus proceeding in which the West Virginia Supreme Court of Appeals laid down guidelines for the application of the West Virginia Code dealing with the definition and punishment of delinquent children[25] in order to meet the constitutional mandates of due process, equal protection, and prohibition of cruel and unusual punishment.[26] A minor child from Calhoun County, after a hearing where the child had counsel present, was adjudged delinquent and committed to Pruntytown. The minor alleged several constitutional defects in the delinquency proceeding relying mainly on equal protection and due process arguments.

The court deemed the juvenile laws in question not inherently unconstitutional, but because of their broad language, there were enormous potentialities for unconstitutional application. Furthermore, it was decided that it was the court's responsibility to lay down specific guidelines for the constitutional application of the statutes.

The *Harris* court pointed out that, by statute:[27] (1) a juvenile defendant in a delinquency proceeding is entitled to counsel at trial and appeal; (2) an indigent juvenile has a right to appointed counsel; and (3) all parties, particularly parents or guardians, must be fully informed of their rights and have a reasonable time to confer with counsel. Any delinquency petition must allege facts giving fair notice of the charges.[28]

The Court then noted that as far as due process and equal protection are concerned, the legislature must choose a proper

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[23] *See*, State ex rel. Rasnake v. Narick, 227 S.E.2d 203 (W. Va. 1976).

[24] 233 S.E.2d 318 (W. Va. 1977).

[25] W. VA. CODE § 49-1-4 (Cum. Supp. 1977) (definition of delinquent child); W. VA. CODE § 49-5-11 (Cum. Supp. 1977) (disposition of delinquent child.).

[26] W. VA. CONST. art. III, §§ 5, 10.

[27] W. VA. CODE § 49-5-10 (Cum. Supp. 1977).

[28] State ex rel. Wilson v. Bambrick, 156 W. Va. 703, 195 S.E.2d 721 (1973).

means for achieving a rational purpose and the means chosen must not be discriminatory as to race, sex, creed or national origin. The cruel and unusual punishment standard requires that no one be punished unless he has done an act deserving of punishment, and that the punishment be proportionate to the offense.

The court based much of its discussion in the *Harris* case on status offenders, those who are punished for acts which if committed by an adult would not be crimes. Status offenders were given a special position in the West Virginia juvenile scheme and any treatment of them by the state fell within the state's power as *parens patriae,* not the plenary punishment power.[29] Therefore, the scheme had to provide for their aid, not their punishment, otherwise the classification as status offender was invidious discrimination. The court also declared summarily that the scheme discriminated against females.

Under the due process standard, the court declared that status offenders could not be incarcerated in a prison-like facility except when there is no reasonable alternative. The *Harris* court analogized the treatment of incarcerated juveniles to the treatment of the incarcerated mentally ill.[30] In applying the cruel and unusual punishment standard to the West Virginia scheme, the *Harris* court noted that punishment must be proportionate to any offense committed. Therefore, since status offenders have not committed a criminal offense, to incarcerate them in a prison-like facility with criminal children is to inflict upon status offenders a constitutionally prohibited disproportionate penalty. Therefore a delinquent child may not be confined with children guilty of criminal conduct. If a status offender is to be confined in a prison-like facility, it must be one dedicated solely to status offenders. In deciding whether or not there is a reasonable alternative to a prison-like facility, the court is to look at the facilities available and those which could be available with state expenditure and with consideration of the state budget.

Gooden v. Board of Appeals[31] affirmed the decision of a lower court reinstating a state trooper to the position from which he was discharged and ordering him to receive back pay. Trooper Gooden was discharged from his position after making a speech that the

[29] State ex rel. Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963).
[30] 233 S.E.2d 318 at 326-29.
[31] 234 S.E.2d 893 (W. Va. 1977).

Department of Public Safety believed violated departmental regulations. In 1975, the trooper was ordered reinstated by the Kanawha County Circuit Court and the department brought this appeal.

The regulations upon which the department fired Gooden were found to be overly broad and void of vagueness and thus unconstitutional because the regulations impermissibly burdened free speech and first amendment rights without giving a rational reason for the burden. The regulations were also deemed to be too broadly worded and thus incapable of giving fair notice of what speech was not allowed.

On the authority of *Erznoznik v. Jacksonville*[32] Trooper Gooden had standing to raise the constitutional issues because he had asserted a real and substantial violation of his and others' constitutional rights. After deciding the petitioner had standing to challenge the constitutionality of the regulations, the *Gooden* court examined the regulations in question to see if they were so vague as not to afford fair notice to the ordinary man that his conduct was prohibited. The statute must be definite in order to satisfy due process.[33] The court noted that public employees do not lose their first amendment rights by being entered on the state's payroll and are entitled to all of the due process procedural safeguards. Therefore, the regulations circumscribing their conduct must also be as definite as any statute which attempts to circumscribe the conduct of the public at large, in order to satisfy due process. These regulations failed to meet the test of definiteness and the firing of Trooper Gooden based on the overly broad regulations could not be upheld because that firing violated his first amendment rights and the requirement of procedural due process.

In *North v. West Virginia Board of Regents,*[34] the summary expulsion of a fourth-year medical student was remanded to the circuit court because the procedure followed by the West Virginia University School of Medicine violated the constitutional requirements of due process, because the interest of the student in obtaining a medical education with concomitant financial rewards was a sufficient property interest to be entitled to procedural safeguards.

North was expelled from the West Virginia University School

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[32] 422 U.S. 205 (1975).
[33] 234 S.E.2d at 896, *citing,* State v. Flinn, 208 S.E.2d 538 (W. Va. 1974).
[34] 233 S.E.2d 411 (W. Va. 1977).

of Medicine because of allegations concerning falsification of statements made in his application to the school. There were two hearings before the expulsion. No formal statement of the charges against North was given to him until after the second hearing. The student appealed to the Board of Regents after his expulsion (which came after his second hearing), and the Board ordered a third hearing. North's attorney, obtained after the first hearing was not permitted to attend either of the subsequent hearings. At that hearing, North admitted some of the allegations but refused to plead guilty to any of the charges made against him. The Committee on Student Discipline considered that he had indeed made a guilty plea to the allegations that he had deliberately falsified his previous academic record to gain admittance into medical school, and North was again expelled. After this second expulsion was upheld by the Board of Regents, petitioner prosecuted this appeal through the Kanawha County Circuit Court to the West Virginia Supreme Court of Appeals.

Traditionally, attending college was a matter of privilege and a student was without recourse if he was summarily expelled. However, later cases recognized that a student, regardless of the level of education, has a property or liberty right in obtaining education, and in protecting one's reputation so as to entitle the student to at least some procedural safeguards against arbitrary action by the educational institution, which action violates the due process standard.[35]

The *North* court concluded that the student's petition showed a sufficient liberty and property interest so as to entitle him to the due process protection under the West Virginia and federal constitutions. It then determined the amount of due process procedure necessary in a case of this sort, involving deprivation of a liberty or property interest. The court noted that the range of liberty and property interests which may be unduly affected by arbitrary state action is infinite.

However, the *North* court wrote that essential to the requirements of due process in this sort of case was an orderly hearing, either before the deprivation of the property interest or promptly after the deprivation, giving the aggrieved party a fuller measure

[35] Goss v. Lopez, 419 U.S. 565 (1975), which protected high school students from summary expulsion for "disruptive conduct" in the absence of the application of due process standards.

of due process.[36] Other than this elementary safeguard, the court noted that what is due process for a given factual situation must be determined on a case-by-case basis. However, there are certain fundamental principles to be followed.

In a case such as this where the punishment was as severe as expulsion with cancellation of credits earned, the amount of due process procedure must be substantial. Among the safeguards the student was entitled to are: formal written notice of the charges; opportunity to prepare a defense; opportunity to retain counsel; opportunity to have counsel present at any hearing to confront accusers and present evidence on the student's behalf; an unbiased tribunal and an adequate record. The court distinguished an expulsion from a short suspension, and held that where the punishment involved is a short suspension, oral notice and an informal hearing are enough.[37] Because no record was taken at any of North's hearings, the lower court was authorized on remand to conduct its own investigation of the procedure followed by the West Virginia University officials, rather than being limited to a review of a scanty, virtually non-existent record.

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[36] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).
[37] 233 S.E.2d at 417-18.

CONTRACTS

In *Board of Education v. W. Harley Miller, Inc.*,[38] the Supreme Court of Appeals was asked to decide "whether the circuit court has jurisdiction to enforce an arbitration award upon a motion for summary judgment by the party prevailing at arbitration."[39] In previous litigation between the parties here involved, the Board of Education instituted a declaratory judgment action to determine whether the contract between the parties required submission of their dispute to arbitration before either party could resort to the courts. The circuit court issued a preliminary injunction against the contractor to prohibit him from proceeding to arbitration until the declaratory judgment action was resolved. On appeal of the injunction order, the Supreme Court of Appeals ordered the injunction dissolved and the declaratory judgment action abated, ruling that, under the contract, arbitration was a condition precedent to any right of action.[40]

Thereafter, the dispute was submitted to arbitration, and an award was made by the arbitrators in favor of the contractor. The contractor filed a Petition to Enforce Award of Arbitrators in the abated declaratory judgment action. The petition was treated as a motion for summary judgment, but the circuit court refused to grant the motion on the grounds that it lacked jurisdiction. The circuit court certified the jurisdictional question to the Supreme Court of Appeals.

The court held that the circuit court had jurisdiction to enforce the arbitration award upon the motion for summary judgment.[41] Although the majority opinion does not make the basis of its ruling clear, it is assumed from the concurring opinion that the court's holding permitted the contractor to enforce the arbitration award by filing an amendment to the abated declaratory judgment action, and moving for summary judgment.[42] It also appears that in the usual case, where there has been no abatement of prior litigation, an arbitration award "is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award

[38] 236 S.E.2d 439 (W. Va. 1977).
[39] Id. at 441.
[40] Board of Education v. W. Harley Miller, Inc., 221 S.E.2d 882 (W. Va. 1975).
[41] 236 S.E.2d at 447-48.
[42] Id. at 451-52 (concurring opinion).

of the arbitrators upon a motion for summary judgment made at the proper time."[43]

In what the concurring opinion classifies as "mere dicta,"[44] the majority opinion primarily concerned itself with pointing the law in West Virginia regarding the enforceability of standard arbitration clauses in commercial contracts in a new direction. The majority found that the common law concepts of revocability and condition precedent, express or implied, which had previously been used by the courts in determining the enforceability of arbitration clauses were archaic and confusing. The majority opinion

> enounce[s] a new rule of law which is generally consistent with the results in prior cases . . . . Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, arbitration is mandatory, and any causes of action under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award and the arbitration award is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award of the arbitrators upon motion for summary judgment made at the proper time.[45]

The majority places great emphasis on the requirement that the agreement to arbitrate have been bargained for by the parties. To the general rule of enforceability of agreements to arbitrate, the court notes three instances where a clause will be found unenforceable because not bargained for: (1) in the traditional contracts of adhesion situation; (2) where a party can bring an arbitration clause within the unconscionability provision of W. Va. Code § 46-2-302; and, (3) when it appears from the nature of the contract that arbitration is wholly inappropriate and could only have been intended to defeat just claims.[46] Despite recognizing these exceptions, the court concludes that "all arbitration provisions in all contracts which indicate that the parties intended to arbitrate their differences rather than litigate them are presumptively binding, and specifically enforceable."[47]

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[43] Id. at 447.
[44] Id. at 452 (concurring opinion).
[45] Id. at 447.
[46] Id.
[47] Id. at 447-48.

CRIMINAL LAW AND PROCEDURE[48]

As has been true in the past, the West Virginia Supreme Court of Appeals dealt extensively in the area of criminal law and procedure in 1977. Several important decisions having potentially wide-ranging impact were rendered, including cases of first impression and cases constituting a reversal of previous judicial thinking in this State. The court, as presently constituted, appears to be continuing its recent liberal trend of progressive interpretation of the law to protect the rights of the criminally accused.

I. IMPEACHMENT: PRE-TRIAL SILENCE & PRIOR CONVICTIONS

Although more appropriately classified as evidentiary, two cases which were handed down concerning impeachment of the testimony of the accused will have a great impact in the criminal law area.

In *State v. Boyd,*[49] defendant Boyd turned himself in to the police, admitted to a shooting, and told where he had thrown the gun away. After being advised of his rights, Boyd chose to remain silent. At trial, Boyd asserted self-defense. Over objections, the prosecutor sought to impeach Boyd on cross-examination by asking why he had not made his defense known to the police and why he changed his story as to where he threw the gun. The prosecutor subsequently referred to this in his closing argument to the jury.

On appeal, the conviction was reversed, the court holding, on constitutional grounds,[50] that it was reversible error for a trial court to permit cross-examination of a defendant as to his pre-trial silence.[51]

It is well established in West Virginia, as a corollary to an

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[48] The following cases concerning criminal law and procedure will not be discussed in this survey: State ex rel. Peacher v. Sencindiver, 233 S.E.2d 425 (W. Va. 1977) (murder statute constitutional); Moore v. McKenzie, 236 S.E.2d 342 (W. Va. 1977) (old rape statute not unconstitutional on the basis of equal protection); and State ex rel. Hutzler v. Dostert, 236 S.E.2d 336 (W. Va. 1977) (plurality opinion) (excessive bail).

[49] 233 S.E.2d 710 (W. Va. 1977). For further discussion of this case see text accompanying notes 11-12, *infra.*

[50] W. VA. CONST. art. III, §§ 5, 10 which read, respectively, "[N]or shall any person, in any criminal case, be compelled to be a witness against himself. . . ." and "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

[51] 233 S.E.2d at 716.

accused's right against self-incrimination, that a prosecutor is precluded from using, in order to show or infer guilt, either defendant's failure to testify at trial,[52] or his pre-trial silence during the custodial period.[53] *Boyd* extends this protection by also prohibiting the use of pre-trial silence to impeach the credibility of a defendant on the witness stand.

The decision brought West Virginia into substantial compliance with the United States Supreme Court ruling in *Doyle v. Ohio*,[54] which held that the use, for impeachment purposes, of a defendant's silence, at the time of his arrest after having received his *Miranda* warnings, violated the due process clause of the Fourteenth Amendment.[55]

The rationale underlying both *Boyd* and *Doyle* is twofold. First, silence in the wake of being advised of one's *Miranda* rights is "insolubly ambiguous."[56] Second, it would be fundamentally unfair to allow an accused's silence to be used as an impeachment tool since the *Miranda* warnings implicitly assure that no penalty will attach to the exercise of those rights, including the right to silence.[57] The *Boyd* court also felt that allowing impeachment in this manner ran counter to the presumption of innocence guaranteed a criminal defendant.[58]

The court also concluded that the State may still impeach a defendant with pre-trial statements inconsistent with his trial testimony if the court finds, out of the presence of the jury, that the statements were "voluntary in the *Miranda* sense."[59]

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[52] *See, e.g.*, State v. Bragg, 140 W. Va. 585, 87 S.E.2d 689 (1955); State v. Jones, 108 W. Va. 264, 150 S.E. 728 (1929); State v. Costa, 101 W. Va. 466, 132 S.E. 869 (1926).

[53] Miranda v. Arizona, 384 U.S. 436 (1966); State v. Fortner, 150 W. Va. 571, 148 S.E.2d 669 (1966).

[54] 426 U.S. 610 (1976).

[55] *Id.* at 619.

[56] *Id.* at 617; 233 S.E.2d at 715.

[57] 426 U.S. at 618; 233 S.E.2d at 715.

[58] 233 S.E.2d at 716. *See also* Pinkerton v. Farr, 220 S.E.2d 682 (W. Va. 1975).

[59] 233 S.E.2d at 716. It is unclear whether this statement was part of the holding or dicta, since there were inconsistencies in Boyd's statements to the police and his trial testimony. Assuming the language to be a holding, the limitation to statements found voluntary "in the *Miranda* sense" appears to be misplaced. Voluntary in the *Miranda* sense is a knowing, intelligent and voluntary waiver of rights. Miranda v. Arizona, 384 U.S. 436, 471-72, 475 (1966). However, the United States Supreme Court in Harris v. New York, 401 U.S. 222, 226 (1971), held that pre-trial statements made without benefit of the *Miranda* warnings, although inadmissible

The second case dealing with impeachment, *State v. McAboy*,[60] also wrought an important change in the criminal jurisprudence of West Virginia. During his murder trial, McAboy took the witness stand in his own defense. Over objection, the prosecutor was permitted to attempt impeachment of McAboy's credibility by questioning him as to a prior felony conviction. He appealed his conviction of second degree murder.

The court held that evidence of prior convictions to impeach the credibility of a criminal defendant who elects to testify would no longer be admissible,[61] with two exceptions: (1) when the defendant himself places his good character and reputation in issue; or (2) when the prior conviction is for perjury or false swearing.[62] With this decision, West Virginia is placed among a small minority of jurisdictions adhering to this rule.[63]

A long line of cases beginning with *State v. Friedman*[64] were overruled where inconsistent, and the rule as stated in *State v. White*[65] and *State v. Webb*[66] was reinstated. The reason the court had changed directions in *Friedman* was the 1931 amendment of West Virginia Code § 57-3-6[67] which was felt to change the prior convictions evidentiary rule.[68] The present court, however, determined that the *Friedman* interpretation was unwarranted, and therefore reinstituted the previous rule of disallowing evidence of prior convictions for impeachment of the accused.[69]

Although declining to reach the constitutional issue, the court cited, as a factor in its decision, the chilling effect the old rule had

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as part of the case in chief, were nonetheless admissible for impeaching the defendant's credibility where these statements were inconsistent with trial testimony. The only condition is that the statements be made under such circumstances as to be "trustworthy". *Id.* at 224. In light of this, *Boyd* appears to go too far.

[60] 236 S.E.2d 431 (W. Va. 1977).

[61] *Id.* at 432.

[62] *Id.* at 437.

[63] There is wide diversity among the rules of the other states, ranging from limitations to crimes of moral turpitude or felonies, to judicial discretion, or admissibility of all past crimes. *See* 3A J. WIGMORE, *Evidence* § 987 (Chadbourn rev. 1970) (collecting cases) and C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 43, at 85 (2d ed. 1972).

[64] 124 W. Va. 4, 18 S.E.2d 653 (1942).

[65] 81 W. Va. 516, 94 S.E. 972 (1918).

[66] 99 W. Va. 225, 128 S.E. 97 (1925).

[67] W. VA. CODE § 57-3-6 (1966). *See* note 3, *supra*.

[68] 124 W. Va. 4, 6-7, 18 S.E.2d 653, 655 (1942).

[69] 236 S.E.2d 431, 432-34.

on a defendant with a criminal record, who must decide whether to take the witness stand in his own defense.[70] This prejudicial effect, coupled with sociological evidence of higher conviction rates for defendants who did not take the stand,[71] was an important factor in the result reached.

The rule, subjecting use of prior convictions to impeach ordinary witnesses' testimony to the trial judge's discretion,[72] was carefully distinguished and left intact in *McAboy*.[73] The reasoning was that evidence of prior convictions would only cause ordinary witnesses some personal embarrassment, while the prejudicial effect on an accused could be an unwarranted conviction.[74]

II. Defendant's Right of Presence[75]

State v. Boyd[76] is also important for its clarification of an accused's rights to presence and confrontation of witnesses against him. The relevant facts are that an objection was made by the prosecutor during the closing argument of defense counsel. The trial court, in considering the objection, invited counsel into chambers. Boyd was not present at this hearing and no record was made

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[70] *Id.* at 436. For a good discussion of this problem, see Note, The Use of Prior Convictions to Impeach the Credibility of the Criminal Defendant, 71 W. Va. L. Rev. 160 (1969).

[71] 236 S.E.2d at 435-436. *See* H. Kalvin & H. Zeigel, The American Jury 160, Tables 43, 52 (1966).

[72] *See e.g.*, State v. Justice, 135 W. Va. 852, 65 S.E.2d 743 (1951); State v. Crummit, 123 W. Va. 36, 13 S.E.2d 757 (1941); State v. Price, 113 W. Va. 326, 167 S.E. 862 (1933).

[73] 236 S.E.2d at 437.

[74] *Id.*

[75] U.S. Const. amend. VI and W. Va. Const. art. III, § 14 both confer on the criminal defendant the right to confront the witnesses against him. The right to presence is a common law right which has been codified. W. Va. Code § 62-3-2 (1977 Replacement Vol.). However, the right to presence has achieved constitutional dimensions as a condition of Fourteenth Amendment due process "to the extent that a fair and just hearing would be thwarted by (defendant's) absence," Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934), or, in effect, at a "critical stage." *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970). In West Virginia, the right to presence has been termed a "constitutional right," State v. Sheppard, 49 W. Va. 582, 39 S.E. 676 (1901) and an "inalienable right." State v. Grove, 74 W. Va. 702, 82 S.E. 1019 (1914).

[76] 233 S.E.2d 710 (W. Va. 1977). For further discussion of this case *see* text accompanying notes 2-12, *supra*. An additional holding in *Boyd* that will not be discussed was that prosecutorial misconduct during trial constituted reversible error.

of the proceedings therein. On appeal, Boyd contended that his right to presence was violated by absence from this hearing.

The court agreed, holding that this was a "critical stage" at which defendant's presence was required and that defendant's right to confrontation was violated.[77] In doing so, the court engaged in what most fittingly could be characterized as "housecleaning."

In *State ex rel. Grob v. Blair,*[78] an *in camera* meeting to determine whether the chief witness in the murder trial wished to recant her testimony was held to be a critical stage at which defendant had a right to be present, and further that his absence constituted a denial of his constitutional right to confront an accuser.[79] In addition, the court held for the first time that these rights were subject to a harmless error rule.[80] The test was initially stated as "whether the apparent error did not, beyond a reasonable doubt, prejudice the accused at trial."[81] But later in the opinion the test was formulated, and appeared in syllabus point eight, as "an accused . . . must demonstrate a possibility of prejudice in the occurrence."[82]

The inconsistency was recognized in *Boyd* and remedied by the holding that "where the State defends against a claim that a right guaranteed by our Constitution has been violated, on the basis that the violation is harmless error, it is incumbent on the State to show that the error was harmless beyond a reasonable doubt."[83] Thus, a defendant on appeal or a habeas corpus petitioner need only show the bare fact of violation. If the State claims harmless error, they also have the burden of proving this beyond a reasonable doubt.

The other "housecleaning" the court undertook also involved *Grob.* In *Grob* it was stated that "we will now accord the right [of presence] to the accused at any 'critical stage in the *criminal* proceeding.' "[84] However, the principle was embodied in syllabus

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[77] *Id.* at 719.

[78] 214 S.E.2d 330 (W. Va. 1975).

[79] *Id.* at 338-39, *citing* W. VA. CONST. art. III, § 14.

[80] 214 S.E.2d at 337.

[81] *Id.* at 337, *citing* State v. Thomas, 203 S.E.2d 445 (W. Va. 1974).

[82] 214 S.E.2d at 337, *citing* Chapman v. California, 386 U.S. 18 (1967) *and* Fahy v. Connecticut, 375 U.S. 85 (1963). The court also disapproved a line of West Virginia cases holding that prejudice was not a necessary element for reversal where defendant was absent. 214 S.E.2d at 337.

[83] 233 S.E.2d at 718.

[84] 214 S.E.2d at 338.

point eight as any "critical stage in the *trial* proceeding."[85] To clear up any ambiguity, the *McAboy* court reaffirmed as the "true" rule that the right of an accused to be present follows any critical stage in the *criminal* proceeding.[86]

A test for a "critical stage" was fashioned as "one where the defendant's right to a fair trial will be affected."[87] To a claim of violation of the right to presence, the State was given two defenses: that the absence occurred at a noncritical stage, or that, even if at a critical stage, it was harmless error.[88]

In connection with the harmless error rule, the duty was given the prosecution of preserving a record of such critical stages; without such a record there could be no proof beyond a reasonable doubt that the error was harmless.[89]

III. Miranda Rights; Confessions

In *State v. Hamrick,*[90] the defendant, Mrs. Hamrick, age twenty-six, was a poor, uneducated, non-verbal, rural resident of very limited intelligence. Having no crib, the Hamricks' baby's bed was in a pasteboard box beside the parents' bed. Mr. and Mrs. Hamrick had taken their child to the hospital where it was pronounced dead. The doctors, suspecting child abuse, called the police, one of whom was present at the autopsy where the cause of death was determined as a subdural hemorrhage.

The next day, after interrogating and extracting statements from both parents, the policemen read Mrs. Hamrick her rights and charged her with voluntary manslaughter. She waived counsel

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[85] *Id.* at 332. This language also appears in syllabus points three and nine, although not specifically recognized by the court in *McAboy.* But the principle should apply equally well to these syllabi.

[86] 233 S.E.2d at 718.

[87] *Id.* at 719. The court noted in dicta that, generally, all matters starting with commencement of the trial until final judgment required the accused's presence, which included pre-trial hearings involving substantial matters of law or the testimony of witnesses. Preliminary hearings have been held to be critical stages. Spaulding v. Warden, 212 S.E.2d 619, 625 (W. Va. 1975). Matters that would not constitute a critical stage were said to be entry of routine orders, filing motions or court orders involving clerical or administrative matters, and consultation between defense counsel, the prosecutor and the court prior to actual trial. 233 S.E.2d at 719.

[88] 233 S.E.2d at 719.

[89] *Id.*

[90] 236 S.E.2d 247 (W. Va. 1977).

and admitted hitting the baby with her hand when he was crying, and signed a confession to that effect.

Mrs. Hamrick's conviction was reversed on appeal on grounds of improper instructions to the jury and not allowing cross-examination of the policemen as to the circumstances under which the statements were obtained.[91] However, the court went further and, although not assigned as error, noted three *Miranda* violations. First, Mrs. Hamrick was a suspect when she came to the police barracks, and the *Miranda* rights should have been given her before questioning.[92] Second, the interviews at the barracks were "custodial," which also required police to read her her rights.[93]

The third objection breaks new ground in West Virginia jurisprudence. In the words of Mr. Justice Harshbarger:

> *Miranda* started a change. We continue it, in West Virginia, by this decision in which we hold that law enforcement authorities cannot elicit admissible statements from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel.[94]

The court cited the fact that Mrs. Hamrick could not even spell her own name correctly on the statements. Since law enforcement authority worked most efficiently among the poor, disadvantaged and ignorant, the court felt its great task was "to attempt to guarantee that the mentally infirm who come into an adversary situation with government, have every protection afforded them that those of ordinary mental fortune would have."[95]

Although the court may be lauded for its efforts to protect the constitutional rights of the mentally incompetent, one can only guess at the standards envisioned by which to gauge whether a

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[91] *Id.* at 248, 249.

[92] *Id.* at 249.

[93] *Id.*

[94] *Id.* at 250. The court cited no authority, but the holding appears not to be entirely unique. The United States Supreme Court has long used a "totality of the circumstances" test by which to gauge the voluntariness of confessions and consents to searches. *See* Spano v. New York, 360 U.S. 315 (1959). Lack of education and low intelligence are only two of many factors to be considered. *Id.* at 321-22. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In this respect, the decision in *Hamrick* breaks new ground by focusing on mental condition alone, instead of considering the entire circumstances. But, other courts have reached the same result under the totality of circumstances test. *See, e.g.*, Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972).

[95] 236 S.E.2d at 250.

person has mental infirmity of such degree as to fit under the *Hamrick* rule. This point must be developed in later cases.

IV. Ineffective Assistance of Counsel

The case of *Cannellas v. McKenzie*[96] came before the West Virginia Supreme Court of Appeals on a writ of habeas corpus alleging, as grounds for relief, ineffective assistance of counsel at both the trial stage and on the appeal of his rape conviction. The court agreed, granted the writ, and discharged the petitioner.[97]

The test applied was that adopted in *State v. Thomas*:[98] "the State's obligation when an indigent is accused of a crime is to provide counsel who will conduct himself in such a way that he exhibits 'the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law. . . .' "[99]

The issue was somewhat confused when language peculiar to the "sham and mockery" test of ineffective assistance was used in *State ex rel. Wine v. Bordenkircher*,[100] although this test had seemingly been rejected in *Thomas*.[101] *Cannellas* settles the test as being the "normal and customary degree of skill" test.[102]

The important point of the case is that no single instance of ineffectiveness was discovered which would have entitled petitioner to relief, but, taken together, petitioner did not have a fair trial overall.[103] Since there was a "substantial probability of actual

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[96] 236 S.E.2d 327 (W. Va. 1977).

[97] *Id.* at 329, 332. The right to effective assistance of counsel arises under U.S. Const. amends. VI and XIV and W. Va. Const. art. III § 14. *See* State v. Thomas, 203 S.E.2d 445 (W. Va. 1975).

[98] 203 S.E.2d 445 (W. Va. 1975).

[99] 236 S.E.2d at 331.

[100] 230 S.E.2d 747, 750 (1976). The "sham and mockery" test is that a conviction will not be voided on the basis of ineffective assistance of counsel unless the attorney's efforts were so inadequate as to render the trial a farce and a mockery of justice. *Id.* at 750. This test is much more lenient than that adopted in *Thomas*.

[101] 203 S.E.2d at 458-61.

[102] The "normal and customary degree of skill" test has also been applied in Carter v. Bordenkircher, 226 S.E.2d 711 (W. Va. 1976).

[103] 236 S.E.2d at 329. The finding of overall ineffectiveness resulted from:

a) failure to challenge the chain of custody of the single piece of corroborating evidence;

b) failure to move for a mistrial when prejudicial evidence of a proposed lie detector test of a key witness came out at trial;

c) failure to question prospective jurors as to whether they had read

injury" from the ineffective representation, the court discharged the petitioner from custody.[104]

An interesting point worth noting is the court's virtual invitation to reconsider the law in West Virginia as it relates to rape corroboration requirements. It was pointed out that the sufficiency of uncorroborated testimony for conviction in a rape trial was a hotly debated issue and had not been considered in West Virginia since 1944.[105]

V. Right to Appeal; Habeas Corpus

Where the State has failed to provide the assistance necessary to allow a defendant to prosecute an appeal, a habeas corpus petitioner is at least entitled to resentencing and another appeal period.[106] But in certain circumstances resentencing may be an inadequate remedy and the appropriate remedy may be discharge.[107]

Actual injury and extraordinary dereliction on the part of the State were found in *Johnson v. McKenzie.*[108] In that case, the habeas corpus petitioner had been found guilty of second degree murder and sentenced to five-to-eighteen years. A notice of intention to appeal was filed, but the State failed to provide a record of the trial proceedings before the eight-month appeal period lapsed. A writ of habeas corpus was granted and petitioner resentenced, but the second appeal period expired when the State again neglected to prepare a record, and a second writ of habeas corpus was filed.

The court held that allowing two appeal periods to expire without providing a record to enable petitioner to appeal was extraordinary dereliction on the part of the State.[109] Furthermore, the

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prejudicial newspaper articles; and

d) introduction of petitioner's marital status since it would be reversible error for the prosecution to introduce this evidence in a rape prosecution.

Id. at 330-31.

[104] *Id.* at 332.

[105] *Id.* at 331, *citing* State v. Beacraft, 126 W. Va. 895, 30 S.E.2d 541 (1944). The court intimated that guidelines may be established and cited several articles and cases.

[106] State ex rel. Bradley v. Johnson, 152 W. Va. 655, 166 S.E.2d 137 (1969).

[107] Carter v. Bordenkircher, 226 S.E.2d 711, 716 (W. Va. 1976). Impossibility of obtaining a transcript was specifically mentioned in footnote 2, citing Shiflett v. Commonwealth of Virginia, 433 F.2d 124, 129 (4th Cir. 1970).

[108] 235 S.E.2d 138 (W. Va. 1977).

[109] *Id.* at 139.

injury from this dereliction of duty was actual, because petitioner would have served the minimum sentence and thus be eligible for parole before an appeal could be made.[110] The appropriate remedy under these circumstances was unconditional discharge from custody; resentencing would simply be insufficient.[111]

As noted, actual injury was found in *Johnson*; but, if the rationale of *Carter v. Bordenkircher*[112] is adhered to, a petitioner need only show a probability of actual injury along with extraordinary dereliction in order to be entitled to discharge.[113]

Smoot v. Dingess[114] also dealt with the right to appeal. The habeas corpus petitioner was incarcerated for civil contempt for failure to pay alimony to his former wife. At the hearing, none of the witnesses were placed under oath, nor was a transcript made of the proceedings.

Stating that an adequate record was one of the fundamental elements of due process, the court held that whenever a person faces a possible loss of liberty, except for contempt committed in the presence of the court, a court reporter must be available and a stenographic record of the proceedings made.[115] Only when this is done can an effective appeal be taken.

VII. Parole Instruction

An issue of first impression in West Virginia arose in *State v. Lindsey*.[116] The jury, after retiring to find a verdict in a murder trial, returned to the courtroom and asked the trial judge certain questions concerning the defendant's right to parole under the permissible verdicts. The judge at one point stated that, if defendant was found guilty and mercy recommended, he would be *entitled* to parole; at another point he stated that the accused would be *subject* to parole under the same verdict. This exchange was assigned as error on appeal after a verdict of guilty with no recommendation of mercy was returned.

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[110] *Id.*
[111] *Id.*
[112] 226 S.E.2d 711 (W. Va. 1976).
[113] *Id.* at 716.
[114] 236 S.E.2d 468 (W. Va. 1977).
[115] *Id.* at 472.
[116] 233 S.E.2d 734 (W. Va. 1977).

After a consideration of the case law from other jurisdictions, it was held that the instruction was erroneous, since the defendant would not be entitled to parole, but only eligible for parole after serving a minimum of ten years in prison. A reversal of the conviction was required as there was no way of knowing the prejudicial effect on the jury of the misleading and inaccurate instruction.[117]

The court did not stop here but also held that the trial court must, without request, instruct the jury that under a verdict of first degree murder, it may add a recommendation of mercy. The trial court must further explain that such a recommendation would mean the defendant could be eligible for parole consideration only after having served a minimum of ten years; otherwise, the defendant would be confined in the penitentiary for life without possibility of parole.[118] However, the jury was not to concern itself with parole matters in deciding the question of guilt or innocence.[119]

This decision places West Virginia in accord with a minority of jurisdictions adhering to the rule that the jury should be informed of parole possibilities. Although the case law from other states was considered on the effect of an *erroneous* parole instruction, the court did not discuss the issue of whether the jury should be informed at all about parole—it was simply held that they should be informed.

This is unfortunate in light of the split of authority that exists. There are mainly two arguments militating against informing the jury: (1) compromise verdict, and (2) separation of powers.[120] The compromise verdict argument is that the jury will resolve doubtful cases in favor of conviction, thus frustrating the reasonable doubt requirement, if knowledge of parole is interjected.[121] The separation of powers argument is that parole is a matter for the executive branch and should not be usurped by the judicial branch and further, parole laws may change from week-to-week.[122]

One of the arguments for instructing the jury on parole mat-

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[117] *Id.* at 739; W. VA. CODE §§ 62-3-15, 62-12-13 (1977 Replacement Vol.).

[118] 233 S.E.2d at 739.

[119] *Id.*

[120] F. DUTILE, *Jury Consideration of Parole*, 18 CATH. U.L. REV. 308, 311, 313 (1969) (hereinafter cited as Dutile).

[121] *See, e.g.*, Lovely v. United States, 169 F.2d 386 (4th Cir. 1948), *cert. denied* 338 U.S. 834 (1949).

[122] *See, e.g.*, State v. White, 27 N.J. 158, 142 A.2d 65 (1958).

ters is that, in reality, matters of parole, pardon, etc. are generally of common knowledge, and the jury should at least be apprised of the correct law since it is evident that parole is considered in the jury room. This argument is strongest where the jury is responsible for sentencing.[123] Secondly, even if the jury does desire to frustrate the parole system, there is no way of preventing it; the best that can be hoped for is to make sure this is not done on an erroneous assumption of law.[124]

In West Virginia a jury is presumed not to know the law.[125] In a murder trial the jury is also responsible for setting the punishment by its decision as to whether or not to recommend mercy.[126] Undoubtedly, juries do consider the possibility of parole. On this basis, *Lindsey* may have reached the correct result for murder trials. The rationale is likely to be extended to other crimes involving a life sentence, for example, kidnapping.[127] However, where the jury has no part in the sentencing or penalty, the reasoning fails and the proper course would appear to be to avoid mention of parole altogether, or, upon questioning, to instruct the jury that their duty is to determine guilt or innocence without regard to parole.

VIII. CRIMINAL PRESUMPTIONS

The recent trend begun in *Pinkerton v. Farr*[128] of striking down statutes or instructions because they created unconstitutional presumptions of guilt was continued in *State ex rel. Cogar v. Kidd.*[129] In *Kidd,* the embezzlement statute[130] was held to violate due pro-

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[123] Note, *Jury Discussion of Parole: A Time for Change,* 25 BAYLOR L. REV. 674, 677-82.

[124] Dutile, *supra* note 86, at 321.

[125] State v. Loveless, 139 W. Va. 454, 469, 80 S.E.2d 442, 450 (1954).

[126] W. VA. CODE § 62-3-15 (1977 Replacement Vol.).

[127] *See* W. VA. CODE § 61-2-14a (1977 Replacement Vol.).

[128] 220 S.E.2d 899 (W. Va. 1975) (conspiracy statute held to create unconstitutional presumption of guilt). *See also,* State v. Pendry, 227 S.E.2d 210 (W. Va. 1976) (instruction on murder created unconstitutional presumption of guilt).

[129] 234 S.E.2d 899 (W. Va. 1977).

[130] W. VA. CODE § 61-3-20 (1977 Replacement Vol.) states in part that:

> In the prosecution of any such [government servant or official] charged with such embezzlement, fraudulent conversion or larceny, if it appear that . . . such (government servant or official) has failed or refused to restore or account for such [money or property] within thirty days after proper demand has been made therefore, such [government servant or official] shall be presumed to be guilty of such offense; but the accused

cess by removing defendant's presumption of innocence and his constitutional right to remain silent.[131] The presumption of guilt which came from a failure to return the property within thirty days was a decision only the jury could properly make. By shifting the burden of proof to the defendant of proving the opposite, the presumption of innocence and the right to remain silent were effectively thwarted.[132]

The second presumption, creating prima facie appropriation by failure to account or pay over, was also found objectionable. Appropriation was an essential element of the crime, and the State was not entitled to any presumption or inference to avoid proof of an element of the crime beyond a reasonable doubt.[133]

The entire statute was not rendered void, but only those parts which created the presumptions. Prosecutions may continue without benefit of the unconstitutional presumptions.[134]

IX. ROBBERY; DOUBLE JEOPARDY

In *State v. Cunningham*[135] the defendant was indicted for robbery.[136] The indictment read in relevant part: "Cunningham . . . in and upon one Orval Hoover an assault did feloniously make, and . . . put in bodily fear." At his trial, defendant was found guilty

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may rebut such presumption by disproving any such facts. . . .
. . . . The failure of any such [government servant or official] to account for or pay over, as required by law, any such [money or property] shall be prima facie evidence that he has so appropriated or used the same for his own benefit or for the benefit of such other person.

[131] 234 S.E.2d at 901.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 902.

[135] 236 S.E.2d 459 (W. Va. 1977).

[136] W. VA. CODE § 61-2-12 (1977 Replacement Vol.) reads as follows:
If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten years. If any person commit or attempt to commit, a robbery in any other mode or by any other means, except as provided for in the succeeding paragraph of this section, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than five nor more than eighteen years.
Although not truly descriptive, "armed robbery" refers to the first sentence of the robbery statute, and "unarmed robbery" refers to the second sentence.

of armed robbery. A new trial was granted on defendant's second motion for a new trial, but the prosecutor entered a *nolle prosequi,* and subsequently obtained another indictment which read in relevant part: "Cunningham . . . in and upon one Orval Hoover an assault did feloniously make, and him the said Orval Hoover, unlawfully did strike, beat and do violence to his person, and . . . feloniously put in bodily fear . . . ." On this indictment, the defendant pleaded guilty to "unarmed robbery" and appealed.

The defendant contended that the first indictment was for unarmed robbery, and that the second indictment on armed robbery was therefore barred by double jeopardy[137] and due process,[138] and that dismissal of the first indictment by the *nolle prosequi* without notice to the defendant or opportunity to be heard also violated due process.

The court did not agree with any of these contentions. The decision of whether or not to prosecute was an executive decision, and, even though its entry required court permission, defendant had no right to a hearing.[139]

The court also held that the first indictment was sufficient to charge defendant with armed robbery.[140] This issue was really the crux of defendant's appeal; the finding of sufficiency was dispositive of both the double jeopardy and due process claims. The first conviction was set aside on defendant's own motion, therefore the State could properly try him again on the same charge.[141] Since the second indictment did not charge a higher offense, there was no denial of due process.[142]

Justice Miller filed a dissenting opinion which brings the importance of the case into sharp focus. He felt that the majority opinion abolished any distinction between armed robbery and unarmed robbery.[143] In effect, the majority held that "assault" was sufficient to mean "partial strangulation, striking, or beating or other violence" within the meaning of the statute. But the word "assault" is in itself ambiguous. At common law an assault was the threat to do violence; a battery was the actual doing of violence to

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[137] U.S. CONST. amend. VII; W. VA. CONST. art. III, § 10.
[138] U.S. CONST. amend. XIV; W. VA. CONST. art. III, § 10.
[139] 236 S.E.2d at 461-62.
[140] *Id.* at 464.
[141] *Id. See* United States v. Ball, 163 U.S. 662 (1896).
[142] 236 S.E.2d at 464. *See* Blackledge v. Perry, 417 U.S. 21 (1974).
[143] 236 S.E.2d at 465.

the person.[144] The identical language of the first indictment would just as well serve to charge unarmed robbery.[145] This being so, the indictment does not plainly inform the defendant of the offense charged, in violation of the West Virginia Constitution.[146]

The other flaw in the majority opinion was in its reliance on *State ex rel. Vascovich v. Skeen*[147] to decide the sufficiency of the language in the first indictment. The language in that case, also involving a charge of unarmed robbery, was pure dicta as to whether it charged armed robbery and this was stated by the court.[148]

Overall, it appears that Justice Miller's dissent was well taken. One can only hope that prosecutors will charge defendants with the crime of armed robbery more artfully than was accomplished in *Cunningham.*

X. NONSUPPORT

In *State v. Clay*[149] the defendant was convicted for nonsupport of an illegitimate daughter. The trial court instructed the jury that paternity need only be proved by a preponderance of the evidence. On appeal, defendant contended that paternity was an element of the crime and that failure to prove this beyond a reasonable doubt constituted a denial of due process. The court agreed and so held,[150] striking down the statute to the contrary as unconstitutional.[151]

The obvious question raised but not answered in the opinion is what effect a prior finding of paternity in a bastardy suit, a civil action,[152] would have in a criminal trial. The issue was not present in *Clay,* so the question remains open for later consideration.

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[144] State v. Hatfield, 48 W. Va. 561, 37 S.E. 626 (1900). "The definition of assault is an unlawful attempt or offer, with force of violence, to do a bodily injury to another. . . . An assault may be completed without touching the person of the one assaulted. . . ." *Id.* at 575, 37 S.E. at 631.

[145] 236 S.E.2d at 467.

[146] *Id.;* W. VA. CONST. art. III, § 14.

[147] 138 W. Va. 417, 76 S.E.2d 283 (1953).

[148] *Id.* at 421-22, 76 S.E.2d at 285-86.

[149] 236 S.E.2d 230 (W. Va. 1977).

[150] *Id.* at 232-33.

[151] W. VA. CODE § 48-8-5 (1976 Replacement Vol.) provides that: "No other or greater evidence shall be required to prove . . . that the defendant is the father . . . of such child or children, than is or shall be required to prove such facts in a civil action. . . ."

[152] *See* W. VA. CODE § 48-7-1 (1976 Replacement Vol.).

XI. CONTRIBUTING TO THE DELINQUENCY OF A MINOR

The West Virginia Supreme Court of Appeals essentially rewrote the law pertaining to the crime of contributing to the delinquency of a minor in *State v. Austin.*[153] In this case, the defendant had been convicted of "contributing" for his marriage to a fifteen-year-old West Virginia girl after taking her to Maryland without parental consent.

On appeal the conviction was reversed with a direction of acquittal.[154] The court held that a law or ordinance that carried no criminal penalty, or which carried only a nominal fine, could not be the foundation for a contributing charge: the "inconsequentialness of the punishment" was said to compel the conclusion that society intended no serious criminal punishment to flow from violation of such laws.[155] Since the statute forbidding marriage to minors without parental consent carried no penalty,[156] the legislature could not have intended that it be the basis of a contributing charge.[157]

Another important aspect of the case was the resolution of two conflicting cases[158] as to whether criminal intent was a necessary element of the crime. The court held that the prosecution was required to prove that the defendant knowingly committed the acts complained of.[159]

The statute defining a delinquent child has been amended since its consideration in *Austin.*[160] This is important in that this statute must be read *in pari materia* with the "contributing" statute to ascertain the elements of contributing to the delinquency of a minor.[161] However, it is doubtful that the basic holding in *Austin* will be affected by this amendment.

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[153] 234 S.E.2d 657 (W. Va. 1977).

[154] *Id.* at 664.

[155] *Id.* at 661.

[156] *See* W. VA. CODE §§ 48-1-1, -8 (1976 Replacement Vol.).

[157] 234 S.E.2d at 661-62.

[158] State v. Harris, 105 W. Va. 165, 141 S.E. 637 (1928) (criminal intent not a necessary element of proof); and State v. Westfall, 126 W. Va. 476, 29 S.E.2d 6 (1944) (proof beyond a reasonable doubt of knowingly contributing required).

[159] 234 S.E.2d at 660.

[160] *See* W. VA. CODE § 49-1-4 (Cum. Supp. 1977) *and* note 137 *infra.*

[161] 234 S.E.2d at 659.

XII. STATUTES

The West Virginia Legislature acted extensively in the criminal law area in 1977. Important statutes were passed in the areas of child welfare, prisoner's rights, worthless checks and court appointment of counsel for indigents.

A. *Child Welfare*

One of the most comprehensive pieces of legislation was the amendment of the Child Welfare Act.[162] "Child,"[163] "delinquent child"[164] and "neglected child"[165] were redefined and a new category, that of "abused child,"[166] was added. In addition, important procedural and substantive changes were made with regard to each of these categories.

A comprehensive procedural framework was established to afford juveniles the full trial rights accorded adults. The most outstanding provisions guarantee children the right to retained or appointed counsel at all stages of the proceedings, a meaningful opportunity to be heard, to testify and cross-examine witnesses and all other protections guaranteed by article III of the West Virginia Constitution.[167] Both the procedural rights afforded adults in criminal proceedings and the rules of evidence were made applicable to juvenile delinquency proceedings.[168]

The legislature also evinces a purpose to preclude detention of juveniles in all but the most demanding circumstances in order to provide maximum protection from adulterating influences and to ensure that the least restrictive punishment advisable under the circumstances be imposed. In this respect, the major provisions include:

(a) a child taken into custody must be released on recognizance unless there is reasonable cause to believe that the child

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[162] W. VA. CODE §§ 49-1-1 to -5, 49-5-1 to -17, 49-6-1 to -10, 49-6A-10 (Cum. Supp. 1977).

[163] *Id.* § 49-1-2.

[164] *Id.* § 49-1-4.

[165] *Id.* § 49-1-3.

[166] An "abused child" is one whose parent or guardian attempts to, inflicts, or allows to be inflicted, physical injury which seriously endangers the present physical or mental health of the child, or inflicts sexual abuse upon the child. *Id.*

[167] *Id.* § 49-5-1.

[168] *Id.*

will commit a crime involving serious injury or will be unavailable for court proceedings;[169]
(b) at a mandatory preliminary hearing, the child may be allowed an improvement period on terms calculated to serve the rehabilitative needs of the child if the court feels this will serve the best interests of the child;[170]
(c) jurisdiction may be transferred to a criminal proceeding for violent crimes or crimes involving substantial danger to the public when the child is sixteen years or older and there is no reasonable prospect of rehabilitation. Provision is made for an interlocutory appeal;[171]
(d) the court is given power to order psychological examination of the child;[172]
(e) the court must make the least restrictive disposition of the case;[173]
(f) strict rules are provided for detaining children in jail and at no time can a child be housed with adults who have committed crimes;[174] and
(g) strict rules are provided for governance of all juvenile correctional facilities.[175]

In conjunction with these provisions, one of the most revolutionary sections mandates that, in January of each year, the court must order the destruction of all law enforcement, court and private agency files and records regarding every person over whom juvenile jurisdiction has terminated. No individual, firm, corporation or other entity may discriminate in any manner against a person because of involvement in a juvenile proceeding; simply stated, a juvenile proceeding is deemed never to have occurred.[176]

The trend, noted above, of affording children full constitutional and procedural rights is carried over to proceedings concerning neglected or abused children. One major change provides that under no circumstances may the same attorney represent both the child and the parents or guardian in such proceedings.[177]

Also noteworthy are the provisions for taking a child from the custody of the parents. A child may be transferred to the tempo-

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[169] *Id.* § 49-5-8(d).
[170] *Id.* § 49-5-9.
[171] *Id.* § 49-5-10.
[172] *Id.* § 49-5-13.
[173] *Id.*
[174] *Id.* § 49-5-16(a).
[175] *Id.* § 49-5-16(b).
[176] *Id.* § 49-6-2.
[177] *Id.*

rary custody of the state department or a responsible relative only if the court finds imminent danger to the physical well-being of the child or the existence of no reasonably available alternatives to removal.[178] Parental custody rights cannot be terminated unless there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future."[179]

Perhaps the most controversial section requires medical professionals, Christian Science practitioners, law enforcement officials and social workers, among others, to report suspected cases of child abuse or neglect under penalty of law.[180] Communications privileges between husband and wife or between any professional person and patient or client (with the exception of the attorney-client privilege) are removed, and civil or criminal liability is absolved for good faith reporting.[181]

B. *Prisoner's Rights*

The legislature also took a significant step in the area of prisoner's rights and prison reform. Espousing an intention of humanely and justly reestablishing the ability of persons committed to institutions to return and live peaceably in the community at the earliest possible time,[182] a Department of Corrections was created for the sole purpose of governing penal and correctional facilities.[183]

Although the commissioner and the wardens were generally given complete authority over management of the institutions,[184] this power was somewhat restricted with codification of certain prisoner's rights. Among the most important are:

(a) an eight-hour work day with a one-hour lunch period;
(b) a mandatory physical examination and work assignment such as the prisoner's physical health and strength reasonably permits;

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[178] *Id.* § 49-6-3.

[179] *Id.* § 49-6-5(b).

[180] *Id.* § 49-6A-2. The full list of those required to report include: "[a]ny medical, dental, or mental health professional, christian science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, peace officer or law enforcement official."

[181] *Id.* §§ 49-6A-6, -7.

[182] W. VA. CODE § 62-13-1 (Cum. Supp. 1977).

[183] W. VA. CODE § 25-1-1 (Cum. Supp. 1977).

[184] *See generally,* W. VA. CODE § 62-13-4 (Cum. Supp. 1977).

(c) commutation of sentence for work in excess of eight hours per day "necessary and essential to efficient organization of convict forces";
(d) relaxation of strict prison rules and extension of social privileges or commutation of sentence on the basis of merit for good conduct; and
(e) opportunity for hearing before any privileges conferred are revoked.[185]

All privileges or commutations of sentence may be revoked for violation of rules known to the prisoner.[186]

C. *Worthless Checks*

The law pertaining to issuance of worthless checks was also revamped during the last legislative session. A distinction is made between obtaining money, services, goods or other property by means of a worthless check or its equivalent,[187] and the making or delivering of a worthless check or its equivalent for the payment of money upon a bank or depository.[188]

Where the person (including a firm or corporation) obtains property by means of a worthless check, he must "know" at the time that there are insufficient funds to pay the same upon presentation.[189] Payment of the dishonored check is no defense or grounds for dismissal,[190] but if the payee had reasonable grounds to believe there were insufficient funds, or the check was post-dated, the section is inapplicable.[191] Conviction under the statute is a felony if the check is in an amount greater than two hundred dollars ($200); otherwise it is a misdemeanor.[192]

A person, issuing or drawing a check or its equivalent upon a bank, who knows or has reason to know that there are not sufficient funds on deposit to cover the same is guilty of a misdemeanor.[193] Here, payment of the check and authorized costs is a defense or

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[185] W. VA. CODE §§ 28-5-27, -28 (Cum. Supp. 1977).
[186] *Id.* But, if an escaped prisoner voluntarily returns without expense to the State, no forfeiture shall be made. *Id.* § 28-5-28.
[187] W. VA. CODE § 61-3-39 (Cum. Supp. 1977).
[188] *Id.* § 61-3-39a.
[189] *Id.* § 61-3-39.
[190] *Id.* § 61-3-39b.
[191] *Id.* § 61-3-39.
[192] *Id.*
[193] *Id.* § 61-3-39a.

grounds for dismissal.[194] Again, the section is inapplicable if the payee had knowledge or reason to believe that the check would be dishonored, or if the check is post-dated.[195]

Providing false information prior to acceptance of the check or in order to obtain check cashing privileges is also made a misdemeanor.[196]

The holder of a worthless check has two options: he may notify the maker and impose a five dollar ($5.00) service charge,[197] or file a complaint with a magistrate in a county wherein venue lies.[198] These remedies are exclusive; he cannot impose the service charge if a complaint is filed. If the holder opts for the notice and service charge, the statute authorizes one notice per a form provided, but no other written or oral threats of prosecution may be made to enhance collection of the check.[199]

If a complaint is filed, statutory notice is given by the magistrate to the maker, but no warrant for arrest may issue unless the check and court costs are not paid within twenty (20) days or the maker is about to flee the jurisdiction.[200]

D. *Appointment Of Counsel For Indigents*

Pursuant to the decision in *State ex rel. Partain v. Oakley*[201] the Legislature passed a new law relating to appointment of counsel for indigents in criminal cases.[202] Under the new system, any person, juvenile or adult, accused of a crime involving a possibility of confinement or a fine of more than five hundred dollars ($500.00) is entitled to court-appointed counsel, investigative services, and other necessary services at all stages of the proceedings, including

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[194] *Id.* § 61-3-39b.
[195] *Id.* § 61-3-39a.
[196] *Id.* § 61-3-39d(c).
[197] *Id.* § 61-3-39e.
[198] *Id.* § 61-3-39f.
[199] *Id.* § 61-3-39e.
[200] *Id.* § 61-3-39g.
[201] 227 S.E.2d 314 (W. Va. 1976). This case stated that a large number of criminal appointments to a particular lawyer could reach such a level as to constitute a taking of property without due process of law. The statutory scheme for appointing counsel was stated to be inadequate; but, rather than acting immediately, the court gave the legislature until July 1, 1977, to act before exercising their supervisory powers over the bar to correct the system. *Id.* at 314, 323. *See* Survey, *Developments of the Law in West Virginia*, 79 W. VA. L. REV. 445 (1977).
[202] W. VA. CODE §§ 51-11-1 to -9 (Cum. Supp. 1977).

sentencing and appeal.[203] The circuit court or magistrate is under a duty to inform the accused of his right to an attorney and investigative and other services.[204] One of the more interesting provisions is that the circuit court shall appoint one or more counsel, at least one of whom shall be reasonably competent in the practice of criminal law.[205]

The court, in deciding whether a person is needy, must consider such factors as net worth, liquidity of assets, disposable income, the number and ages of dependents and other material factors; the fact of release on bond cannot be determinative.[206] The furnishing of false information by either the accused or an attorney is a misdeameanor.[207]

The legislature has thus attempted to prevent the criminal appointment system from becoming unconstitutional. Although the hourly rates of compensation are the same as those under the old statute, appointed attorneys are now relieved of the burden of paying any necessary investigative or other services required by the case.

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[203] *Id.* §§ 51-11-2, -3. This right extends to juvenile proceedings. *Id.* § 50-4-3, post-conviction habeas corpus, *Id.* § 53-4A-4, and parole violation hearings, *Id.* § 62-12-22, as well as in the circuit court. *Id.* § 62-3-1.

[204] *Id.* § 51-11-4.

[205] *Id.* § 51-11-5.

[206] *Id.* § 51-11-6.

[207] *Id.* §§ 51-11-6, -7.

DOMESTIC RELATIONS

At issue in *Petition for Change of Name of Harris*[208] was "the right of a divorced woman with minor children to change her name and the right of the guardian of a minor child to have the child's name changed."[209] A divorced woman petitioned the circuit court to have her maiden name restored and to have the name of her minor son changed. Although notice of the proposed name changes was published in a newspaper of general circulation in compliance with statutory requirements, the circuit court denied both petitions.[210]

Considering the right of the divorced woman to have her name changed, the court recognized that a court granting a divorce is authorized to restore to a woman her former or maiden name only where the woman has no living children.[211] The court noted, however, that the general statute regarding change of name[212] permits any person to change his or her name upon fulfilling the statutory requirements.[213] In concluding that a divorced woman has a right to have her name changed regardless of the fact that she has living children, the court said, "W. Va. Code, 48-5-1 [1969] does not exclude a divorced wife with living children from its provisions, and accordingly . . . any woman who has been divorced, notwithstanding the fact that she has living children by that marriage, may petition either to have her maiden name restored or to change her name to some other name . . ., and she has an absolute right to such change if there are otherwise no impediments under W. Va. Code, 48-5-3 [1969], notwithstanding Code, 48-2-23 [1969]."[214]

In dealing with the right of the divorced woman to have her child's name changed, the court announced two underlying considerations which should guide a judge in considering a petition for the change of name of a minor child—the interest of the child's

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[208] 236 S.E.2d 426 (W. Va. 1977).

[209] *Id.* at 427.

[210] "In the case of Mrs. Harris, the circuit court denied the petition on the grounds that the court granting her divorce had declined to restore her maiden name because she had a minor child, and in the case of the child,. . . the court denied the petition on the grounds that to grant the name change the court would, 'in effect bastardize this child.' " *Id.*

[211] W. VA. CODE § 48-2-23 (1976 Replacement Vol.).

[212] W. VA. CODE § 48-5-1 (1976 Replacement Vol.).

[213] W. VA. CODE § 48-5-3 (1976 Replacement Vol.).

[214] 236 S.E.2d at 428.

father and the best interests of the child.[215] The court found that a father has a protectible interest in having his child bear his name, although that interest is not so great that it cannot be taken away where the best interests of the child would be served by changing the child's name.[216] Nevertheless, the interest is such that where the child's father is living, actual notice must be given to the father before the petition for change of name may be heard if the father's whereabouts are known or could be determined with reasonable diligence.[217] However, the interest of the father in having his child bear his name is made to depend on the extent to which the father exercises his parental rights and obligations. Where the father, living or dead, has exercised his parental rights and performed his parental duties, the court holds that "the name of the child should not be changed absent a showing by clear, cogent, and convincing evidence that such change will significantly advance the best interests of the child."[218] On the other hand, where the father has abandoned the child, and has not undertaken to exercise the authority and responsibilities of a parent, the court would allow the mother or guardian to change the child's name upon proper notice to the father, the father having waived his interest in having his child bear his name by the abandonment.[219]

In *Murredu v. Murredu,*[220] the Supreme Court of Appeals dealt with the corroboration requirement in divorce cases as applied to a claim for divorce asserting a separation for the statutory period, a divorce court's authority to award to one party exclusive possession of jointly owned real property and individually owned personal property incident to a child custody award, and the amendment of claims for divorce asserting new grounds therefor.

Initially, the court ruled that corroborative testimony was required by statute to authorize a divorce court to grant a divorce grounded on a separation of the parties for the statutory period of time.[221] The court noted that by statute, no divorce could be

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[215] 236 S.E.2d at 428-29.

[216] *Id.* at 429.

[217] *Id.* at 428.

[218] *Id.*

[219] *Id.* at 430. The court points out that the abandonment contemplated by their formulation is that required to divest a father of his parental rights under the adoption statute, W. VA. CODE § 48-4-1 (Cum. Supp. 1977). The court requires such proof of abandonment in order to insure that the change of name statute is not used to circumvent the adoption statute by divesting a father of his parental appearance.

[220] 236 S.E.2d 452 (W. Va. 1977).

[221] *Id.* at 455. W. VA. CODE § 48-2-4(a)(7) (Cum. Supp. 1977) amended the prior

granted on the uncorroborated testimony of the parties.[222] Reasoning from the recently enacted irreconcilable differences ground for divorce, which by express provision makes corroborative testimony unnecessary,[223] the court found that where the legislature intended corroboration to be unnecessary it expressly permitted the courts to grant a divorce on the uncorroborated testimony of the parties. Since the Legislature had made no such exception with regard to the separation statute, the court concluded that corroborative testimony was required before a divorce court could decree a divorce on such ground.

The court next dealt with the divorce court's disposition of the real and personal property of the parties. The divorce decree in the instant case granted a divorce to the husband, awarded him custody of the couple's three minor children, granted him the right to live in the home property until the youngest child reached eighteen, and awarded him possession of the household furnishings. The wife contended that the divorce court had no jurisdiction to award the husband exclusive possession of the jointly owned real property, nor to award him posession of all the household furnishings.

In considering a divorce court's authority to award exclusive possession of jointly owned real property, the court noted that although one previous decision indicated a court had jurisdiction to make such an award incident to an award of alimony, child custody and maintenance,[224] subsequent decisions had expressly left unresolved the issue of whether the West Virginia statute governing alimony and child custody and maintenance[225] authorized

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Code provision by reducing the statutory period required for living separate and apart from two years to one year.

[222] W. VA. CODE § 48-2-19 (1976 Replacement Vol.) provides in part that: "no judgment order shall be granted on the uncorroborated testimony of the parties or either of them."

[223] W. VA. CODE § 48-2-4(a)(10) (Cum. Supp. 1977) provides that: "In such case no corroboration of the grounds for divorce shall be required."

[224] Kinsey v. Kinsey, 143 W. Va. 574, 103 S.E.2d 409 (1958).

[225] W. VA. CODE § 48-2-15 (1976 Replacement Vol.). The language of the statute relevant to the issue at hand is:

> For the purpose of making effectual any order provided for in this section the court may make any order concerning the estate of the parties, or either of them, as it shall deem expedient.

It is interesting to note that W. VA. CODE § 48-2-13 (Cum. Supp. 1977), dealing with the maintenance of spouse and children pendente lite, expressly authorizes the court "to grant exclusive use and occupancy of the marital home to one of the parties during the pendency of the action."

an award of exclusive possession.[226] In the instant case the court settled the issue, holding that "the court did have jurisdiction under W. VA. CODE, 48-2-15, to decree the exclusive possession of the home property to the spouse who was awarded custody of the children."[227]

The court then considered the trial court's award of all the furnishings to the husband. West Virginia Code, § 48-2-21, permits a party to a divorce to petition the court for a return of his property which is in the control of the other party.[228] Prior case law in West Virginia established that, in a divorce action, a court is authorized to award ownership of personal property under section 48-2-21 only upon a specific request for possession of enumerated items.[229] As no specific request for possession had been made in the instant action with regard to the household furnishings, the court held that "the trial court erred in awarding all of the household furnishings to the husband, [and] on remand the wife will be entitled to petition the trial court for her personal property which is in the possession of the husband."[230] However, the court noted that the right of a party to regain possession of his or her personal property by resort to section 48-2-21 was limited by the statutory ability of the court to make any award concerning the property of either party as an incident to making effectual a decree of alimony, custody and maintenance of children.

Additionally, the court dealt with the amendment of a claim for divorce to assert a new ground for divorce. The husband in *Murredu* had amended his counterclaim to the wife's original complaint for divorce to assert as grounds for divorce the two-year separation statute. The trial court awarded the husband a divorce based on that ground. The Supreme Court of Appeals, distinguishing instances where the evidence used to prove the original ground for divorce was obtained after the institution of the action[231] from cases where a new claim for divorce is asserted on grounds arising after the institution of the initial action, held that the husband's

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[226] State ex rel. Collins v. Muntzing, 151 W. Va. 843, 157 S.E.2d 16 (1967); State ex rel. Hammond v. Worrell, 144 W. Va. 83, 106 S.E.2d 521 (1958).

[227] 236 S.E.2d at 457.

[228] W. VA. CODE § 48-2-21 (1976 Replacement Vol.).

[229] Wood v. Wood, 126 W. Va. 189, 28 S.E.2d 423 (1943).

[230] 236 S.E.2d at 457.

[231] Brown v. Brown, 142 W. Va. 695, 97 S.E.2d 811 (1957).

amendment to his counterclaim asserting the two-year separation statute was permissible under our liberal rules of pleading.[232]

In 1977, the West Virginia Legislature enacted several significant amendments to Chapter forty-eight, Article two of the West Virginia Code governing divorce and support and maintenance pendente lite.

Paragraph (a) of section four, which names and describes the grounds for divorce in West Virginia, was amended to reduce the statutory time period for accrual of a ground in two instances. Amended subparagraph (a)(3) shortened the period for abandonment or desertion from one year to six months.[233] Subparagraph (a)(7), which makes living separate and apart a ground for divorce, was amended to provide that the parties' separation must be continuous for only one year in lieu of the previously required two year separation.[234]

Paragraph (a) of section four was also amended to add two additional grounds for divorce. Subparagraph (a)(9) provides that abuse or neglect of a child, as defined therein, shall be a ground for divorce.[235] The degree of proof required to sustain a divorce on the ground of child abuse or neglect is "clear and convincing evidence" sufficient to justify depriving the offending party of his or her right to custody. Subparagraph (a)(10) provides that a divorce may now be granted where the parties admit by way of verified complaint and answer that irreconcilable differences exist between the parties.[236] Significantly, no corroborative testimony is required to prove irreconcilable differences. Additionally, the statute mandates that no divorce can be ordered on the grounds of irreconcilable differences until at least sixty (60) days have elapsed since the date of the filing of the complaint.

Section thirteen of Article 48, Chapter two was amended[237] to

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[232] 236 S.E.2d at 458-59.

[233] W. VA. CODE § 48-2-4(a)(3) (Cum. Supp. 1977).

[234] W. VA. CODE § 48-2-4(a)(7) (Cum. Supp. 1977).

[235] W. VA. CODE § 48-2-4(a)(9) (Cum. Supp. 1977):

> . . . For purposes of this subsection, "abuse" means any physical injury including, but not limited to, sexual molestation, or mental injury inflicted on such child; and "neglect" means wilful failure to provide, by one of the parties who is legally responsible for the care and maintenance of a child, the proper or necessary support, education as required by law, or medical, surgical or other care necessary for the well-being of a child.

[236] W. VA. CODE § 48-2-4(a)(10) (Cum. Supp. 1977).

[237] W. VA. CODE § 48-2-13 (Cum. Supp. 1977).

give a divorce court express authority to grant to one of the parties to an action for divorce exclusive use of the marital home during the pendency of the action. Additionally, the section now permits a party deserted or abandoned, or where the parties are living separate or apart, to institute an action for divorce alleging that he or she believes the abandonment or separation will continue for the statutory period. This permits the court to order maintenance payments and other forms of relief prior to the accrual of a ground for divorce. If the period of abandonment or separation does in fact continue for the requisite period of time to constitute a ground for divorce, the divorce action may proceed to hearing without the filing of a new complaint so long as the opposing party is given twenty days notice of the hearing.

Finally, Chapter forty-eight, Article two, section fourteen, dealing with when a divorce is not permitted and setting forth several defenses to actions for divorce, was amended to completely eliminate collusion as a defense to a divorce action.[238]

The West Virginia Legislature also made several additions to the Code sections regulating adoption and child welfare agencies in an effort to deal with the increased recognition of the rights of natural fathers of illegitimate children in those children.

Chapter forty-eight, Article four, section six of the West Virginia Code was amended to provide that a determined father[239] of an illegitimate child who did not consent to the adoption of that child, a determined father of an illegitimate child entitled to notice under § 48-4-1(b)(1) of an adoption proceeding who was not served with notice as provided,[240] or a natural father of an illegitimate child entitled to notice under § 49-3-1(b) of a proceeding by a child welfare agency to terminate his rights who was not served with

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[238] W. VA. CODE § 48-2-14 (Cum. Supp. 1977).

[239] W. VA. CODE § 48-4-1(a) (Cum. Supp. 1977) provides that:

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

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

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

[240] W. VA. CODE § 48-4-1(b)(1) (Cum. Supp. 1977). If the father resides within the State he must be personally served with notice, but if after due diligence personal service cannot be obtained, or if the father lives outside the State, the notice may be sent by registered mail to his last known address.

notice as provided,[241] may petition the court to vacate the adoption "at any time within one year after learning of or having reasonable opportunity to learn of the adoption."[242]

Section one of Chapter forty-nine, Article three, was amended so as to provide child welfare agencies with a method to terminate the rights of a natural father of an illegitimate child upon grounds of "nonsupport . . . , abandonment, desertion, or neglect . . . , or that said father is unfit to have custody" when the mother has executed a relinquishment of the child to the agency.[243] The statute requires that the father be given notice of the hearing on the petition.[244] However, if actual notice cannot be given to the father, the section permits the court to proceed with the hearing and, upon proper proof, terminate the father's parental rights, subject to the father's right to revocation under § 48-4-6.

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[241] W. VA. CODE § 49-3-1(b) (Cum. Supp. 1977) provides in part that

> A copy of the petition and notice of the date, time and place of the hearing on said petition shall be personally served on said father at least twenty days prior to the date set for the hearing; and if after due diligence personal service cannot be obtained, or if the father resides outside the state, the copy of the petition and the notice of the hearing shall be sent by certified mail, return receipt requested, to the last known address of said father.

[242] W. VA. CODE § 48-4-6(a) (Cum. Supp. 1977).

[243] W. VA. CODE § 49-3-1(b) (Cum. Supp. 1977).

[244] *Id.*

INSURANCE

In *Broy v. Inland Mutual Insurance Co.*,[245] the issue was whether a named insured under an automobile liability insurance policy could maintain a direct action against her insurer on a judgment recovered against a tort-feasor who was an additional insured under the policy's omnibus clause. The plaintiff was injured when struck by a pickup truck owned by her husband but being driven by another with her husband's permission. In a previous action by the plaintiff against the driver of the vehicle, plaintiff recovered a jury verdict in the amount of $7,000. Execution on the judgment was returned "no property found," and plaintiff instituted the present action to recover the judgment amount from her husband's insurance company.

At trial, the court directed a verdict in favor of the insurance company, ruling that the plaintiff was precluded from recovering against the insurer on either of two theories. "First, if she was a jointly named insured with her husband on the policy sued upon, she was, in effect, suing herself. Secondly, if not a named insured, the doctrine of interspousal immunity precluded her suit in that her husband was a named insured."[246] The Supreme Court of Appeals reversed, holding that "where an additional insured causes injury to a named insured under an automobile liability policy, the named insured may, in the absence of any exclusionary language to the contrary, maintain a direct action against the insurance company to recover the amount of the judgment rendered against the additional insured."[247]

The court initially noted that precedent in West Virginia allowed an injured plaintiff to maintain a direct action against the insurer where an insured with coverage under a liability policy

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[245] 233 S.E.2d 131 (W. Va. 1977).

[246] *Id.* at 132. Whether or not plaintiff was a named insured under her husband's policy with the defendant was in dispute at trial. Given the alternative reasons for the trial court's decision, the trial court apparently found resolution of that dispute unnecessary. Likewise, as the Supreme Court of Appeals reversed as to both theories offered by the trial court in support of the directed verdict, a determination of whether or not plaintiff was a named insured was not essential to its decision.

[247] *Id.* at 133. Although the insurance policy was not introduced into evidence at trial, neither party questioned that the policy conformed to the statutory requirement that all automobile liability policies issued in West Virginia contain an omnibus clause. W. VA. CODE § 33-6-31(a) (1975 Replacement Vol.).

failed to pay a judgment entered in a personal injury action.[248] The argument generally advanced by insurers in cases similar to the instant case is that to allow the named insured to recover against the insurer would transform the policy from one of indemnity to one of personal accident insurance for the benefit of the insured.[249] The court reasoned, however, that the indemnity aspect of the policy was preserved because the person required to be indemnified by the statutory omnibus clause was the additional insured. Restating the general principle that insurance contracts are to be strictly construed against the insurer,[250] the court said that in the absence of language in the policy excluding a named insured from recovering for personal injuries, such an exclusion should not be implied.[251]

In rejecting the argument that the doctrine of interspousal immunity precluded the plaintiff from maintaining the present action, the court noted that generally the doctrine was applicable only when the suit was between husband and wife.[252] Here, however, the plaintiff was not suing her husband to recover for the injuries she sustained. The plaintiff sought to enforce the additional insured's contractual right to indemnity from the insurer as provided in the statutorily required omnibus clause. The additional insured's contractual right to indemnity coverage, and the plaintiff's consequent right to enforce the indemnity coverage, were found to be independent of plaintiff's relationship with her husband, and the court refused to extend application of the interspousal immunity doctrine to the instant case.

Despite holding that a named insured under an automobile liability insurance policy may maintain an action against his insurer for injuries caused by an additional insured under the policy, the court limited its holding to instances where the policy contains no language excluding the named insured from coverage. Courts which have previously considered such exclusionary clauses have generally held them to be valid in the absence of any statutory prohibition.[253] Whether the West Virginia Supreme Court of Ap-

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[248] 233 S.E.2d at 132.

[249] Annot., 15 A.L.R.3d 711 (1967).

[250] 233 S.E.2d at 133.

[251] *Id.*

[252] *Id.* at 134.

[253] Annot., 46 A.L.R.3d 1061 (1972). *See, e.g.*, Jenkins v. Morano, 74 F. Supp. 234 (E.D. Va. 1947), applying Virginia law and upholding a clause excluding named insureds from coverage.

peals will find that West Virginia statutory law authorizes the use of clauses excluding named insureds from coverage when injured by an additional insured remains for future consideration.

LOCAL GOVERNMENT

In *State ex rel. Piccirillo v. City of Follansbee,*[254] petitioner challenged a provision of the Charter of Follansbee which required a candidate for council to have paid taxes on at least one hundred dollars ($100.00) worth of real or personal property in the city, contending that the property restriction violated her constitutional right of equal protection. Since the West Virginia Code contains a similar property ownership requirement for municipal office holders,[255] the issue presented was whether the State *or* a municipality may require a city council candidate to possess assessed property.

The noteworthy aspect of this case is that it marks the first time this clause of the West Virginia Constitution[256] has been used to challenge the validity of property-holding requirements for candidates for municipal public office. Therefore, the task before the court was to apply that clause to a new factual situation and formulate standards to determine when it has been violated.

The case closest to the one at hand is a United States Supreme Court decision, *Turner v. Fouche,*[257] in which a Georgia statute requiring a candidate for a local board of education to be a freeholder, was held to violate the Equal Protection Clause. In that case, the court used two tests to determine whether a state classification violates the equal protection guarantee. These two federal standards were adopted by the West Virginia Supreme Court in applying the Fourteenth Amendment of the federal Constitution in *Cimino v. Board of Education.*[258] One is the traditional standard, requiring that the state classification bear some "rational relationship" to the achievement of a legitimate state purpose. The other is a more demanding test, to be used on statutes and classifications which impinge on sensitive and fundamental rights and constitutional freedoms, such as religion and speech. In order to uphold these statutes a court must find that a "compelling" state interest is served.

The court chose to adopt these federal standards in applying the state clause. The next step was deciding which standard to

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[254] 233 S.E.2d 419 (W. Va. 1977).

[255] W. VA. CODE § 8-5-7(c) (1976 Replacement Vol.).

[256] W. VA. CONST. art. III, § 17.

[257] 396 U.S. 346, (1970). The Court held in *Turner* that Georgia's freeholder requirement was unconstitutional.

[258] 210 S.E.2d 485 (W. Va. 1974).

apply, or more specifically, whether being a council candidate is a fundamental right requiring the more demanding compelling interest test. The court in *Brewer v. Wilson*[259] specifically recognized that the right to become a candidate for election to public office is a valuable and a fundamental right. In that case, no equal protection argument was advanced and the court upheld qualifications for candidates imposed by the Legislature. In *State ex rel. Maloney v. McCartney,*[260] the right to be a candidate was recognized as fundamental and entitled to constitutional protection under the Equal Protection Clause and First Amendment concepts of freedom of association and expression. In that case, a sufficiently compelling state interest was found to sustain the Governor's Succession Amendment. However, the court found that the property qualifications imposed in the Follansbee Charter and the West Virginia Code served no compelling interest of the state since it had little possible benefit and could possibly lead to "insidious consequences."[261] Therefore, the property restrictions for becoming a candidate violated one's right of equal protection as guaranteed by the state's Constitution.

Matter of Boso[262] was an appeal taken from a decision of the Circuit Court of Marshall County holding that Herbert Carl Boso, an elected member of the Moundsville City Council, was guilty of official misconduct and ordering his removal from office. The issues arose under Section 11 of the City Charter, providing as follows:

> Neither the council nor any of its members shall direct or request the appointment of any person to, or his removal from office by the city manager or by any of his subordinates . . . Any councilman violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall cease to be a councilman.[263]

The findings of fact by the trial court were that the respondent did "direct and request" the City Manager to remove the Chief of Police with the words, "Why don't you fire that damn Chief of Police?" Such behavior was held to be official misconduct under

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[259] 151 W. Va. 113, 150 S.E.2d 592 (1966).
[260] 223 S.E.2d 607 (W. Va. 1976). See 79 W. VA. L. REV. 435 (1977).
[261] 233 S.E.2d at 424.
[262] 231 S.E.2d 715 (W. Va. 1977).
[263] MOUNDSVILLE, W. VA. CODE § 11 (1956).

W. Va. Code § 6-6-5,[264] which warranted removal from office under W. Va. Code § 6-6-7.[265]

The issues on appeal were the amount of evidence required to remove an official from office and whether the trial court had found that amount. The requirement of W. Va. Code § 6-6-7 is that the charge against an official must be established by "satisfactory proof" in order to remove him. That provision has been construed by the court as equivalent to the "clear and convincing" standard: "To warrant removal of an official pursuant to Code 1931, 6-6-7, clear and convincing evidence must be adduced to meet the statutory requirement of satisfactory proof."[266] Furthermore, removal from office "is a drastic remedy and the statutory provision prescribing the grounds for removal is given strict construction."[267]

With these controlling principles in mind, the court looked at the evidence in the record and concluded that the requisite standard had not been met. Therefore, Respondent Boso was ordered reinstated to office with back pay.

The only question before the court in *Fox v. Board of Education*[268] was whether a teacher's unexcused absence from a parent-teacher conference constituted a wilful neglect of duty warranting his dismissal. Appellee had been employed by the Doddridge County Board of Education for twenty-three years when he missed a parent-teacher meeting on January 29, 1975. Charges were brought against him by the County School Superintendent, a hearing was held, and he was fired by unanimous vote of the county board. The circuit court affirmed his termination.

Upon appeal, the court held that the dismissal had satisfied procedural due process requirements, but that the punishment did not fit the misdeed. "The authority of a county board of education to dismiss a teacher under W. Va. Code, 1931, § 18A-2-8, as amended, must be based upon the just causes listed therein and

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[264] W. VA. CODE § 6-6-5 (1971 Replacement Vol.) provides: "Any state officer . . . may be removed from office . . . (b) for official misconduct. . . ."

[265] W. VA. CODE § 6-6-7 (1971 Replacement Vol.) provides: "Any person holding any . . . municipal office . . . may be removed by the circuit court of the county wherein such officer or person resides . . . on any of the grounds, or for any of the causes, for which a state officer may be removed under section five of this article (§ 6-6-5). . . ."

[266] Evans v. Hutchinson, 214 S.E.2d 453 (W. Va. 1975), Syllabus Point 9.

[267] Smith v. Godby, 154 W. Va. 190, 174 S.E.2d 165 (1970), Syllabus Point 2.

[268] 236 S.E.2d 243 (W. Va. 1977).

must be exercised reasonably, not arbitrarily or capriciously."[269] Balancing the inconvenience to parents and the embarrassment to school authorities occasioned by Fox's absence, against the strong contract interest of a teacher of twenty-three years' experience, the court concluded that a lesser disciplinary action, such as temporary suspension, would be justified, and ordered reinstatement with back pay.

The issue in *Mason County Board of Education v. State Superintendent of Schools*[270] was whether a county board of education had standing to obtain judicial review of an order of the State Superintendent of Schools requiring reinstatement of an employee dismissed by that county board.

On September 1, 1972, the Mason County Board of Education dismissed one of its school principals under the authority granted in W. Va. Code, § 18A-2-8.[271] Since the board decision was not unanimous, the principal was able to appeal to the State Superintendent of Schools, who issued a reinstatement order. When refused a writ of certiorari from the Circuit Court of Kanawha County, the board appealed to the supreme court.

The court first established that the Administrative Procedure Act was not applicable to this case. The State Board of Education

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[269] Beverlin v. Board of Education, 216 S.E.2d 554 (W. Va. 1975), Syllabus Point 3. The causes listed in the statute are immorality, incompetency, cruelty, insubordination, intemperance, and wilful neglect of duty. W. VA. CODE § 18A-2-8 (1977 Replacement Vol.).

Fox was charged with the last on the list. Therefore, citation of the *Beverlin* principle indicates that the county board erred in exercising its statutory authority capriciously.

[270] 234 S.E.2d 321 (W. Va. 1977).

[271] W. VA. CODE § 18A-2-8 (1977 Replacement Vol.).

Suspension and dismissal of school personnel by board.

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or wilful neglect of duty, but the charges shall be stated in writing and the employee so affected shall be given an opportunity to be heard by the board upon not less than ten days' written notice, which charges and notice shall be served upon the employee within five days of the presentation of the charges to the board. The hearing may be held at the next regular meeting of the board or at a special meeting called for that purpose; and in any case when the board is not unanimous in its decision to suspend or dismiss, the person so suspended or dismissed shall have the right of appeal to the state superintendent of schools.

is expressly exempted from the Act[272] as is its chief executive officer, the State Superintendent of Schools. Nor are county boards of education subject to the Act, not being state agencies.[273] Furthermore, an Opinion of the Attorney General stated that the Administrative Procedure Act is not meant to apply to an administrative hearing held by a local board of education.[274]

Next, the court cited with approval the general rule that in the absence of statutory authority, an administrative officer or agency is not entitled to judicial review of an adverse ruling made within the administrative appellate process of the agency.[275] The reason is that the final ruling of an agency represents its policy and should not be attacked from within. The rule was cited but not applied; whether or not it would prohibit a county board from requesting judicial review of an appellate administrative decision would seemingly depend on whether a county board could be considered a unit within the agency, that agency here being the State Board of Education. Later in the opinion is the statement that county boards are virtually independent of the State Superintendent and are directly answerable to the citizens of the counties. From this divergence one may presume a lack of control by the Superintendent over decisions of the county boards,[276] and a corresponding right to judicial review of agency decisions, since county school boards are not "within" the State Board of Education. Presumably then, the rule was used to support the court's decision to allow the county school board standing to request judicial review.

Third, the court establishes the lack of legislative guidance for dealing with the problem of the school boards appeal. The only applicable statutory provision is W. Va. Code, § 18A-2-8, which does not provide for appeal from the State Superintendent's decision. "Because of the absence of statutory guidelines,"[277] the court turns to precedent. *Beverlin v. Board of Education*[278] held that a teacher could apply directly for certiorari after dismissal by a county board of education. Also, *Smith v. Siders*[279] held that where an employee of a county board appeals his dismissal to the State

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[272] W. VA. CODE § 29A-1-2 (1976 Replacement Vol.).
[273] W. VA. CODE § 29A-1-1(a) (1976 Replacement Vol.).
[274] ___ Op. Atty. Gen ___ (June 18, 1975).
[275] 234 S.E.2d at 322.
[276] 234 S.E.2d at 323.
[277] 234 S.E.2d at 322.
[278] 216 S.E.2d 554 (W. Va. 1975).
[279] 155 W. Va. 193, 183 S.E.2d 433 (1971).

Superintendent, the county board must be given notice and an opportunity to be heard. Although neither case addressed the present problem, the reasoning extended from them is as follows: since *Beverlin* gave one party to the employment contract, the board employee, the right to judicial review of an adverse ruling, that same right must be extended to the other party to the employment contract, the school board. Otherwise, one party to the contract would have an unfair advantage. "Mutuality of remedy is essential to validity of contract."[280] *Smith,* by granting a mandatory right to be heard to the county board, when its dismissals are appealed to the State Superintendent, suggests that the county board does have standing as an interested party. If that is the case, then the board should have sufficient standing to request judicial review on its own motion.

The foregoing reasoning led the court to conclude that a county board of education has standing to obtain judicial review through a writ of certiorari of an order of the State Superintendent reinstating an employee dismissed by the board.

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[280] McGinnis v. Enslow, 140 W. Va. 99, 109, 82 S.E.2d 437, 442 (1954).

PRACTICE AND PROCEDURE

I. RULES 8, 12 AND 56.

Chapman v. Kane Transfer Co.[281] presented the West Virginia Supreme Court of Appeals with an opportunity to discuss the relationship among Rules 8, 12(b)(6) and 56(c) of the West Virginia Rules of Civil Procedure. In this negligence action, the defendant had initially moved for dismissal pursuant to Rule 12(b)(6). The trial court denied the motion, ruling the amended complaint sufficient. Defendant then moved for summary judgment pursuant to Rule 56(c), and affidavits and counter-affidavits were filed by the parties. Answers to interrogatories and stipulations of fact were also before the trial court.[282] Evaluation of these evidentiary materials led the trial court to conclude that the defendant owed no legal duty to the plaintiff. Although a motion for summary judgment pursuant to Rule 56(c) was before the trial court, it reverted to Rule 12(b)(6) and granted a motion to dismiss for failure to state a claim upon which relief could be granted. The pleadings had not been amended since the initial motion to dismiss for failure to state a claim had been denied. The Supreme Court of Appeals reversed, holding that it is error to convert a motion for summary judgment into a motion to dismiss for failure to state a claim, particularly where the trial court considers matters outside the pleadings as a basis for its judgment.[283] The court indicated that, for purposes of motions to dismiss, inquiry should be directed to the pleading requirements of Rule 8(a).[284] Citing the landmark case of *Conley v. Gibson*,[285] the court stated that motions to dismiss are viewed with disfavor, especially in actions to recover for personal injuries and further held that the complaint satisfied the requirements of Rule 8.[286]

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[281] 236 S.E.2d 207 (W. Va. 1977).

[282] *Id.* at 209.

[283] *Id.* at 211. It is arguable the court overstated its position since a motion to dismiss for failure to state a claim is presumably countenanced at later stages of the trial. *See* W. VA. R. CIV. P. 12(b)(6). Treating a motion for summary judgment as a motion to dismiss for failure to state a claim upon which relief could be granted would seem proper, but only if matters outside the pleadings are not considered.

[284] W. VA. R. CIV. P. 8(a) provides, in part, that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled."

[285] 355 U.S. 41 (1957).

[286] 236 S.E.2d at 212.

II. RULES 17 AND 19.

Housing Authority of Bluefield v. Boggess[287] involved an action brought by a local housing authority on a contract it had executed with the defendant, which required the defendant to provide architectural and related services for the construction and development of two low-income housing projects. The complaint alleged negligence, fraud and breach of express and implied warranties. The Department of Housing and Urban Development was not a party to this contract, although according to an agreement with the local housing authority, HUD retained significant supervision rights with respect to project construction and defendant's performance pursuant to the contract with the local housing authority. All necessary funds for the projects were provided by HUD.[288] The defendant moved to dismiss the claim contending that although HUD was not a party to the contract, its control over the project was so pervasive that it made HUD the only real party in interest to enforce the obligations of the contract.[289] The trial court held that HUD's absence was so prejudicial that the action could not continue and, therefore, dismissed the action. The West Virginia Supreme Court of Appeals reversed. The court found the local housing authority to be a viable legal entity whose rights and obligations arising under the contract with the defendant were not erased by the presence of HUD.[290] In response to the argument that defendant would be exposed to a risk of multiplicity of suits if HUD were not the real party in interest, it was noted that the function of Rule 17 was not to protect defendant's from a risk of multiplicity of suits but to insure that the plaintiff has a right to sue even though he may not have all the substantive law rights. The court indicated that the alleviation of prejudice devolving upon the defendant from claims that might be made by other real parties in interest is more properly the function of Rule 19.[291]

III. PROHIBITION—RIGHT TO JURY TRIAL

It is often stated that the writ of prohibition is a matter of

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[287] 233 S.E.2d 740 (W. Va. 1977).

[288] *Id.* at 743.

[289] *Id.* at 742.

[290] *Id.* at 743-44.

[291] *Id.* at 744. The court did not decide whether HUD was an indispensable party pursuant to W. VA. R. CIV. P. 19. The plaintiff had assigned its interests in the contract to HUD, which subsequently intervened at the appellate level. *Id.* at 746.

right, not subject to sound judicial discretion.[292] But *State ex rel. West Virginia Truck Stops, Inc. v. McHugh*[293] indicates that equitable principles do apply to proceedings in prohibition. In the answer to a complaint filed to enforce a mechanic's lien, the defendant asserted a compulsory counterclaim alleging breach of contract and demanded a jury trial on the factual issues raised therein. The demand for a jury was denied by the trial court, who referred the matter to a commissioner. After hearings before the commissioner had continued from time to time for nearly two years, the plaintiff rested. This was followed by a motion filed by the defendant seeking to dismiss the action because it was unconstitutionally being denied a trial by jury, or, alternatively, to suspend proceedings before the commissioner until there had been a jury determination that the defendant owed money to the plaintiff. The trial court denied the motion on the ground that the prejudicial effect in terms of time and expense that would accrue if the proceedings began anew outweighed the injustice that might result from denying the motion.[294] Proceedings in prohibition followed. Respondent (plaintiff) argued, in part, that laches should bar the writ of prohibition because it was sought after a delay of nearly two years from the initial denial of the request for a jury trial. The West Virginia Supreme Court of Appeals implicitly recognized that the equitable doctrine of laches applied to proceedings in prohibition but held that there had not been an intervening change of position by the respondent induced by the relator. The court observed that the relator was under no legal obligation to act in any manner during the period the matter was before the commissioner, and that mere expiration of time is not the controlling factor in determining whether proceedings in prohibition were instituted in a timely manner.[295] Upon the merits of the petition, the court held that the trial court had exceeded its legitimate powers when it denied the right to a jury trial[296] on the factual issues raised by the counterclaim. Consequently, the writ of prohibition was awarded.

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[292] *E.g.*, State ex rel. Valley Distributors v. Oakley, 153 W. Va. 94, 168 S.E.2d 532 (1969).

[293] 233 S.E.2d 729 (W. Va. 1977).

[294] *Id.* at 731.

[295] *Id.* at 732.

[296] The respondent argued that the mechanic's lien suit is historically an equitable proceeding to which no right to jury trial on factual issues attaches. The court, without citation or analysis, held that W. VA. CONST. art. III, § 13, which mandates the preservation of the right to trial by jury upon demand, entitled the relator to a jury trial on its counterclaim. *Id.* at 731.

PROPERTY

Somon v. Murphy Fabrication & Erection Co.[297] gave rise to an opportunity to restate and clarify the elements of adverse possession in West Virginia. Factually, the plaintiff and defendant were involved in a boundary dispute, with plaintiff claiming title to the area by virtue of one of three theories (1) true ownership, (2) adverse possession, (3) acquiesence. Plaintiff Somon had rented this land from his grantor prior to buying it. At the time Somon obtained the deed in 1953, he and the grantor had walked the boundary line and had agreed that an old fence, standing in what later was the disputed area, constituted part of the boundary line. Following his bonafide belief that he owned the area up to the fence, plaintiff used and cared for the property, grazing cattle, hunting, cutting timber and repairing the fence. From a judgment awarding plaintiff the land on all three theories, the defendant appealed.

The theories of true ownership and acquiesence were summarily disposed of by the West Virginia Supreme Court. Plaintiff could not be regarded as the true owner of the property in dispute because the calls and monuments contained in the two deeds were harmonious, i.e., the boundary line was clear and Somon's claim to the disputed property had to rest on another theory. The doctrine of acquiesence was regarded by the Court as arising only when parties agree to a common line and then proceed to use their respective properties as if the agreed upon boundary were the actual boundary.[298] The West Virginia Supreme Court of Appeals dismissed the doctrine of acquiesence from its consideration because, there was no evidence to show that the parties had indeed acquiesced to a new boundary.

The Court agreed, however, with the lower court's ruling that the plaintiff owned the area by virtue of adverse possession. The elements of adverse possession were stated to be actual, hostile possession for the statutory period (currently ten years).[299] To qualify as hostile possession, such possession must be open and notorious, adverse to the true owner, exclusive, continuous and under claim of title or color of right.[300]

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[297] 232 S.E.2d 524 (W. Va. 1977).

[298] *Clear Fork Coal Co. v. Anchor Coal Co.*, 111 W. Va. 219, 161 S.E. 229 (1931).

[299] W. VA. CODE § 55-2-1 (Cum. Supp. 1977).

[300] For an excellent discussion on the requirements for adverse possession as

The only contention of the defendant that the Court in *Somon* found worthy of note was the Company's claim that if the plaintiff thought he was the true owner, he could not fit the requirement of hostile possession necessary to establish adverse possession. The *Somon* Court noted that "hostile" meant adverse, rather than malicious, and that actual possession under circumstances reasonably calculated to give the owner notice of a claim against his title, would fit the requirements for adverse possession.[301] Since the plaintiff had held the area for more than twenty years, his title ripened into ownership because of the doctrine of adverse possession.

The West Virginia Supreme Court of Appeals in *Jones v. Hudson,*[302] reversed a dismissal of the action and held that since the writing in question *could* possibly satisfy the requirements of the Statute of Frauds,[303] dismissal as a matter of law was error.

The Statute of Frauds[304] requires, in pertinent part, that all contracts for the sale of an interest in realty must be in writing and signed by the party to be charged with non-performance. In *Jones,* there was a writing, and it was signed by both the proposed vendors and vendees of a certain piece of real estate. Mr. Justice Neely, in writing for a unanimous court, noted that while this writing satisfied the statutory requirements, throughout the centuries, jurists have engrafted another criterion onto the Statute: contained in this writing must be a certain description of the realty as to its area and location. However, extrinsic evidence may be used to make certain that which may be permissibly inferred from the words of the writing.[305]

The Court inferred from the writing in dispute that: 1) the land was probably about one hundred acres in area, 2) the land was located on Big Run which was probably in Jackson County, 3) the land was probably a farm, and, 4) defendant-vendors probably meant to sell land they owned. Therefore, on remand, extrinsic evidence would be admissible to show if the defendants owned a

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construed by the Supreme Court of Appeals of West Virginia, *See,* Core v. Faupel, 24 W. Va. 238 (1884).

[301] 232 S.E.2d at 528.

[302] 236 S.E.2d 38 (W. Va. 1977).

[303] W. VA. CODE § 36-1-3 (1966).

[304] *Id.*

[305] For cases representative of the application of this doctrine in West Virginia, *See, Holley's Executor v. Curry,* 58 W. Va. 70, 51 S.E. 135 (1905); and *White v. Core,* 20 W. Va. 272 (1882).

farm, in Jackson County, on Big Run, around one hundred acres in size. If these inferences are established, then the writing would be a specifically enforceable contract.

The issue involved in *Wheeling Dollar Savings & Trust Co. v. Hanes,*[306] was whether or not adopted children were to be included in the distribution of the principal from a trust.

Pertinent provisions of the West Virginia Code[307] that were enacted in 1969, insure that adoptive children will be treated as natural children of their adoptive parents for all purposes. The inter vivos trust involved in *Wheeling Dollar Savings & Trust Co.* was executed in 1938. Two cases[308] which dealt with the right of adoptive children to take under inter vivos or testamentary trusts had held that for those trusts executed prior to the enactment of the 1969 code section, adoptive children were not deemed natural children of a beneficiary in order to share in the distribution of the corpus.

Mr. Justice Neely, in writing for the Court, specifically overruled those two cases, and held that regardless of the date of execution of the trust instrument, and whether the trust was testamentary or inter vivos, adopted children were to be included in the distribution of the principal, unless the language of the instrument evidenced a clear intent on the part of the settlor or testator to exclude adopted children.

The Court pointed to, as part of the basis for its decision, the increasing pervasiveness of adoption, and to the fact that adopted children become as natural children, emotionally and financially. The Court also noted that the purpose of a trust is generally to benefit those whom the testator loves, and that if alive, the settlor, in all likelihood, would love the adopted child as much as any natural child.

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[306] 237 S.E.2d 499 (W. Va. 1977).

[307] W. VA. CODE § 48-4-5 (Cum. Supp. 1977) (as enacted 1969). One form or another of this statute has been in effect since 1882. The statute makes adopted children "natural" children of their adoptive parents for all purposes, and excludes adoptive children from any estate of inheritance or any obligation whatsoever toward their biological parents. The Court pointed to the lengthy existence of this statute as evidence of the legislative intent to make adopted children completely equal to and synonymous with natural children.

[308] *Security National Bank & Trust Co. v. Willim,* 151 W. Va. 429, 153 S.E.2d 114 (1967); *Wheeling Dollar Savings & Trust Co. v. Stewart,* 128 W. Va. 703, 37 S.E.2d 563 (1946).

In *Johnson v. Junior Pocahontas Coal Co., Inc.*,[309] surface owners of land attempted to recover for damages to their property occasioned by an independent contractor's alleged negligence in strip-mining nearby land. The plaintiffs held their land by a deed expressly subject to exculpatory clauses in their chain of title insulating the mineral owner from liability for such property damage. The mineral owner leased the coal for removal purposes to a company which then engaged the defendant to strip-mine the coal. The issue, therefore, was whether the clauses protecting the mineral owner extended to the independent contractor. The plaintiffs' complaint alleges injury to their real estate, and improvements thereon, as a result of wilful and wanton conduct in drilling and blasting, and asks for actual and compensatory, punitive and treble damages.

The majority analyzed the case in terms of privity: while privity of estate existed between the coal owner and the lessee company, only privity of contract existed between the lessee and its independent contractor. The defendant held no estate or interest in the coal but was merely under a contractual obligation to remove it. The rule is that privity of contract alone will not carry the benefit of a convenant.[310] Therefore, the benefit of the exculpatory clause did pass from the mineral owner to the lessee with the leasehold estate, but did not pass from the lessee to the defendant because they lacked privity of estate. Accordingly, the narrow holding of the court was that the independent contractor was not insulated from tort liability, and the case was remanded for resolution.

Justice Neely, vigorously dissenting from the majority's privity analysis and criticizing it as a technicality resulting in "nice legal distinctions which give the appearance of applied logic,"[311] confronts the issue as being whether the exculpatory clauses are valid. In his view, the line drawn at privity of contract, beyond which a covenant will not pass with the property is an arbitrary distinction which would prevent the use of independent contractors by owners of mineral interests. He relies on the *Restatement of Property* § 530-§ 537 (1944) to establish that the burden of the promise of exculpation from liability did run through their chain of title to the plaintiffs; and on § 542 of the same work to show that...

[309] 234 S.E.2d 309 (W. Va. 1977).

[310] 20 AM. JUR.2d, *Covenants, Conditions, and Restrictions*, § 34 (1965).

[311] 234 S.E.2d at 320.

the benefits of the promise respecting such use of the land without liability extended to the lessee. The dissenting opinion then draws the line at the same place as the majority, but the reason is that the defendant is a "servant" of the lessee, in an "employment relationship" which does not involve "land covenants or rights to property."[312] Therefore, covenants such as the exculpatory clauses, extend only to parties having rights to the property, excluding the independent contractor. It is essentially the same analysis made by the majority, reaching the same result, but done in a more careful, logical progression and without using the word "privity."

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[312] *Id.*

TORTS

In *Freshwater v. Booth,*[313] the Supreme Court of Appeals sought to clarify the rules for handling inadequate jury awards. The instant case involved an automobile accident. The damages sought by the plaintiffs included stipulated special damages and damages for pain and suffering. The jury returned a verdict for the plaintiffs for the exact amount of the stipulated special damages, but made no award for any pain and suffering, which the court found had been conclusively proven at trial. The trial court entered judgment on the jury verdict, and the plaintiffs appealed.

The Supreme Court of Appeals reversed and remanded the case to the circuit court for a new trial on all the issues. The court held that in a case where (1) liability was strongly contested, (2) there was sufficient evidence to sustain a verdict for plaintiffs or defendants, (3) the jury's award of damages was inadequate, and (4) where the defendant's liability had been proven, a court cannot determine whether the jury was mistaken as to the rules for determining liability or as to the proper measure of damages. In such a case, the court cannot infer whether, upon a new trial, the jury would find in favor of the plaintiff or the defendant, and a new trial on all the issues is the proper course.[314]

The court also noted three other typical classes of cases involving inadequate jury damage awards. The first was the situation where the plaintiff would have been entitled to a directed verdict on the issue of liability, but the jury verdict was obviously inadequate when viewed most favorably for the defendant. In that case, the court said the case should be remanded on the issue of damages alone.[315] Closely akin to the above situation was the case in which, although the plaintiff would not be entitled to a directed verdict, the question of liability was conclusively proved by the plaintiff. When that is the circumstance, the court can reasonably infer that any inadequate jury award was the result of error with regard to the proper measure of damages and should remand the case for a new trial on the issue of damages alone.[316]

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[313] 233 S.E.2d 312 (W. Va. 1977).

[314] *Id.* at 316, *citing* King v. Bittinger, 231 S.E.2d 239 (W. Va. 1976).

[315] *Id.* at 315, *citing* Delong v. Albert, 205 S.E.2d 683 (W. Va. 1974); Hall v. Groves, 151 W. Va. 449, 153 S.E.2d 165 (1967).

[316] *Id.* at 317, *citing* Keiffer v. Queen, 155 W. Va. 868, 189 S.E.2d 842 (1972); Biddle v. Haddix, 154 W. Va. 748, 179 S.E.2d 215 (1971); England v. Shufflebarger, 152 W. Va. 662, 166 S.E.2d 126 (1969); Richmond v. Campbell, 148 W. Va. 595, 136 S.E.2d 877 (1964).

The final type of case involving inadequate jury awards was where defendant's verdict was perversely expressed. This involved a situation where liability was tenuous or strongly contested, and the jury award was so inadequate as to be nominal under the circumstances. Because the jury award was nominal, the court found that it is reasonable to infer in such cases that the jury's mistake was made on the issue of liability, and that it was entitled to accept the nominal award as a defendant's verdict perversely expressed.[317]

Jarrett v. E.L. Harper & Son, Inc.[318] was a case of two major issues. One involved an application of W. Va. R. C. P. 68 and the other was the measure of damages for injury to real property.

Defendant-contractor destroyed plaintiffs' water well while building a sewer, resulting in the plaintiffs being without water during the five weeks that work was being done on a new well. Plaintiffs sued Harper & Son, demanding a jury trial, for $5000.00 to recover the new well cost of $766.82, expenses for carrying water from a neighbor, and compensation for their annoyance and inconvenience. The defendant confessed judgment for $882.12 to cover the cost of the new well plus $115.30 for out-of-pocket expenses including the cost of buckets and payment for the use of a laundromat. The trial judge immediately entered judgment for plaintiffs for $882.12, denying the other elements of damage. The Supreme Court of Appeals held this action to be error, based on Rule 68 and on the jury trial demand. The rule provides that a defendant's offer of judgment, which only partially satisfies the plaintiffs' claim and which is rejected or accepted as part payment only, must be considered by the court to have been withdrawn; in such case the circuit court should have then proceeded with the jury trial.

Injuries to real property have been classified, with some problems, as temporary or permanent. Confusion has arisen both in classifying the damage and in applying the proper rule of damages.[319] The court took this opportunity to overrule cases using the old differentiation between temporary and permanent damage to real property, and to enunciate a new principle:

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[317] *Id.* at 316-17, *citing* Shields v. Church Brothers, Inc., 156 W. Va. 312, 193 S.E.2d 151 (1972); Haffner v. Cross, 116 W. Va. 562, 182 S.E. 573 (1935).

[318] 235 S.E.2d 362 (W. Va. 1977).

[319] *See* Cline v. Paramount Pacific Inc., 153 W. Va. 600, 170 S.E.2d 577 (1969), and Manley v. Brown, 90 W. Va. 564, 111 S.E. 505 (1922).

> When realty is injured the owner may recover the cost of repairing it plus his expenses stemming from the injury including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover the money equivalent of its lost *value* plus his expenses resulting from the injury including loss of use during the time he has been deprived of his property.[320]

Applying this new rule to the present case, the plaintiffs could recover the cost of the new well, out-of-pocket expenses stemming from the injury, plus compensation for loss of use. The latter element is usually equal to lost profits or lost rental value; however, when that standard is inappropriate because the property was not used commercially, "annoyance" and "inconvenience" may properly be considered. This new twist was based on two old out-of-state cases,[321] indicating that the court wanted to establish the availability of damages for discomfort caused by injury to real property.

Justice Neely concurred specifically[322] to applaud the allowance of damages for inconvenience. Stating that the rule here announced "probably also applies" to inconvenience from injury to personal property, he looked forward to jury verdicts against insurance companies for the annoyance and inconvenience of being without one's automobile while the insurance company delays payment for repairs. Hopefully, the effect will be quicker settlement of property damage claims by insurance carriers, to mitigate possible annoyance and inconvenience damages.

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[320] 235 S.E.2d at 365.

[321] *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928). See also *City of Richmond v. Wright*, 151 Va. 964, 145 S.E. 732 (1928).

[322] 235 S.E.2d at 366.

WORKMEN'S COMPENSATION

I. COMPENSATION FOR OCCUPATIONAL INJURIES

The compensability formula of the West Virginia Workmen's Compensation Act requires that employees sustain "personal injuries in the course of and resulting from their covered employment"[323] as a condition precedent to entitlement to the benefits afforded by the Act. *Ware v. State Workmen's Compensation Comm'r*[324] presented a novel question dealing with the "resulting from" segment of the formula. The claimant's work station consisted of a raised platform adjacent to a conveyor and from which the claimant packed glassware. Located behind the claimant was a metal table stacked with the boxes used to pack the glassware. While standing on the raised platform, the claimant fell backwards from the platform, across the metal table and onto the concrete floor sustaining severe injuries. Evidence introduced by the claimant was to the effect that the platform, which was not attached to the floor, changed positions causing her to lose her balance and fall. The employer's evidence tended to show that the fall was a result, not of the platform, but of a dizzy spell brought on by a pre-existing inner-ear disorder. The employer argued that the injuries resulted from the claimant's pre-existing physical condition rather than from the employment. The Commissioner's order awarded compensation and the Appeal Board reversed.[325] The West Virginia Supreme Court of Appeals avoided resolving the factual dispute, holding the injuries compensable under either version of the cause of the fall.[326] The court ruled that, if the fall were indeed idiopathic, the employment nonetheless contributed to the risk of, or aggravation to, the injury from the fall. The raised position of the platform and the presence of the metal table and the concrete floor[327] were conditions of the employment whose cumulative effect was to place the claimant in a position that increased the dangerous effects of the idiopathic fall. With this case, West Virginia joined a majority of jurisdictions, which hold that the effects of idiopathic falls are

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[323] W. VA. CODE § 23-4-1 (Cum. Supp. 1977).

[324] 234 S.E.2d 778 (W. Va. 1977).

[325] *Id.*

[326] *Id.* at 779.

[327] The court expressly indicated that the effects of an idiopathic fall might not be compensable where the only employment-related factor that increased the dangerousness of the fall was a hard floor. *Id.* A majority of the jurisdictions that have considered that issue have denied compensation. 1 A. LARSON, WORKMEN'S COMPENSATION § 12.10 (desk ed. 1976).

compensable where there are employment-related factors that increase the dangers of the employee's fall.[328]

A long-standing judicial overlay to the compensability formula is the requirement that the personal injuries occur "by accident."[329] This may be shown by proof that the disability was attributable to a "definite, isolated, and fortuitous occurrence"[330] or by demonstrating that the disability was the unexpected result of the performance of a usual or ordinary duty of the employment.[331] This is an evolving area of the workmen's compensation law in West Virginia,[332] primarily because of the function it serves. It has been argued that the concept functions not so much to insure that the circumstances resulting in the disability were of a fortuitous or accidental quality but, rather as an added assurance that compensation will not be awarded for disabilities that are not, to any substantial degree, caused by the employment.[333]

Charlton v. State Workmen's Compensation Comm'r[334] is an example of a case where the employee proved that his disability was precipitated by the conditions of his employment yet was unable to demonstrate that the factual circumstances resulting in the disability met the requirements of the traditional "by accident" analysis. The employee worked while standing in coal treatment water, and after five or six months on the job his feet became massively scarred and ulcerated. Medical evidence established that: (1) the employee was suffering from Buerger's Disease, (2) Buerger's Disease is not an occupational disease, and (3) although Buerger's Disease is not an occupational disease, the conditions of the employment had probably precipitated or aggravated the disease.[335] The Commissioner denied the claim for compensation, holding that the disability was not due to an occupational disease

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[328] Larson, *supra* note 5, § 12.10.

[329] *E.g.*, Jordan v. State Workmen's Compensation Comm'r, 191 S.E.2d 497 (W. Va. 1972); Martin v. State Compensation Comm'r, 107 W. Va. 583, 149 S.E. 824 (1929).

[330] Jordan v. State Workmen's Compensation Comm'r, 191 S.E.2d 497 (W. Va. 1972).

[331] Pennington v. State Workmen's Compensation Comm'r, 222 S.E.2d 579 (W. Va. 1976) (back strain incurred while performing usual duties).

[332] *See Survey of Developments—Workmen's Compensation*, 79 W. Va. L. Rev. 503, 506 (1977).

[333] 1 A. LARSON, *supra* note 5 § 38.80 at 7-29 (desk ed. 1976).

[334] 236 S.E.2d 241 (W. Va. 1977).

[335] *Id.* at 242.

received in the course of and resulting from the employment.[336] The Appeal Board affirmed but did acknowledge the working in the coal treatment water perhaps aggravated the employee's pre-existing condition. The Supreme Court of Appeals reversed and remanded to the Commissioner. The court cited precedent[337] that awarded compensation to employees whose pre-existing Buerger's Disease was aggravated or accelerated by an injury received in the course of and resulting from their employment, thereby causing disability sooner than would otherwise have occurred. However, both of the cases cited involved pre-existing Buerger's Disease that was aggravated by injuries that could be described as "definite, isolated and fortuitous occurence[s]."[338] In *Charlton,* the disease was aggravated or precipitated gradually over a five or six month period. The court offered no analysis of the "by accident" requirement, presumably because of the medical evidence strongly establishing that the conditions of the employment precipitated or aggravated the pre-existing disease, thus resulting in a disabling condition sooner than would have occurred with a normal progression of the disease.[339]

II. The Liberality Rule

The remedial character of the workmen's compensation law is the basis for a spirit of liberality that favors the employee both in statutory construction and in the appraisal of evidence.[340] One area in which the rule operates is attribution of disability to injury. The

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[336] A disease must be such that it can fairly be traced to the employment as the proximate cause in order for it to be deemed to have been incurred in the course of and resulting from the employment and compensable as an occupational disease. *See* W. Va. Code § 23-4-1 (Cum. Supp. 1977).

[337] Hall v. Compensation Commissioner, 110 W. Va. 551, 159 S.E. 516 (1931) (toe injury caused by falling object); Manning v. State Compensation Commissioner, 124 W. Va. 620, 22 S.E.2d 299 (1942) (isolated injury to hand while operating crane).

[338] Jordan v. State Workmen's Compensation Comm'r 191 S.E.2d 497, 501 (W. Va. 1972). *See also* Hall v. Compensation Comm'r, 110 W. Va. 551, 552, 159 S.E. 516, 517 (1931) where the court states: "[i]f the loss of claimant's limbs were due to the disease, unaggravated or unaccelerated by any fortuitous event which may be denominated an accident, then, in view of the statute, the injury is not compensable."

[339] *See* Charlton v. State Workmen's Compensation Comm'r, 236 S.E.2d 241, 243 (W. Va. 1977).

[340] *See, e.g.,* Johnson v. State Workmen's Compensation Comm'r, 155 W. Va. 624, 186 S.E.2d 771 (W. Va. 1972). *See generally* Comment, *The Demise of the Liberality Rule?* 77 W. Va. L. Rev. 370 (1975).

law presumes that a disability resulted from a given injury if the disability cannot, with some degree of certainty, be attributed to a cause other than that injury.[341]

In *Dunlap v. State Workmen's Compensation Comm'r,*[342] the West Virginia Supreme Court of Appeals dealt with a similar issue: the attribution of a specific injury to a given industrial accident. In *Dunlap,* the employee sustained an injury to his back while pulling steel rods. His initial complaints consisted of pain in the neck, shoulder and arm. Diagnosis of the pain experienced in the neck was an intervertebral disk injury, for which surgery was performed. Six months later, the claimant secured employment with a different employer but ceased working a short time thereafter because of pain experienced in the arm, shoulder and, in addition, the low back area. Subsequent examination by the same treating physicians indicated residual disability, a result of the cervical injury and a lumbosacral strain.[343] During these examinations, after the brief employment with the subsequent employer had discontinued, the claimant informed one of the physicians that the low back injury occurred during his employment with the original employer. The claimant also maintained that position at two hearings before the Commissioner. Medical evidence, however, could not connect the lumbosacral strain to the cervical disk injury; nor did the medical records indicate that the claimant had made any complaints involving the low back area after the accident that had occurred during the employment with the original employer. The Commissioner's order disposed of the claim without reaching the attribution issue. The Appeal Board affirmed but in its opinion stated that while the record was not clear, it appeared that the lumbosacral strain was unrelated to the accident that occurred during the employment with the original employer.[344] The court reversed, holding that where an injured employee provides some evidence demonstrating that a specific injury did arise from a given accident, it will be presumed to have resulted from such accident unless evidence exists which, to some degree of certainty, attributes the injury to a cause other than the accident.[345]

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[341] Sisk v. State Workmen's Compensation Comm'r, 153 W. Va. 461, 170 S.E.2d 20 (1969) (psychiatric disability attributed to physical injury).

[342] 232 S.E.2d 343 (W. Va. 1977).

[343] *Id.* at 344.

[344] *Id.*

[345] *Id.* at 346. The court noted that the presumption is not a substitute for proof and that the employee must supply evidence that the injury arose from the acci-

III. Reopening Claims for Occupational Injuries

An injured employee may petition for further adjustment of his claim by submitting a written application to the Commissioner.[346] The grounds necessary for further adjustment are progression or aggravation of the claimant's condition, or some fact or facts which had not been considered by the Commissioner in his former findings and which would entitle the injured employee to greater benefits than he has already received.[347] If the application fails to establish a prima facie cause for reopening the claim, the petition is denied.[348] *Harper v. State Workmen's Compensation Comm'r*[349] involved the character or degree of proof that must be contained in the written application to demonstrate a prima facie cause for reopening claims for further adjustment. The claimant had previously been awarded a 15% permanent partial disability award for occupational pneumoconiosis. In connection with his application for reopening, a medical report was submitted which outlined numerous phhysical disabilities. The report also indicated that the claimant was suffering from a chronic neurosis and that the physical disabilities had contributed significantly to that impairment. The report's conclusion was that if the claimant was suffering from an occupational disease such as pneumoconiosis, psychiatric impairment should be considered as approximately 40%.[350] The Appeal Board affirmed the Commissioner's denial of the petition for reopening, taking the view that the medical report was not sufficiently precise to demonstrate that the psychiatric impairment was causally related to the occupational pneumoconiosis. The West Virginia Supreme Court of Appeals reversed, holding that a prima facie cause for reopening is demonstrated where any evidence is submitted which tends to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.[351]

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dent. However, the quantum of evidence necessary to create the presumption apparently need only be minimal, since the medical evidence was inconclusive and the injury, along with the claimant's attribution of it to the accident, appeared a significant time after the accident had occurred.

[346] W. Va. Code § 23-5-1(a) (1973 Replacement Vol.).

[347] *See* W. Va. Code § 23-5-1(b) (1973 Replacement Vol.).

[348] *Id.*; Backus v. State Workmen's Compensation Comm'r, 154 W. Va. 79, 173 S.E.2d 353 (1970).

[349] 234 S.E.2d 779 (W. Va. 1977).

[350] *Id.*

[351] *Id.* at 783. The court indicated that this standard would also apply to the alternate ground for reopening disability claims: where there exists facts not pre-

The issue presented in *Ford v. State Workmen's Compensation Comm'r*[352] involved the reopening of occupational pneumoconiosis claims. In both of the consolidated cases, the employee had received a permanent, partial award for occupational pneumoconiosis. Each claimant continued his employment, although one of the two claimants continued with a different employer. At least two years subsequent from the date of initial filing for pneumoconiosis, each claimant filed a second application for occupational penumoconiosis benefits. In each of the cases, the employer contended that since essentially the same period of exposure was involved, the employee must seek a reopening of the previous claim as opposed to filing a new claim. The Appeal Board in each case held that the employee could only seek a reopening of the previous claim.[353] The West Virginia Supreme Court of Appeals reversed, holding that each claimant had the right to seek either a reopening of the previous claim or to file a new claim for occupational pneumoconiosis.[354] The court recognized that section 23-4-6(a) of the West Virginia Code[355] expressly makes applicable to claims for occupational pneumoconiosis the "reopening for further adjustment" provisions of sections 23-5-1(a)-(d) of the West Virginia Code.[356] The court, however, interpreted that provision as an additional, rather than exclusive, method of adjusting prior claims. The basis for holding that the claimants had the alternate right to file new claims was the statutory inclusion of occupational pneumoconiosis in the terms "injury" and "personal injury"[357] and a statutory provision that deems the date of injury in occupational pneumoconiosis cases as the date of the last exposure to the hazards of the disease.[358] Since occupational pneumoconiosis is an "injury" and the "date of injury" is the date of the last exposure, any subsequent exposure to the hazards of occupational pneumoconiosis gives a claimant the option to treat such exposure as a new and separate injury.[359]

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viously considered by the Commissioner in his former findings. See text accompanying note 25 *supra*.

[352] 236 S.E.2d 234 (W. Va. 1977).

[353] *Id.* at 234-35.

[354] *Id.* at 235.

[355] W. Va. Code § 23-4-6(a) (1973 Replacement Vol.).

[356] W. Va. Code § 23-5-1(a)-(d) (1973 Replacement Vol.).

[357] W. Va. Code § 23-4-1 (Cum. Supp. 1977).

[358] W. Va. Code § 23-4-14 (Cum. Supp. 1977).

[359] In order for compensation to be payable for occupational pneumoconiosis, the employee must have been exposed to the hazards of the disease in West Virginia

IV. Successive Disabilities

In *Akers v. State Workmen's Compensation Comm'r.*,[360] the claimant had sustained numerous compensable and noncompensable injuries prior to 1972. In 1972, the claimant filed a claim for occupational pneumoconiosis but continued in the same employment. For the purposes of the workmen's compensation law, this injury was deemed to have occurred on the date the claim was filed.[361] In 1974, while the claim for occupational pneumoconiosis was pending, the claimant sustained an injury which resulted in a 25% permanent partial disability award. Subsequently, the Appeal Board awarded the claimant a 40% permanent partial disability award for the pneumoconiosis claim and, since the claimant's disability rating exceeded 85%, additionally awarded the claimant a permanent total disability award.[362] The employer contended that it should be charged only with the 1974 injury, since that 25% permanent partial disability award, when combined with the existing 65% disability rating, exceeded 85%. When an employee becomes totally and permanently disabled through the combined effect of prior disabilities and a second injury, the employer is normally charged only with the second injury.[363] Therefore, the employer asserted that the 40% permanent partial disability award for pneumoconiosis should be chargeable to the second injury reserve. The Appeal Board assessed both the 1972 and 1974 disability awards to the employer's account. The West Virginia Supreme Court of Appeals affirmed, holding that both disability awards were second injuries since both occurred in the course of employment with that employer.[364] The court relied upon *McClanahan v. State Workmen's Compensation Comm'r*[365] which recognized that the second injury reserve scheme was not designed or intended to

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"over a continuous period of not less than two years during the ten years immediately preceding the date of his last exposure to such hazards, or for any five of the fifteen years immediately preceding the date of last exposure." W. Va. Code § 23-4-1 (Cum. Supp. 1977).

[360] 232 S.E.2d 347 (W. Va. 1977).

[361] The date of last exposure is taken as the date of injury. W.Va. Code § 23-4-14 (Cum. Supp. 1977). Since the claimant continued working, the Commissioner substituted date of filing for date of last exposure. 232 S.E.2d at 348.

[362] Employees qualify for permanent total disability, payable from the second injury reserve, when a compensable injury causes their cumulative disability rating to exceed 85%. W. Va. Code § 23-3-1 (1973 Replacement Vol.).

[363] W. Va. Code § 23-3-1 (1973 Replacement Vol.).

[364] 232 S.E.2d at 349.

[365] 207 S.E.2d 184 (W. Va. 1974).

relieve an employer of any liability for injuries that occur during the course of employment with that employer.[366]

At issue in *Cropp v. State Workmen's Compensation Comm'r.*[367] was the question of whether an employee who had previously been granted a permanent total disability award was entitled to additional benefits for an injury which occurred in the course of and resulted from his continued employment with the same employer. The employee's claim for medical expenses and a temporary total disability award were denied by the Commissioner on the ground that additional workmen's compensation benefits were precluded by the prior award of permanent total disability.[368] The Appeal Board affirmed the order and the West Virginia Supreme Court of Appeals reversed. The court began its analysis by indicating that the initial inquiry with respect to the availability of benefits is always whether the injury satisfies the basic compensability requirement that it occur in the course of and resulting from the employment.[369] The compensability standard having been satisfied, the question then is whether there are provisions in the Act which limit or preclude the receipt of benefits subsequent to an award of permanent total disability.

Regarding the receipt of medical benefits, the court determined that the only limitation upon payment contained in the applicable statutory provision, section 23-4-3 of the West Virginia Code,[370] is that medical benefits do not commence until the injury is found to be compensable, a limitation found inapplicable since the injury had met the compensability standard.[371] The court found the prevailing rule in other jurisdictions persuasive:[372] the availability of medical benefits is unaffected by income benefit rights under disability provisions. Consequently, the court held

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[366] In Griffith v. State Workmen's Compensation Comm'r, 205 S.E.2d 157 (W. Va. 1974), the court indicated that the purpose of the second injury reserve scheme was simply to encourage the employment of workers with previous disabilities. The rule prevents the unfair impact that would otherwise devolve upon employers if the entire disability resulting from the combination of the prior disabilities and the present injury were changeable to the current employer.

[367] 236 S.E.2d 480 (W. Va. 1977).

[368] *Id.* at 481.

[369] *See* W. Va. Code § 23-4-1 (Cum. Supp. 1977).

[370] W. Va. Code § 23-4-3 (Cum. Supp. 1977).

[371] 236 S.E.2d at 482.

[372] Cited as authority: Depue v. Barsh Truck Lines, 493 P.2d 80 (Okla. 1972); Brooks v. Arkansas Best Freight System, Inc., 247 Ark. 61, 444 S.W.2d 246 (1969); 2 A. LARSON, *Workmen's Compensation* § 61.11 (desk ed. 1972).

that the claimant was entitled to medical benefits for the injury despite the prior award for permanent total disability.[373]

Availability of temporary total disability benefits to a claimant receiving permanent total disability benefits for a prior injury presents a more intricate issue because the two compensation payments would exceed a seemingly applicable maximum weekly payment limitation.[374] The employer relied upon *Dunlap v. State Workmen's Compensation Director*[375] for the proposition that this duplication of benefits was improper. *Dunlap* involved a claimant who received temporary total disability benefits until permanent total disability benefits were awarded. The claimant sought to compel payment of this latter award as of the date of injury instead of the date of the award. The court in that case held that overlap would result in payments in excess of the statutory weekly award limit.[376] The court distinguished *Dunlap* on the ground it dealt with duplicative benefits for but one injury, whereas the instant case dealt with two separate injuries.[377] The court further held that the maximum weekly award limit was inapplicable where there are two separate compensable injuries. This conclusion resulted primarily from an interpretation of section 23-4-6 of the West Virginia Code.[378] The court viewed a provision that precludes offset of temporary total disability benefits against permanent partial disability benefits to specifically deal with deductibility of temporary total disability benefits from permanent total disability awards.[379]

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[373] 236 S.E.2d at 482.

[374] W. VA. CODE § 23-4-6(k) (Cum. Supp. 1977) provides that "[c]ompensation payable under any subdivision of this section shall not exceed the maximum nor be less than the weekly benefits specified in subdivision (b) of this section." W. VA. CODE § 23-4-6(b) (Cum. Supp. 1977) sets disability benefits payable for injuries that cause temporary total disability.

[375] 149 W. Va. 266, 140 S.E.2d 448 (1965).

[376] *Id.* The limiting provision then applicable was W. VA. CODE § 23-4-6(h) (1965).

[377] 236 S.E.2d at 483.

[378] W. VA. CODE § 23-4-6 (Cum. Supp. 1977).

[379] The court reasoned that prior to an amendment in 1974, W. VA. CODE § 23-4-6(j) (1973 Replacement Vol.) provided that temporary total disability benefits could not be deducted from either permanent partial disability awards or permanent total disability awards. Since the 1974 amendment stated that temporary total disability payments can be deducted from permanent partial disability awards but omitted any mention of deductibility from permanent total disability awards, the court was persuaded that the inference with respect to legislative intent, was that temporary total disability benefits can be deducted from permanent total disability awards. This argument is somewhat tenuous since its premise is incorrect. Prior to

The maximum weekly award limit was found not controlling because it is a general provision that does not specifically address itself to the issue of deductibility.[380] Although the offset provision was viewed as applying specifically to the deductibility issue, it does not do so, since it neither authorizes nor prohibits the duplication of disability benefits. Apparently, the court held that the claimant was entitled to temporary total disability benefits because the compensability standard was met and no provision of the Act precluded payment of the benefits. The argument was advanced that a man can be no more than totally disabled, and that duplication of disability benefits may make it more profitable for him to be disabled than to be well. This was rejected on two grounds: (1) the Act recognizes that an injured employee may receive permanent total disability benefits and yet possess sufficient skills to work,[381] and (2) the position is a moral argument in a compensation scheme that is purely statutory.[382]

In *Dunlap v. State Workmen's Compensation Comm'r.*,[383] the question presented was whether the receipt of temporary total disability benefits should terminate where the claimant resumes employment but soon thereafter is physically unable to continue working because of residual disability related to the injury giving rise to the temporary total disability benefits. The Commissioner's order that the benefits terminate was affirmed by the Appeal Board.[384] The West Virginia Supreme Court of

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1974, W. VA. CODE § 23-4-6(j) (1973 Replacement Vol.) dealt *only* with permanent partial disability awards. The 1974 amendment simply redesignated the provision § 6(1).

[380] The court viewed W. VA. CODE § 23-4-6(e) (Cum. Supp. 1977), which concerns compensation for permanent partial disabilities, as support for its position that the maximum weekly award limit was not intended to be a limition upon all disability benefits payable under, § 23-4-6, since subsection (e) contains a separate schedule of weekly benefit limits for permanent partial disability benefits. Realistically, however, subsection (e) is of limited support because the maximum benefits obtainable for permanent partial disabilities are significantly less than those provided for in § 23-4-6(b), which constitutes the maximum weekly award limit for any disability. *See* W. VA. CODE § 23-4-6(k) (Cum. Supp. 1977).

[381] In determining the issue of total disability, an inability to engage in employment that requires skills and abilities comparable to those of any gainful activity the injured employee has previously engaged in must be considered. *See* W. VA. CODE § 23-4-6(n) (Cum. Supp. 1977).

[382] 236 S.E.2d at 484.

[383] 232 S.E.2d 343 (W. Va. 1977). For a discussion of a separate issue contained in this case, see text accompanying notes 18-23 *supra*.

[384] *Id.* at 344.

Appeals reversed. Noting the absence of any statutory provision concerning the effect of an attempt to return to work upon temporary total disability benefits,[385] the court was persuaded that a valid social policy could be furthered by encouraging an attempt to return to work. If the attempt is successful, the period of disability is reduced, thereby restoring the claimant to his former wage level and diminishing the employer's compensation exposure.[386] The court stated that potential abuse would be minimized by statutory safeguards[387] that enable the Commissioner to determine if cessation of work in these circumstances is a result of the injury giving rise to the temporary total disability benefits.[388]

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[385] The court indicated that the use of the words "during the continuance thereof" and "aggregate award" in W. VA. CODE §§ 23-4-6(b)-(c) (Cum. Supp. 1977) suggest that the legislative intent was that temporary total disability need not be limited to a continuous period of disability.

[386] 232 S.E.2d at 345.

[387] The Commissioner has authority to order a physical examination of the cliamant when, in his opinion, it is necessary. W. VA. CODE § 23-4-8 (Cum. Supp. 1977). The Commissioner also has continuing jurisdiction to make such modifications in his findings and orders as are justified. W. VA. CODE § 23-4-16 (Cum. Supp. 1977). Finally, aggregate awards for temporary total disability are limited to a period not exceeding 208 weeks. W. VA. CODE § 23-4-6(c) (Cum. Supp. 1977).

[388] 236 S.E.2d at 345.