



Volume 79 | Issue 2

Article 7

January 1977

Judicial Reform in West Virginia: The Magistrate Court System

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Recommended Citation

John C. Purbaugh & Robert A. Burnside Jr., *Judicial Reform in West Virginia: The Magistrate Court System*, 79 W. Va. L. Rev. (1977).

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JUDICIAL REFORM IN WEST VIRGINIA: THE MAGISTRATE COURT SYSTEM*

With the passage, on November 5, 1974, of the Judicial Reorganization Amendment¹ to the West Virginia Constitution, a new era of judicial administration began for West Virginia. Central to this new judicial article was the unification of the lower state courts under the general supervision of the Supreme Court of Appeals of West Virginia.² The Amendment mandated the establishment of a magistrate court system,³ replacing the system of justice of the peace (J.P.) courts used in the Virginias since 1661.⁴ This article will examine and evaluate the legislative implementation of the magistrate courts system,⁵ discuss differences between the J.P. system⁶ and the magistrate system, and offer some suggestions for effective advocacy in magistrate courts.

THE MAGISTRATE COURT ACT⁷

I. COURTS AND OFFICERS: ARTICLE I

A. Creation and General Provisions

Article one of new chapter fifty of the West Virginia Code

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¹ The Judicial Reorganization Amendment of 1974 completely rewrote article VIII of the West Virginia Constitution, substituting new sections 1 to 15 for the existing sections 1 to 30. The Amendment also altered article III, section 13, and added sections 9 to 13, which incorporate much of sections 23, 24, 26 and 29 of the repealed article VIII, to article IX.

A somewhat similar amendment failed to receive support from the required majority of voters in the state in 1940. See Silverstein, *Small Claims Courts Versus Justices of the Peace*, 58 W. VA. L. REV. 241 (1956), and Carlin, *The Judiciary Amendment*, 45 W. VA. L.Q. 220 (1939), for discussions of this amendment.

² W. VA. CONST. art. 8, § 3 provides, in pertinent part:

The Court shall have general supervisory control over all intermediate appellate courts, circuit courts, and magistrate courts. The chief justice shall be the administrative head of all the courts

³ W. VA. CONST. art. 8, § 10 provides, in pertinent part:

The legislature shall establish in each county a magistrate court or courts with the right of appeal as prescribed by law

⁴ Note, *The Justice of the Peace in Virginia: A Neglected Aspect of the Judiciary*, 52 VA. L. REV. 151, 157 (1966).

⁵ W. VA. CODE ANN. §§ 50-1-1 to 50-6-2 (Cum. Supp. 1976).

⁶ Former W. VA. CODE ANN. §§ 50-1-1 to 50-19-9 (1966) (repealed 1976).

⁷ Hereinafter cited as "The Act." It is suggested that volume fourteen of the W. VA. CODE ANN. (1976 Replacement Volume) be consulted throughout the reading of this article. Citations to the justice of the peace statutes are prefaced by "former"

provides for the creation of magistrate courts, a magistrate's term of office, the amount of the filing fee for election, and specifies applicable voting procedures.⁸ The number of magistrates per county is dependent upon population as determined by the most recent census,⁹ as is the salary of a magistrate.¹⁰ Provision is also made for the filling of vacancies in office,¹¹ the offices of magistrate clerks¹² and magistrate assistants¹³ and their respective bonds,¹⁴ and the location of magistrate offices.¹⁵

B. Court Administration and Transition From J.P. Courts

The intent of the Judicial Reorganization Amendment is most clearly reflected in those provisions of article one which delineate the administrative structure of the magistrate courts system and chart the transition from justice of the peace courts to magistrate courts.

Consistent with the desire for a unified system of courts in West Virginia,¹⁶ the Supreme Court of Appeals is authorized to

and are found in the body of the 1976 volume. Citations to the magistrate statute are prefaced by "new" and are found in the pocket part cumulative supplement to the 1976 volume.

⁸ New W. VA. CODE ANN. § 50-1-1 (Cum. Supp. 1976). The legislature was given the option, in implementing the Judicial Reorganization Amendment, to require that the election of magistrates be nonpartisan. W. VA. CONST. art. 8, § 10. This was not done.

⁹ New W. VA. CODE ANN. § 50-1-2 (Cum. Supp. 1976).

¹⁰ Justices of the peace were originally paid under a fee system, which was declared unconstitutional in *State ex. rel. Reece v. Gies*, 198 S.E.2d 211 (W. Va. 1973), and *State ex. rel. Shrewsbury v. Poteet*, 202 S.E.2d 628 (W. Va. 1974). Former W. VA. CODE ANN. § 50-19-3 (Cum. Supp. 1975) changed J. P.'s from a fee system to salary. W. VA. CONST. art. 8, § 10 provides, in pertinent part:

No magistrate or any officer of a magistrate court shall be compensated for his services on a fee basis or receive to his own use for his services any pecuniary compensation, reward or benefit other than the salary prescribed by law.

New W. VA. CODE ANN. § 50-1-3 (Cum. Supp. 1976) specifies the amount of a magistrates' salary.

¹¹ New W. VA. CODE ANN. § 50-1-6 (Cum. Supp. 1976).

¹² New W. VA. CODE ANN. § 50-1-8 (Cum. Supp. 1976).

¹³ New W. VA. CODE ANN. § 50-1-9 (Cum. Supp. 1976).

¹⁴ New W. VA. CODE ANN. § 50-1-10 (Cum. Supp. 1976).

¹⁵ New W. VA. CODE ANN. § 50-1-11 (Cum. Supp. 1976). The clear intent of the legislature, as expressed in this section, was to establish and maintain magistrate's offices where they would be most accessible to the public, as determined by population dispersion and other factors.

¹⁶ Berry, *A Proposed New Judicial Article for West Virginia*, 76 W. VA. L. REV. 481 (1974).

promulgate rules to carry out the intent of the Act.¹⁷ This section also clearly indicates the supremacy of the supreme court's rules over any other rules promulgated by lower courts,¹⁸ in keeping with the felt need for the magistrate courts to be ultimately and directly responsible to the Supreme Court of Appeals in an administrative as well as a judicial context. This administrative structure is bolstered by the addition of "willful violation of this chapter or any rule, regulation or order provided for in [chapter fifty]"¹⁹ to the grounds provided by constitution²⁰ and statute²¹ for impeachment of a constitutional officer. Through its rules, the Supreme Court of Appeals may also censure or temporarily suspend any magistrate.²²

Magistrates must abide by the Code of Judicial Conduct,²³ and may not acquire or hold an interest in matters before the magistrate court, purchase property sold as a result of magistrate court action, represent anyone before a magistrate court, or conduct any moneymaking activities on the magistrate court office premises.²⁴ Violation of these provisions is a misdemeanor, with a fine as penalty, and voids "[a]ny judgment rendered involving conduct in violation of this section"²⁵

The chief judge of each circuit court may appoint a magistrate as chief magistrate of the county, with the duty to coordinate all

¹⁷ New W. VA. CODE ANN. § 50-1-16 (Cum. Supp. 1976).

¹⁸ W. VA. CONST. art. 8, § 6, gives circuit courts general supervisory control over all magistrate courts in the circuit, subject to the ultimate authority of the Supreme Court of Appeals.

¹⁹ New W. VA. CODE ANN. § 50-1-5 (Cum. Supp. 1976).

²⁰ W. VA. CONST. art. 4, § 9.

²¹ W. VA. CODE ANN. § 6-6-3 (1966).

²² New W. VA. CODE ANN. § 50-1-5 (Cum. Supp. 1976).

²³ Code of Judicial Conduct; adopted by the Supreme Court of Appeals, Dec. 20, 1972; effective Jan. 1, 1973. A copy appears at W. VA. CODE ANN. Vol. 1, Appendix (1973 Replacement Volume).

²⁴ New W. VA. CODE ANN. § 50-1-12 (Cum. Supp. 1976). W. VA. CONST. art. 8, § 7, allows magistrates who are licensed to practice law to do so except insofar as it violates the proscriptions of W. VA. CODE ANN. § 50-1-12 (Cum. Supp. 1976). This apparently allows a magistrate-attorney to practice law except while on the premises of the magistrate's office. One commendable result of this lenient provision may be the encouragement of attorneys to seek the office of magistrate. Abuses of the dual occupation limitations, either in time allocation [W. VA. CODE ANN. § 50-1-4 (Cum. Supp. 1976), specifies the time to be devoted to magisterial duties] or otherwise, can be remedied by an administrative ruling from the circuit court judge or the chief judge of the Supreme Court of Appeals.

²⁵ New W. VA. CODE ANN. § 50-1-12 (Cum. Supp. 1976) (emphasis added).

docketing and reporting procedures.²⁶ The flexibility inherent in this section will allow each county or judicial circuit to tailor a local magistrate court administrative structure to fit its needs and should be geared to provide a clear conduit between individual magistrates, the chief magistrate, the circuit court, and the Supreme Court of Appeals. Such a conduit is essential both for the transmission of administrative rulings to the magistrates from the supreme court, and for feedback from the magistrates themselves on the practicalities and implementation of rulings.

Because of variance in caseload from one magistrate to another, both within and between counties, it is important that magistrates be able and willing to serve temporarily in another jurisdiction where an increased caseload demands their assistance. A magistrate may be ordered to serve temporarily at another location within his home circuit by either the chief judge of the circuit court or the chief justice of the Supreme Court of Appeals.²⁷ Such a temporary assignment cannot exceed sixty days per year without the magistrate's consent, and any possible challenge to such a transferred magistrate's jurisdictional authority while in another county is avoided by a specific statutory grant of jurisdiction and authority equal to that in his home county.²⁸

The transition from justice of the peace courts to magistrate courts is accomplished by both constitutional and statutory provisions, by which the new system became effective on January 1, 1977.²⁹ As a part of the transition, the office of constable is abolished, and constables' duties are assumed by deputy sheriffs.³⁰ Among these duties are serving as bailiff in magistrate courts and serving process in the same manner as provided by law for the service of process from circuit courts.³¹

Central to the orderly transition from justice of the peace courts to magistrate courts is the portion of the Act which exempts

²⁶ New W. VA. CODE ANN. § 50-1-7 (Cum. Supp. 1976).

²⁷ Circuit judges may similarly be assigned to another circuit for temporary duty. W. VA. CONST. art. 8, § 3.

²⁸ New W. VA. CODE ANN. § 50-1-13 (Cum. Supp. 1976).

²⁹ W. VA. CONST. art. 8, § 15; new W. VA. CODE ANN. § 50-1-15 (Cum. Supp. 1976).

³⁰ New W. VA. CODE ANN. §§ 50-1-15, 17 (Cum. Supp. 1976). Section 17 further provides that the words "justice of the peace" or "justice" shall be construed to mean "magistrate" beginning January 1, 1977.

³¹ New W. VA. CODE ANN. § 50-1-14 (Cum. Supp. 1976).

for life any justice of the peace who served for at least one year prior to November 5, 1974, from the qualifications required of all new candidates for magistrate.³²

II. JURISDICTION AND AUTHORITY: ARTICLE 2

A. Civil Jurisdiction: § 50-2-1

Magistrates are granted the power to determine questions of fact or law if the questions fall within certain prescribed categories. The specific inclusions of this section are:

1. Civil actions in which the value of the property or the damages sought is \$1500 or less;
2. Cases involving unlawful entry or detainer, except where title to real property is in dispute; and
3. Actions on bonds given pursuant to chapter fifty.

Cases decided under the statute which granted jurisdiction to justices of the peace,³³ using language quite similar to the present grant of jurisdiction to magistrates, impose additional qualifications and limitations on the jurisdiction of magistrates. The plaintiff's demand cannot be split into separate, smaller claims in order to bring it within the jurisdictional limit,³⁴ but the amount over the limit can be released to gain jurisdiction.³⁵ Multiple claims need not be joined and demand made in one complaint, so separate actions may be maintained for separate notes³⁶ or checks.³⁷ The

³² W. VA. CONST. art. 8, § 10, and new W. VA. CODE ANN. § 50-1-4 (Cum. Supp. 1976), both contain the "grandfather clause" exemption. That constitutional provision also provides, in pertinent part:

[T]he legislature shall not have the power to require that a magistrate be a person licensed to practice the profession of law, nor shall any justice or judge of any higher court establish any rules which by their nature would dictate or mandate that a magistrate be a person licensed to practice the profession of law.

Magistrates must, however, complete a course of instruction in principles of law and procedure before assuming office, and must also attend continuing educational courses. New W. VA. CODE ANN. § 50-1-4 (Cum. Supp. 1976).

³³ Former W. VA. CODE ANN. § 50-2-1 (1976 Replacement Volume).

³⁴ *Hale v. Weston*, 40 W. Va. 313, 21 S.E. 742 (1895).

³⁵ New W. VA. CODE ANN. § 50-4-11 (Cum. Supp. 1976), analogous to former § 50-2-7 (1976 Replacement Volume).

³⁶ *McDowell County Bank v. Wood*, 60 W. Va. 617, 55 S.E. 753 (1906).

³⁷ *Pocohontas Wholesale Grocery Co. v. Gillespie*, 63 W. Va. 578, 60 S.E. 597 (1908).

jurisdictional amount is to be determined exclusive of costs and interest.³⁸

The grant of jurisdiction over actions of unlawful entry and detainer apparently refers to W. VA. CODE ANN. § 55-3-1 *et seq.* (1966). Since old chapter fifty, which contained its own section dealing with unlawful entry and detainer, was repealed by the Magistrate Courts Act, the limitation on § 55-3-1, that it applies only to courts of record, must be considered implicitly repealed by the provisions of new chapter fifty.³⁹ Although the jurisdictional limit of \$1500 is stated in a separate, unconnected sentence from the grant of jurisdiction in actions of unlawful entry and detainer and the grant concerning actions on bonds given under this chapter, the jurisdictional limit is still applicable to these two types of actions.⁴⁰

The jurisdiction over bonds given pursuant to the provisions of this chapter does not refer to the bonds required of the magistrate assistant and magistrate court clerk.⁴¹ Jurisdiction is granted over civil bonds required of a nonresident plaintiff,⁴² of any party who appeals in a civil case,⁴³ and, in cases seeking the enforcement of liens, or indemnifying, suspending, and forthcoming bonds.⁴⁴

This section and the section on criminal jurisdiction⁴⁵ incorporate by reference other grants of jurisdiction contained in other statutes.⁴⁶ The Act confers jurisdiction concurrent with circuit

³⁸ Moore v. Harper, 42 W. Va. 39, 24 S.E. 633 (1896).

³⁹ See W. VA. CODE ANN. § 2-2-10(cc) (Cum. Supp. 1976).

⁴⁰ This result is required by that part of W. VA. CODE ANN. § 50-4-11 (Cum. Supp. 1976), which provides:

If at any time a magistrate determines that an action involves . . . an amount in excess of the jurisdiction of the magistrate court, the action shall be dismissed without prejudice.

See also State *ex rel.* Honaker v. Black, 91 W. Va. 251, 112 S.E. 497 (1922); State v. Lambert, 24 W. Va. 399 (1884).

⁴¹ See White v. Conley, 108 W. Va. 658, 152 S.E. 527 (1930).

⁴² New W. VA. CODE ANN. § 50-3-5 (Cum. Supp. 1976).

⁴³ New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

⁴⁴ W. VA. CODE ANN. § 38-6-1 *et seq.* (1966), are expressly applied to the enforcement of magistrate court judgments by W. VA. CODE ANN. § 50-6-1 (Cum. Supp. 1976).

⁴⁵ New W. VA. CODE ANN. § 50-2-3 (Cum. Supp. 1976).

⁴⁶ These include, but are not necessarily limited to:

§ 5-1-9 Extradition Proceedings

§ 8-28-5 Jurisdiction, Concurrent with Circuit Courts, of Municipal Traffic Offenses Occurring Within One Quarter Mile of a Municipal Airport

- § 8-29-9 Regional Airports
- § 11-15-29 Consumer Sales Tax
- § 11-17-19 Cigarette Tax Act Violation
- § 15-1F-9 National Guard
- § 15-3-9 Misuse of Police Communications
- § 16-2A-10 Local health organization, interference
- § 16-4-26 Control of Venereal Disease
- § 17-16A-15 Defrauding Turnpike Commission, Trespass
- § 17-19-15 Roads and Highways
- § 17A-11-3 Motor Vehicle Chapter—Jurisdiction of All Misdemeanors
- § 17B-5-2 Operators and Chauffeur's Licenses
- § 17D-6-5 Safety Responsibility Law
- § 18-11-25 Parking Offenses at West Virginia University Campus
- § 19-18-12 Driving Livestock by Non-resident on Lands of State Resident Without Permission
- § 19-20-18 Killing Dog for Destruction of Livestock
- § 20-7-10 Motor boating
- § 21-2-14 Employment Agencies
- § 21-3-14 Labor-Safety and Welfare of Employees
- § 21A-10-13 Unemployment Compensation
- § 24A-7-4 Complaints Against Motor Carriers
- § 29-2-3 Interference with or Destruction of Monuments Used in Geological Survey
- § 30-17-8 Sanitarian
- § 34-1-1 Estrago, Drift and Derelict Property
- § 37-5-3 Excavations Near Boundaries
- § 47-1-37 False Weights and Measures
- § 48-7-1 Maintenance of Illegitimate Children
- § 48-8-2 Desertion of Non-support of Wife or Child
- § 51-3-3 Watercourses
- § 51-10-10 Professional Bondsmen
- § 55-9-2 Proper Recovery of Property Lost in Gambling
- § 60-6-18 Issuance of Search Warrants
- § 61-8-5 Houses of Ill Fame and Assignment
- § 61-2-25 Dueling
- § 61-10-27 Engaging in Work on Sunday
- § 62-10-1 Peace Bonds
- § 62-10-7 Offenses Committed in the Presence of a Justice
- § 62-10-8 Special Peace Officers for Fairs

The crime of unlawful assault [W. VA. CODE ANN. § 61-2-9 (1977 Replacement Volume)] presents a peculiar problem of classification. Alternate punishments for this crime are within the judge's discretion. He may choose to confine the miscreant in the penitentiary for one to five years or in jail for up to twelve months, plus a fine. The statute expressly classifies unlawful assault as a felony, but a conviction under the statute was treated as a misdemeanor for purposes of the statute of limitations in *State v. King*, 140 W. Va. 362, 84 S.E.2d 313 (1954). In that case, the jury returned a conviction of assault and battery after a trial under an indictment charging felonious assault. The conviction was regarded as a conviction for a misdemeanor and reversed because the indictment was returned after the one-year statute of limitations, which is applicable only to misdemeanors, had passed. This suggests that the magistrate has jurisdiction to hear criminal assault cases provided he sentences the defendant, if convicted, to the lesser of the alternate sentences.

courts upon justices of the peace and municipal judges to hear violations of public health offenses⁴⁷ until January 1, 1977.⁴⁸ No mention is made of what happens after January 1, 1977. Apparently, only the circuit courts now have jurisdiction, since magistrate courts gain jurisdiction only through special grants.⁴⁹ Since the time of this grant has now expired, the general jurisdiction courts seem to be the only ones with the power to enforce the provisions on public health offenses.

Magistrate courts are specifically prohibited from hearing cases involving determinations of title to real estate, eminent domain, satisfaction of liens through sale of real estate, actions for false imprisonment, malicious prosecution, slander or libel, or any of the extraordinary remedies of chapter fifty-three of the Code.⁵⁰

B. Venue: § 50-2-2

Venue of the magistrate courts is the same as that for the circuit courts. Those sections of the Code which define the venue for circuit courts are incorporated by reference into the Magistrate Courts Act.

C. Criminal Jurisdiction: § 50-2-3

In general, this section confers criminal jurisdiction on the magistrate for all misdemeanor offenses. The previous chapter fifty enumerated the misdemeanors over which justices of the peace had original jurisdiction.⁵¹ Certain misdemeanors listed in that section of the old chapter fifty do not appear elsewhere in the Code as misdemeanors.⁵² It can be argued that such a crime cannot now be prosecuted in magistrate court because chapter fifty was repealed, amended and reenacted in its entirety. Any crime that appeared in the old chapter fifty, but not in the chapter as reenacted, nor elsewhere in the Code, is no longer a crime prosecutable in magistrate court or elsewhere.⁵³

⁴⁷ W. VA. CODE ANN. § 16-9-1 *et seq.* (1972 Replacement Volume).

⁴⁸ W. VA. CODE ANN. § 16-9-8 (Cum. Supp. 1976).

⁴⁹ *State ex rel. Collins v. Collins*, 143 W. Va. 64, 99 S.E.2d 873 (1957).

⁵⁰ New W. VA. CODE ANN. § 50-2-1 (Cum. Supp. 1976).

⁵¹ Former W. VA. CODE ANN. § 50-18-1 (1976 Replacement Volume).

⁵² *E.g.*, former W. VA. CODE ANN. § 50-18-1(b) (1976 Replacement Volume) (trespass to personal property).

⁵³ *Cf. State v. Harr*, 38 W. Va. 58, 65, 17 S.E. 794, 796 (1893) (no common law felonies in West Virginia). This can be extended by analogy to misdemeanors.

The grant to the magistrate of jurisdiction over all misdemeanors significantly increased the power of the minor judiciary. Except for those crimes in other sections of the Code incorporated by reference in old chapter fifty,⁵⁴ the largest fine a justice could impose for any one crime was fifty dollars and the longest imprisonment, thirty days.⁵⁵ Extension of the magistrate's jurisdiction to include all misdemeanors has, by definition, increased the maximum penalties which the magistrate may impose. Certain misdemeanors are punishable by confinement in jail, as distinguished from the penitentiary, for up to one year⁵⁶ and by fines well over the previous fifty-dollar ceiling.⁵⁷

III. COSTS, FINES, AND RECORDS

A. Costs In Civil Actions: § 50-3-1

Costs are specified for the filing and trying of a civil action, services enforcing judgments, filing of bonds, taking of depositions, taking of acknowledgements, and any mailings.⁵⁸ As under the prior system,⁵⁹ these are required to be collected in advance, and are included in the amount of the judgment. All costs in civil actions are forgiven a person who files a "pauper's affidavit."⁶⁰

B. Security Bond For Costs: § 50-3-5

The magistrate may, and if the defendant so requests, must require a security bond for costs in a civil action brought by a non-resident plaintiff. The amount is wholly within the discretion of the magistrate. These provisions and the remainder of the statute, relating to collection through the security, are substantially the same as the procedure under the J.P. system.⁶¹

C. Costs In Criminal Proceedings: § 50-3-2

Unlike the old provision, where a ten-dollar fee was assessed, whether or not a hearing was held,⁶² the new section provides for

⁵⁴ Former W. VA. CODE ANN. § 50-18-1 (1976 Replacement Volume).

⁵⁵ *Id.*

⁵⁶ W. VA. CODE ANN. § 61-11-1 (1977 Replacement Volume).

⁵⁷ *E.g.*, W. VA. CODE ANN. § 61-2-5 (1966) (involuntary manslaughter).

⁵⁸ New W. VA. CODE ANN. § 50-3-1 (Cum. Supp. 1976).

⁵⁹ Former W. VA. CODE ANN. § 50-17-18 (1976 Replacement Volume).

⁶⁰ W. VA. CODE ANN. § 59-2-1 (1966).

⁶¹ Former W. VA. CODE ANN. §§ 50-17-6, 7 (1976 Replacement Volume).

⁶² Former W. VA. CODE ANN. § 50-17-11 (1976 Replacement Volume).

the imposition of the same amount only where a hearing is held and the defendant is convicted. This cost is in addition to the fine, other statutory costs, or penalty assessed for the offense.⁶³

D. Generally

The disposition of fines, forfeitures, penalties,⁶⁴ and costs,⁶⁵ as well as records and reports,⁶⁶ and audits of magistrate courts,⁶⁷ are provided for in this article.

IV. PROCEDURE BEFORE TRIAL: COMMENCEMENT OF ACTIONS: ARTICLE 4

A. Civil

1. *Commencement in General*: § 50-4-1

The plaintiff must take two steps prior to the commencement of a civil action in a magistrate court. He must first pay the ten-dollar filing fee,⁶⁸ and second, provide the magistrate or magistrate assistant with a concise statement, either oral or written, of the nature of the cause of action.⁶⁹ When the statement and fees are received, the magistrate assistant prepares a summons in accordance with the rules promulgated by the Supreme Court of Appeals.⁷⁰ The date of the summons is the date the request is received and the filing fee collected, and the action is deemed to commence on the date affixed to the summons.⁷¹

The summons and any service of process fees that may have been collected are forwarded to the magistrate court clerk,⁷² who docket the case in a central docket and assigns the case to the magistrate in whose office the action originated. There is a provision for assignment to another magistrate when necessary to maintain an equitable distribution of cases among magistrates, but this is to be done only when the judge or chief judge of the circuit court

⁶³ New W. VA. CODE ANN. § 50-3-2 (Cum. Supp. 1976).

⁶⁴ New W. VA. CODE ANN. § 50-3-3 (Cum. Supp. 1976).

⁶⁵ New W. VA. CODE ANN. § 50-3-4 (Cum. Supp. 1976).

⁶⁶ New W. VA. CODE ANN. § 50-3-7 (Cum. Supp. 1976).

⁶⁷ New W. VA. CODE ANN. § 50-3-8 (Cum. Supp. 1976).

⁶⁸ New W. VA. CODE ANN. § 50-3-1(a) (Cum. Supp. 1976).

⁶⁹ New W. VA. CODE ANN. § 50-4-1 (Cum. Supp. 1976).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² New W. VA. CODE ANN. § 50-3-4 (Cum. Supp. 1976).

determines by rule that such reassignment is necessary.⁷³ This reassignment for equitable distribution is to be distinguished from removal from one magistrate to another upon affidavit of a party that the magistrate is biased or prejudiced.⁷⁴

Under the previous statute, a civil action was commenced "by summons or by the appearance and agreement of the parties without summons."⁷⁵ It is no longer possible to commence an action by appearance and agreement. The previous statute provided a form summons,⁷⁶ while the present statute provides only that the Supreme Court of Appeals will provide by rule for the contents of the summons.⁷⁷ Under the old form, a statement of the nature of the cause of action was included in the summons, which served, along with a more formal complaint entered at a later stage,⁷⁸ to notify the defendant of the nature of the action. Under the new procedure, there is no complaint other than the statement of the cause of action filed at the initiation of the proceeding, so it appears that the only notice the defendant will receive of the substance of the action will be in the summons.⁷⁹

The statute provides for collection of service of process fees by the magistrate assistant; these fees are to be distinguished from the filing fee which is also collected at the commencement of an action.⁸⁰ The Act does not provide for a fee for service of process;⁸¹ rather, the entire procedure for service of process is to be performed as provided by law for circuit courts.⁸² Hence, an effectual commencement of an action in magistrate court requires the payment of both the ten-dollar filing fee and the three-dollar service of process fee,⁸³ unless the plaintiff chooses to avoid the latter fee by having

⁷³ *Id.*

⁷⁴ W. VA. CODE ANN. § 50-4-7 (Cum. Supp. 1976). See part IV(A)(7) of this article, for further discussion of removal of cases.

⁷⁵ Former W. VA. CODE ANN. § 50-3-1 (1976 Replacement Volume).

⁷⁶ Former W. VA. CODE ANN. § 50-3-4 (1976 Replacement Volume).

⁷⁷ New W. VA. CODE ANN. § 50-4-1 (Cum. Supp. 1976).

⁷⁸ Former W. VA. CODE ANN. § 50-4-4 (1976 Replacement Volume).

⁷⁹ New W. VA. CODE ANN. § 50-4-1 (Cum. Supp. 1976).

⁸⁰ New W. VA. CODE ANN. § 50-3-1(a) (Cum. Supp. 1976).

⁸¹ New W. VA. CODE ANN. § 50-3-1(a) - (c) (Cum. Supp. 1976), lists the costs which must be collected in advance by the magistrate assistant.

⁸² New W. VA. CODE ANN. § 50-1-14 (Cum. Supp. 1976).

⁸³ The fee for having process served in circuit courts is three dollars. W. VA. CODE ANN. § 59-1-14 (Cum. Supp. 1976).

someone other than the sheriff serve process,⁸⁴ or by filing a pauper's affidavit.

2. *Manner of Service of Process: § 50-4-4*

Under the old statute the constable was charged with the responsibility of serving process.⁸⁵ A special constable could be appointed to do so if no "duly elected" constable was available,⁸⁶ a procedure perhaps analogous to service by a credible person now provided by Rule 4 of the West Virginia Rules of Civil Procedure. The statute provided for special modes of service on specific types of defendants.⁸⁷ These special rules of service are no longer in use, having been replaced by a procedure common to all defendants.⁸⁸

Under the new system the office of constable no longer exists.⁸⁹ The fees previously collected by them for service of process will be collected by the sheriff.⁹⁰ The summons and service of process fees, if collected, are sent to the magistrate court clerk by the magistrate assistant who originally received them when the action was commenced. Upon assigning the matter to a magistrate, the magistrate court clerk notes the assignment on the summons which is then forwarded to the sheriff along with any service of process fees that may have been collected. The sheriff then serves process. If the plaintiff wishes to have someone other than the sheriff serve process, he does not submit the service of process fee to the magistrate assistant.⁹¹ In this event, the magistrate assistant for-

⁸⁴ W. VA. R. CIV. P. 4(a) allows the plaintiff to direct that someone other than the sheriff serve process on the defendant. If process is not served by the sheriff, Rule 4(c) requires that the person serving process be "any credible person who is not a party" and not the attorney for a party.

⁸⁵ Former W. VA. CODE ANN. § 50-3-3 (1976 Replacement Volume).

⁸⁶ Former W. VA. CODE ANN. § 50-1-14 (1976 Replacement Volume).

⁸⁷ See former W. VA. CODE ANN. § 50-3-7 (joint defendants); § 50-3-10 (infants); § 50-3-11 (domestic corporations); § 50-3-12 (foreign corporations); § 50-3-16 (secretary of state as attorney in fact for any corporation).

⁸⁸ New W. VA. CODE ANN. § 50-4-4 (Cum. Supp. 1976).

⁸⁹ See former W. VA. CODE ANN. § 50-19-6 (1976 Replacement Volume).

⁹⁰ New W. VA. CODE ANN. § 50-4-1 (Cum. Supp. 1976).

⁹¹ Assignment of a case to a magistrate by the magistrate court clerk is discussed in part IV(A)(1) of this article. If the purpose of having someone other than the sheriff serve process is to avoid paying the three dollar fee, the plaintiff might consider seeking waiver of fees by use of a pauper's affidavit. If all fees are waived, the sheriff must serve process without payment of the fee. However, if the plaintiff does not choose to seek waiver of fees he must arrange for service of process in accordance with W. VA. R. CIV. P. 4(c). See note 84 *supra*.

wards the summons without the service of process fee to the magistrate court clerk, who notes on the summons the magistrate to whom the case is assigned.⁹²

The summons must be forwarded to the sheriff by the magistrate court clerk with either the service of process fee or a pauper's affidavit. It would appear that the better procedure where the plaintiff does not want the sheriff to serve process would be to return the summons to the magistrate assistant from whom the summons originated. He would then hold it until the plaintiff obtained it for conveyance to the person who would serve process. The alternative is to require the plaintiff to go to the sheriff to receive the summons, a procedure more likely to cause confusion and delay.

3. *Return in Civil Actions:* § 50-4-5

The summons gives the defendant a choice in his manner of response. He can appear before the magistrate within twenty days of service of the summons upon him or otherwise notify the magistrate within the same period that he wishes to contest the matter.⁹³ No purpose is served by an appearance by the defendant simply to notify the magistrate of his intention to contest the matter; an appearance should be used only if the defendant wishes to file a counterclaim.⁹⁴ The trial date is to be set no fewer than five days from the defendant's notification unless all parties agree otherwise. There is no provision in the present statute for a formal answer, as there was in the previous statute.⁹⁵

4. COUNTERCLAIMS: § 50-4-9

There are no compulsory counterclaims in magistrate court.⁹⁶ If the defendant commences a separate action against the plaintiff, the two actions may be tried together if two circumstances are present: the defendant has commenced his action against plaintiff within twenty days of service of process on him, and the counter-

⁹² New W. VA. CODE ANN. § 50-4-1 (Cum. Supp. 1976).

⁹³ New W. VA. CODE ANN. § 50-4-5 (Cum. Supp. 1976).

⁹⁴ New W. VA. CODE ANN. § 50-4-9 (Cum. Supp. 1976), discussed in part IV(A)(4) of this article.

⁹⁵ Former W. VA. CODE ANN. §§ 50-4-2, 5 (1976 Replacement Volume).

⁹⁶ New W. VA. CODE ANN. § 50-4-9 (Cum. Supp. 1976); compare W. VA. R. Civ. P. 13(c).

claim has arisen from the same transaction or occurrence that is the subject matter of the initial claim.⁹⁷

The defendant who files a counterclaim must follow the same steps as he would in filing suit. There are two major differences between the prior statute and the present one respecting counterclaims. First, a counterclaim was allowed only when the plaintiff's case was "founded on judgment or contract, express or implied" and must have arisen from the same contract or transaction.⁹⁸ Other restrictions were applied to the counterclaim,⁹⁹ but the Act does away with all these restrictions except the ones mentioned herein. Second, a counterclaim was mandatory under the previous statute. If the defendant failed to assert an available and allowable counterclaim, he was "forever precluded from maintaining any action for the recovery thereof." This extended also to a plaintiff's counterclaim to the defendant's counterclaim.¹⁰⁰

5. *Judgment Before Trial*: § 50-4-10

If the defendant fails to notify the magistrate of his intention to contest the action, default judgment may be entered against him.¹⁰¹ Such a judgment must be based upon testimony or affidavit which establishes: (1) the nature of the claim, (2) whether or not it is for a sum certain or for a sum which by computation can be made certain,¹⁰² and (3) the defendant's failure to contest the claim.¹⁰³ The magistrate may, for good cause, set aside a default judgment upon motion by the defendant within twenty days after entry of default judgment.¹⁰⁴ Under the prior statute, default judgment was to be entered against the defendant if the defendant

⁹⁷ W. VA. CODE ANN. § 50-4-9 (Cum. Supp. 1976).

⁹⁸ Former W. VA. CODE ANN. § 50-5-1 (1976 Replacement Volume).

⁹⁹ *Id.*; e.g., limitations on unliquidated counterclaims and counterclaims against insolvent persons.

¹⁰⁰ Former W. VA. CODE ANN. § 50-5-2 (1976 Replacement Volume).

¹⁰¹ New W. VA. CODE ANN. § 50-4-10 (Cum. Supp. 1976). Note the provision in subsection (b) that a default judgment may not be entered against a person who is an infant, incarcerated convict, or incompetent person unless he is represented by a guardian *ad litem* or other representative.

¹⁰² If the sum is not certain or cannot be made certain by computation, the affidavit must further show that the relief sought is appropriate. New W. VA. CODE ANN. § 50-4-10(a) (Cum. Supp. 1976).

¹⁰³ New W. VA. CODE ANN. § 50-4-10(a) (Cum. Supp. 1976).

¹⁰⁴ *Id.* see W. VA. R. CIV. P. 60(b) for suggestions as to what should constitute good cause. See also M. LUGAR and L. SILVERSTEIN, WEST VIRGINIA RULES 465-71 (1960).

failed to appear,¹⁰⁵ but the plaintiff was required to prove his case to recover against even a non-appearing defendant.¹⁰⁶ This requirement has survived in a less stringent form,¹⁰⁷ as discussed above. The default judgment could be set aside within fourteen days after its entry upon notice to the plaintiff.¹⁰⁸

The magistrate is directed to enter judgment plus costs against the defendant when the defendant offers in writing to confess judgment. The plaintiff may request that the case be set for trial if his claim exceeds the amount confessed, but if the plaintiff's actual recovery at such trial does not exceed the amount confessed, costs are to be assessed to the plaintiff.¹⁰⁹ Under the previous statute the defendant's offer to confess judgment was formally served on the plaintiff. The plaintiff could refuse to accept the offer, in which case judgment was not entered, but if the plaintiff failed to recover a judgment more favorable than the rejected offer, he was required to pay the costs.¹¹⁰

It is clear that the new procedure for confession of judgment is an improvement over the old. No time is wasted in adjudging a confessing defendant liable because judgment for the confessed amount is immediately entered against him. The plaintiff may require that the action go to trial notwithstanding the entry of judgment for an amount confessed by the defendant. The immediate entry of judgment for the amount so confessed appears to remove from the plaintiff any option to reject the defendant's offer to confess judgment. If the plaintiff requires a trial and receives a verdict for less than the amount confessed, the statute does not provide for entry of judgment for the amount indicated by such a verdict. The result is that a plaintiff appears guaranteed to receive a judgment for at least the amount confessed and entered as a judgment. The only thing he stands to lose if he chooses to proceed to trial in the face of a judgment already entered for the amount confessed by the defendant is that costs will be assessed against him if his recovery does not exceed the amount confessed.

¹⁰⁵ Former W. VA. CODE ANN. § 50-13-4 (1976 Replacement Volume).

¹⁰⁶ Former W. VA. CODE ANN. § 50-13-3 (1976 Replacement Volume).

¹⁰⁷ New W. VA. CODE ANN. § 50-4-10 (Cum. Supp. 1976).

¹⁰⁸ Former W. VA. CODE ANN. § 50-13-4 (1976 Replacement Volume).

¹⁰⁹ New W. VA. CODE ANN. § 50-4-10 (Cum. Supp. 1976).

¹¹⁰ Former W. VA. CODE ANN. § 50-13-5 (1976 Replacement Volume).

6. *Dismissal of Action: § 50-4-12*

Dismissal of the action can be with or without prejudice to the right of the plaintiff to pursue a new action. Dismissal will be with prejudice if dismissed for the following reasons: (1) the plaintiff fails to appear and prosecute his action at the proper time, (2) the plaintiff fails or refuses to testify when properly required to do so, or (3) the plaintiff fails to give security for costs when properly required to do so.¹¹¹ The magistrate has discretion to dismiss without prejudice if dismissal is for either of the first two reasons above, and plaintiff shows good cause.¹¹²

Dismissal without prejudice is mandated if the summons is defective or erroneous and cannot be amended,¹¹³ or the plaintiff requests dismissal before trial.¹¹⁴ A counterclaim is not affected by the dismissal of the primary claim.¹¹⁵

Under the previous statute, all dismissals of plaintiffs' actions were without prejudice.¹¹⁶ In addition to the reasons specified in the new statute, a plaintiff's action could be dismissed for failure "to make or file his complaint at or before the time the summons is returnable,"¹¹⁷ a situation which could not arise under the new statute because the summons and complaint are effectively combined.¹¹⁸

Despite the use of the word "may," the corresponding section in the previous statute¹¹⁹ was construed as being mandatory. Upon the occurrence of any of the events that gave rise to dismissal, the justice of the peace was required to enter dismissal.¹²⁰ "May" was

¹¹¹ New W. VA. CODE ANN. § 50-4-12 (Cum. Supp. 1976).

¹¹² Compare W. VA. R. CIV. P. 41(b). Under that rule, involuntary dismissal operates as judgment on the merits unless the court orders otherwise.

¹¹³ See section IV(A)(10) of this article for a discussion of the summons and its contents.

¹¹⁴ Compare W. VA. R. CIV. P. 41(a)(1). The rule applicable in circuit court requires that the plaintiff request voluntary dismissal before the defendant's answer or before motion for a summary judgment. There is no answer as such in magistrate court, nor is there provision for a motion by defendant for summary judgment. The phrase "before trial" in the penultimate sentence of § 50-4-12 is a somewhat vague limitation on the plaintiff's right to move for voluntary dismissal.

¹¹⁵ New W. VA. CODE ANN. § 50-4-12 (Cum. Supp. 1976).

¹¹⁶ Former W. VA. CODE ANN. § 50-13-1 (1976 Replacement Volume).

¹¹⁷ Former W. VA. CODE ANN. § 50-13-1(b) (1976 Replacement Volume).

¹¹⁸ New W. VA. CODE ANN. § 50-4-1 (Cum. Supp. 1976).

¹¹⁹ Former W. VA. CODE ANN. § 50-13-1 (1976 Replacement Volume).

¹²⁰ Buena Vista Freestone Co. v. Parrish, 34 W. Va. 652, 12 S.E. 817 (1891).

construed as "shall" under this section of the old statute and might be so construed in the new statute. It is possible, however, that the legislature, being aware of this construction, overruled it by retaining "may" instead of substituting "shall" in the new statute. If the supreme court's rules governing magistrates do not speak to this, litigation on the point is likely to arise.

7. *Removal to Another Magistrate: § 50-4-7*

Either party in a criminal or civil proceeding can, as a matter of right, cause the proceedings to be removed once to another magistrate if the first magistrate has a personal bias or prejudice for or against either party. A form affidavit for this purpose is to be provided by the Supreme Court of Appeals. The affidavit must be filed before trial begins, whereupon the magistrate is required to transfer all matters to the magistrate court clerk for reassignment to a second magistrate.¹²¹

There is no provision for removal to another magistrate if the bias or prejudice is discovered after trial begins. A litigant in this situation must rely on the availability of a trial de novo to cure any violation of due process such a situation might produce.¹²² The litigant is similarly trapped if he discovers that the magistrate to whom the trial has been removed is also biased or prejudiced, because removal is available only once to each party.

Removal of civil and criminal proceedings to another magistrate was also permitted under the previous statute for the same reason and by the same procedure as in the new one.¹²³ In addition, removal was permitted when the justice had advised or counselled the plaintiff,¹²⁴ a reason for removal obviously applicable only to civil proceedings. It is possible that the legislature omitted this second reason from the new statute because such advice and counsel to one party is indicative of the personal bias or prejudice for or against a party that constitutes the general reason for seeking removal. The change also indicates that removal for this second reason is available to a defendant or the state in criminal proceed-

¹²¹ New W. VA. CODE ANN. § 50-4-7 (Cum. Supp. 1976).

¹²² New W. VA. CODE ANN. § 50-5-13 (Cum. Supp. 1976). See the discussion of appeals from magistrate court in section V(C)(3) and V(D)(2) of this article. See *North v. Russell*, 96 S. Ct. 2709 (1976) for authority that the availability of a trial de novo is a cure for due process defects in magistrate court procedure.

¹²³ Former W. VA. CODE ANN. § 50-4-33 (1976 Replacement Volume).

¹²⁴ *Id.*

ings, because the new statute does not differentiate between civil and criminal proceedings in establishing grounds for removal to another magistrate.

8. *Removal to Circuit Court: § 50-4-8*

Removal to circuit court is available in civil proceedings upon payment of a ten-dollar fee if the action involves more than one hundred dollars.¹²⁵ There is no corresponding removal to circuit court for criminal proceedings. This virtually automatic removal was not available under the old statute.

The availability of this new form of removal is especially significant to a defendant in a civil action. It gives the defendant the choice of forum previously available only to plaintiffs who could choose freely whether to bring suit in magistrate or circuit court in those cases where there is jurisdictional overlap. The defendant is no longer forced to rely on a trial de novo available only after he has lost in magistrate court. The trial in circuit court that follows removal is not a trial de novo because there is no magistrate judgment from which to appeal.¹²⁶ As litigants in an original action in circuit court, the parties are entitled to use discovery procedures¹²⁷ that are not available upon trial de novo following appeal from magistrate court.¹²⁸

9. *Dismissal for Lack of Jurisdiction: § 50-4-11*

This section applies to both civil and criminal actions. The determination that a matter is outside the magistrate's jurisdiction may be made by the magistrate at any time, and upon such determination, the plaintiff's action is dismissed without prejudice.¹²⁹ The plaintiff can unilaterally confer jurisdiction on the magistrate by forgiving any amount in excess of the fifteen

¹²⁵ W. VA. CODE ANN. § 50-4-8 (Cum. Supp. 1976). The original jurisdiction of the circuit court does not extend to claims of less than one hundred dollars. It should be noted, however, that their appellate jurisdiction extends to appeal from the judgment of any magistrate court. W. VA. CONST. art. VIII, § 6. The result is that a trial de novo is available in circuit court for a claim for which the circuit court does not have original jurisdiction.

¹²⁶ New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

¹²⁷ W. VA. R. CIV. P. 26-37 set out discovery procedures for civil actions.

¹²⁸ W. VA. R. CIV. P. 81(a)(1).

¹²⁹ New W. VA. CODE ANN. § 50-4-11 (Cum. Supp. 1976). See section IV(B)(3) of this article for a discussion of dismissal for lack of criminal jurisdiction.

hundred dollar jurisdictional limit.¹³⁰ The plaintiff is not empowered to confer jurisdiction where lack of jurisdiction is based on any factor other than jurisdictional amount.

B. Criminal

1. *Commencement in General: §§ 50-4-2 and 50-4-6*

The statute leaves one uncertain as to the procedure for initiating a criminal action. A criminal action is to be commenced by warrant obtained and executed in compliance with the provisions of article 1, chapter 62 of the West Virginia Code.¹³¹ Execution of an arrest warrant in compliance with this statute is by arrest of the person named in the warrant,¹³² but the new magistrate statute directs that the defendant "be notified of the return date" when a warrant is executed in criminal proceedings.¹³³ There is no provision for a return date in article 1 of chapter sixty-two, nor is there any return date applicable to criminal defendants in the new chapter fifty.¹³⁴

This uncertainty as to the manner of execution of an arrest warrant results in uncertainty as to the moment a criminal action is commenced. Ascertainment of this moment is especially important when the crime is a misdemeanor, as any crime tried before a magistrate must be.¹³⁵ Prosecution for a misdemeanor is usually

¹³⁰ *Id.* See section II(A) of this article, discussing the civil jurisdiction of magistrate courts.

¹³¹ A warrant for the arrest of the defendant is obtained by making a complaint under oath before the magistrate. W. VA. CODE ANN. § 62-1-1 (1977 Replacement Volume). A warrant is issued "if it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant committed it." W. VA. CODE ANN. § 62-1-2 (1977 Replacement Volume). The contents of the warrant are set forth in W. VA. CODE ANN. § 62-1-3 (1977 Replacement Volume).

¹³² W. VA. CODE ANN. § 62-1-4 (1977 Replacement Volume).

¹³³ New W. VA. CODE ANN. § 50-4-6 (Cum. Supp. 1976).

¹³⁴ It is possible that the legislature intended to provide a simplified procedure for commencement of criminal actions. Two procedures are suggested:

(1) The officer executes the warrant by arresting the defendant and bringing him before the magistrate. The magistrate then sets the return date (i.e. trial date) and hears a request for appointment of counsel if any is made, or for subpoena of witnesses; or

(2) The officer executes the warrant by issuing a form of citation. The defendant is notified, without arrest, that he is about to be prosecuted and that he must appear for trial on a given date. On or before that date, he requests counsel and subpoena of witnesses.

¹³⁵ New W. VA. CODE ANN. § 50-2-3 (Cum. Supp. 1976). See discussion of

limited by a one-year statute of limitations¹³⁶ which stops running at the commencement of an action against the accused,¹³⁷ which in magistrate court is at the execution of the criminal warrant. But if the manner of execution is uncertain, the exact moment of execution is vague; and it becomes quite difficult to ascertain whether the action was commenced in compliance with the statute of limitations.

2. *Appointment of Counsel: § 50-4-3*

The magistrate is required to advise a defendant of his right to counsel and of his right to have counsel appointed only if the crime of which he is accused is punishable by imprisonment.¹³⁸ A defendant who requests appointed counsel must execute an affidavit that he is unable to afford counsel.¹³⁹ The magistrate has no authority to appoint counsel, and upon receipt of the defendant's request and his affidavit, the magistrate is directed to stay the proceedings and forward the request to the judge of the circuit court.¹⁴⁰ The statute operates on the presumption that the circuit court has established rules for the appointment of counsel in that if there is no judge sitting at the time of the request, the clerk of the circuit court must make the appointment according to pre-established local rules.

3. *Dismissal for Lack of Jurisdiction: § 50-4-11*

This section of the statute is applicable both to criminal and civil actions. A criminal action must be dismissed if the magistrate determines at any time that the matter is not within his jurisdiction.¹⁴¹ If a second criminal proceeding is commenced in circuit court after the magistrate dismisses for lack of jurisdiction, the bar of former jeopardy does not apply because jeopardy cannot attach

criminal jurisdiction in section II(C) of this article.

¹³⁶ W. VA. CODE ANN. § 61-11-9 (1977 Replacement Volume) provides that a "prosecution for a misdemeanor shall be commenced within one year after the offense was committed, except that a prosecution for petit larceny may be commenced within three years after the commission of the offense." See *State ex rel. Myers v. Wood*, 154 W. Va. 431, 443, 175 S.E.2d 637, 645 (1970).

¹³⁷ *State v. Wiseman*, 141 W. Va. 726, 92 S.E.2d 910 (1956).

¹³⁸ New W. VA. CODE ANN. § 50-4-3 (Cum. Supp. 1976). This provision codifies the rule of *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹³⁹ New W. VA. CODE ANN. § 50-4-3 (Cum. Supp. 1976).

¹⁴⁰ *Id.*

¹⁴¹ New W. VA. CODE ANN. § 50-4-11 (Cum. Supp. 1976).

in proceedings before a court which is not of competent jurisdiction, regardless of whether a magistrate has heard evidence or a jury has been sworn.¹⁴²

V. TRIALS, HEARINGS AND APPEALS: ARTICLE 5

A. Provisions Applicable in the Same Way to Civil and Criminal Trials

1. *General Rules of Procedure*: § 50-5-1

The Act supplies the procedural background to which one may refer to fill in the gaps that may exist in the rules for magistrate courts to be promulgated by the Supreme Court of Appeals.¹⁴³ The West Virginia Rules of Civil Procedure by their own terms apply only to courts of record,¹⁴⁴ which does not include magistrate courts.¹⁴⁵ Notwithstanding the noted provision in the Rules of Civil Procedure, the legislature directed that "*provisions of law relating to trials . . . in circuit court*" shall apply to trials in magistrate courts.¹⁴⁶ It can be argued that the Rules of Civil Procedure are included among those provisions of law, resulting in their applicability to magistrate courts to the extent that they are not inconsistent with this statute or with the rules to be adapted specifically for magistrate courts.¹⁴⁷ Whether they actually apply in such circumstances is unresolved.

If the magistrate courts are to be a part of a unified court system, there is good reason to make the West Virginia Rules of Civil Procedure for Trial Courts of Record applicable to magistrate courts, except in those areas where the Supreme Court of Appeals feels that the magistrate court has a unique function requiring

¹⁴² *Brooks v. Boles*, 151 W. Va. 576, 153 S.E.2d 526 (1967). *E.g.*, *Illinois v. Sommerville*, 410 U.S. 458 (1973) (attachment of jeopardy after a jury has been sworn); *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933) (attachment of jeopardy when the judge in a nonjury trial begins to hear evidence).

¹⁴³ *New W. VA. CODE ANN.* § 50-5-1 (Cum. Supp. 1976).

¹⁴⁴ *W. VA. R. CIV. P.* 1.

¹⁴⁵ *W. VA. CONST.* art. 8, § 10.

¹⁴⁶ *New W. VA. CODE ANN.* § 50-5-1 (Cum. Supp. 1976) (emphasis added).

¹⁴⁷ There is no constitutional provision that would prevent the legislature from directing that the Rules of Civil Procedure apply to magistrate courts notwithstanding their failure to make them courts of record. It is clear, however, that the Supreme Court of Appeals could undo such legislation by exercise of its rule making authority granted under article VIII, section 8 of the West Virginia Constitution and by its statutory authority to supersede, with rules, legislation that is purely procedural in nature. *W. VA. CODE ANN.* § 51-1-4 (1966).

special rules. On the other hand, if the magistrate system as a whole serves a special function, even within the notion of a unified court system, the use of special rules is justified. It is suggested here that one function of the magistrate court is to provide a simplified system for settling simpler disputes — disputes that require a final adjudication but that do not require complex procedural steps toward that end. The use of a special set of rules less complex than the Rules of Civil Procedure for Trial Courts of Record is not inconsistent with the establishment of a unified court system. Moreover, in light of a recent decision by the United States Supreme Court, that magistrates need not be lawyers,¹⁴⁸ and of the fact that the minimum educational requirement for a magistrate in West Virginia is a high school diploma or its equivalent,¹⁴⁹ to require the magistrate to administer a simpler set of rules seems quite appropriate.

2. *Subpoenas*: § 50-5-4

The statute authorizes two forms of subpoenas in magistrate courts: a subpoena compelling the attendance and testimony of a witness; and a subpoena duces tecum compelling the production of some writing or other object.¹⁵⁰ The subpoena must be issued on request, and the requesting party need not justify that request.¹⁵¹ The sheriff is to enforce the subpoena, and the magistrate is empowered to punish for contempt any person who does not obey a subpoena.¹⁵²

3. *Privileged Communications*: § 50-5-5

Communications recognized as privileged in the circuit courts are to be recognized as such in the magistrate courts.¹⁵³ The old justice of the peace statute accorded a form of privilege to communications between husband and wife, attorney and client, clergyman and confessor, and doctor and patient by declaring the spouse, attorney, clergyman or physician incompetent to testify to certain communications made to him.¹⁵⁴ No corresponding statute

¹⁴⁸ *North v. Russell*, 96 S. Ct. 2709 (1976).

¹⁴⁹ *New W. VA. CODE ANN.* § 50-1-4 (Cum. Supp. 1976).

¹⁵⁰ *New W. VA. CODE ANN.* § 50-5-4 (Cum. Supp. 1976).

¹⁵¹ *Id.*

¹⁵² *Id.*; see part V(A)(4) of this article.

¹⁵³ *W. VA. CODE ANN.* § 50-5-1 (Cum. Supp. 1976).

¹⁵⁴ *Former W. VA. CODE ANN.* § 50-6-10 (1976 Replacement Volume). The privi-

exists for circuit courts, except for one dealing with confidential communications between husband and wife.¹⁵⁵

The Supreme Court of Appeals of West Virginia has long recognized as privileged certain communications other than those between husband and wife, most notably an attorney-client privilege¹⁵⁶ and a doctor-patient privilege.¹⁵⁷ The significance in the change of statute is that there is no longer a statutory basis for claiming these three communication privileges in magistrate court.

4. *Competency to Testify: § 50-5-5*

As noted above, the old statute blurred the distinction between the privilege to withhold testimony as to a privileged communication and incompetency to testify. There is no corresponding section in the magistrate statute which sets forth specific incompetencies. As with privileged communications, the practitioner in magistrate court must look to the provisions of law applicable to trial courts of record to determine competency to testify in magistrate court.

West Virginia has by statute removed most of the common law testimonial incompetencies. A husband or wife is a competent witness for or against the spouse,¹⁵⁸ except that in criminal cases one spouse may be compelled to testify in behalf of the other but may not be compelled to testify against the other without the consent of the other.¹⁵⁹ A person convicted of a felony or a perjury is no longer incompetent to testify, although the fact of such conviction may be used to impeach his credibility.¹⁶⁰ An accused is competent to testify at his own trial,¹⁶¹ chiropractors are competent to testify

leged nature of these communications was recognized under the heading "Persons Incompetent to Testify," which disregards the distinction between a person's competency to testify and his right or obligation to refuse to testify to a privileged communication. By casting these as factors rendering the witness incompetent instead of as forms of privileged communication, what had been a waivable privilege possibly became an incompetency unwaivable by the person benefitting from the fact of another's incompetency to testify.

¹⁵⁵ W. VA. CODE ANN. § 57-3-4 (1966).

¹⁵⁶ M. MARSHALL, *THE LAW OF EVIDENCE IN VIRGINIA AND WEST VIRGINIA* § 59 (1954).

¹⁵⁷ *Id.*, § 60.

¹⁵⁸ W. VA. CODE ANN. § 57-3-2 (1966).

¹⁵⁹ W. VA. CODE ANN. § 57-3-3 (1966).

¹⁶⁰ W. VA. CODE ANN. § 57-3-5 (1966).

¹⁶¹ W. VA. CODE ANN. § 57-3-6 (1966). Note that the accused waives his privi-

as to matters of chiropractic medicine,¹⁶² and no person is deemed incompetent as a witness on account of race or color.¹⁶³

The statute known as the Dead Man's Act¹⁶⁴ is the vestige of the general common law incompetency of a person to be a witness in a case to which he is a party.¹⁶⁵ No attempt is intended here to explore the vicissitudes of the Dead Man's Act¹⁶⁶ except to point out to the practitioner that it is now unquestionably applicable to magistrate court.¹⁶⁷

5. Contempt: § 50-5-11

The Act enumerates the only acts for which a magistrate may find one in contempt, and the possible fines or sentences which may be imposed.¹⁶⁸

B. Provisions Applicable Differently to Civil and Criminal Trials

1. Continuances: § 50-5-2

Either party, as a matter of right, may obtain on motion one continuance of from five to ten days. Additional continuances are available at the magistrate's discretion either by motion of a party for good cause or at the motion of the magistrate.

In a criminal proceeding, when the defendant is in custody, the state has no absolute right to a continuance but may be

lege against self-incrimination by voluntarily testifying. However, his testimony may not later be used against him by virtue of § 57-2-3. Thus, on trial de novo, the fact that the accused waived his testimonial privilege in magistrate court will not result in his testimony coming back to haunt him in circuit court. The possibility of impeachment remains, but the absence of a record from magistrate court, the presence of hearsay rules, and the general nature of a trial de novo render this danger slight.

¹⁶² W. VA. CODE ANN. § 57-3-8 (1966).

¹⁶³ W. VA. CODE ANN. § 57-3-7 (1966).

¹⁶⁴ W. VA. CODE ANN. § 57-3-1 (1966).

¹⁶⁵ *Crothers v. Crothers*, 40 W. Va. 169, 20 S.E. 927 (1895); *Anderson v. Snyder*, 21 W. Va. 632 (1883).

¹⁶⁶ See C. McCORMICK, EVIDENCE § 65 (2d ed. 1972); 2 J. WIGMORE, EVIDENCE § 578 (3d ed. 1940).

¹⁶⁷ W. VA. CODE ANN. § 50-5-1 (Cum. Supp. 1976). The existence of enumerated incompetencies in the old statute (*see note 154 supra*) suggests that as to justice of the peace courts that list was exclusive; hence, the Dead Man's Act did not apply. There has been no known litigation on this point.

¹⁶⁸ New W. VA. CODE ANN. § 50-5-11 (Cum. Supp. 1976). This list of acts is identical to that in former W. VA. CODE ANN. § 50-12-1 (1976 Replacement Volume).

granted one for good cause at the magistrate's discretion. The magistrate may also grant a continuance on his own motion in criminal proceedings when the defendant is in custody, but only once and for only forty-eight hours.

Under the old system, either party in a criminal proceeding was entitled of right to a continuance of ten days if the defendant had been admitted to bail, but if he had not, only the defendant was so entitled.¹⁶⁹ The new statute makes no reference to the availability of a continuance when the defendant in a criminal proceeding is not incarcerated. In such an instance, continuances in criminal cases are granted in the same way as continuances in civil cases, which differed from the old procedure only in that there is now a five-day minimum on such continuances.¹⁷⁰

2. *Trial by Jury*: § 50-5-8

This section is self-explanatory on the existence of a right to trial by jury in civil actions. The amount in controversy must exceed twenty dollars or involve possession of real estate, the same standards applying to civil proceedings under the old statute.¹⁷¹ Any defendant in a criminal action is entitled to trial by jury, regardless of the potential punishment.¹⁷² Under the old statute, trial by jury was available to a criminal defendant if the potential fine exceeded five dollars or if the crime was punishable by imprisonment.¹⁷³

A criminal defendant does not waive by silence his right to a jury trial. He can waive the jury only in writing after he has been advised of his right to a jury trial. This is a significant departure from prior law, which treated the defendant as having waived his right to jury trial where he made no demand.¹⁷⁴ There is no mention

¹⁶⁹ Former W. VA. CODE ANN. § 50-18-6 (1976 Replacement Volume), incorporating, by reference, W. VA. CODE ANN. § 62-1-9 (1966). Note that under the old procedure the magistrate could grant a continuance after denying bail, but the resulting incarceration could be for no more than five days after such grant, which had the practical affect of limiting the continuance to five days. There is no corresponding limit to length of incarceration while under a continuance except for the forty-eight hours limitation on a continuance on the magistrate's motion while defendant is incarcerated.

¹⁷⁰ New W. VA. CODE ANN. § 50-5-2 (Cum. Supp. 1976).

¹⁷¹ Former W. VA. CODE ANN. § 50-7-1 (1976 Replacement Volume).

¹⁷² New W. VA. CODE ANN. § 50-5-8 (Cum. Supp. 1976).

¹⁷³ Former W. VA. CODE ANN. § 50-18-7 (1976 Replacement Volume).

¹⁷⁴ *Vetock v. Hufford*, 74 W. Va. 785, 786, 82 S.E. 1099, 1100 (1914).

of a need for civil litigants to waive their right to jury trial in writing, so, presumably, it remains necessary to demand a jury in a civil proceeding or the right will be deemed waived.¹⁷⁵ The jury in either a civil or criminal case in magistrate court consists of six persons.¹⁷⁶

Under the old system, the constable was to be commanded by the magistrate to summon six jurors¹⁷⁷ who were subject to the same exemptions as jurors in circuit court.¹⁷⁸ The same procedure was followed in criminal cases,¹⁷⁹ except that twenty people were summoned from whom a jury of twelve was to be composed,¹⁸⁰ and they were sworn differently than in civil cases.¹⁸¹ The new statute merely leaves it to the Supreme Court of Appeals to promulgate rules for the selection and summoning of jurors in magistrate courts.¹⁸²

3. *Judgment*: § 50-5-9

The magistrate enters judgment immediately at the conclusion of a criminal trial or hearing, and within twenty-four hours after the conclusion of other proceedings.¹⁸³

4. *Setting Aside Judgment*: § 50-5-10

Either party in a civil action, but only the defendant in a

¹⁷⁵ Under the justice of the peace statute, former W. VA. CODE ANN. § 50-7-2 (1976 Replacement Volume), the demand in a civil case for trial by jury had to be made before the justice had examined any witness or heard any evidence.

¹⁷⁶ W. VA. CODE ANN. § 50-5-8 (Cum. Supp. 1976) provided for a jury of six in civil cases and of twelve in criminal cases. Former W. VA. CODE ANN. § 50-7-1 (1976 Replacement Volume).

¹⁷⁷ Former W. VA. CODE ANN. § 50-7-5 (1976 Replacement Volume).

¹⁷⁸ Former W. VA. CODE ANN. § 50-7-7 (1976 Replacement Volume).

¹⁷⁹ Former W. VA. CODE ANN. § 50-18-7 (1976 Replacement Volume).

¹⁸⁰ *Id.* “[F]our more names shall be drawn than will be required after each side has exercised its right to two preemptory challenges.”

¹⁸¹ *Id.* “[E]xcept that the jury will be sworn well and truly to try the case between the State and the accused, and to give a true verdict according to the evidence”

¹⁸² New W. VA. CODE ANN. § 50-5-8 (Cum. Supp. 1976).

¹⁸³ New W. VA. CODE ANN. § 50-5-9 (Cum. Supp. 1976). Compare the old statute, former W. VA. CODE ANN. § 50-13-6 (1976 Replacement Volume), where an immediate entry of judgment was required only when the defendant in a criminal case was in custody, when judgment was confessed, or when property was held under attachment. Otherwise, judgment was to be entered within twenty-four hours.

criminal action, may move within twenty days of judgment to set aside judgment. The magistrate may set it aside for good cause and grant a new trial, and all parties must be given the right to be heard on the motion.

Under the old procedure, judgment could be set aside within fourteen days of judgment upon motion by either party when the trial had been by jury,¹⁸⁴ or by the defendant when he had lost the case upon failure to appear,¹⁸⁵ or by the plaintiff when dismissed for failure to appear.¹⁸⁶ Where a civil case had been tried by jury, the losing party could move within twenty-four hours to have it set aside, but only on the grounds of "fraud or undue means."¹⁸⁷ A person convicted of a misdemeanor could not seek to have the conviction set aside under the old statute.¹⁸⁸

C. Provisions Applicable Only to Civil Trials

1. *Guardian Ad Litem*: § 50-5-3

An infant, incompetent person, or convict may not sue or be sued unless by his duly qualified representative, by his next friend, or by a guardian *ad litem* appointed by the magistrate. Infants¹⁸⁹ and convicts¹⁹⁰ are defined by statute.

It is likely that the magistrate will seldom have to appoint a guardian *ad litem*. Infants usually have parents or someone else to sue or defend as next friend; convicts commonly have committees appointed to manage their property, as do incompetents. However, should the magistrate determine that such is not the case, he is empowered to appoint a guardian *ad litem*, who may be an attorney but need not be, to sue or defend on behalf of the person under a disability.¹⁹¹

¹⁸⁴ Former W. VA. CODE ANN. § 50-13-7 (1976 Replacement Volume).

¹⁸⁵ Former W. VA. CODE ANN. § 50-13-3 (1976 Replacement Volume). When the defendant failed to appear, the plaintiff was nonetheless required to prove his case.

¹⁸⁶ Former W. VA. CODE ANN. § 50-13-1 (1976 Replacement Volume).

¹⁸⁷ Former W. VA. CODE ANN. § 50-7-19 (1976 Replacement Volume).

¹⁸⁸ *Ex Parte* Gilbert, 78 W. Va. 658, 659-60, 90 S.E. 111, 112 (1916).

¹⁸⁹ W. VA. CODE ANN. § 2-3-1 (Cum. Supp. 1976).

¹⁹⁰ W. VA. CODE ANN. § 28-5-36 (1971 Replacement Volume). The disability begins with incarceration and ends upon the convict's release. *Nibert v. Carroll Trucking Company*, 139 W. Va. 583, 82 S.E.2d 445 (1954). This statute does not apply to persons committed to the county jail; it is unlikely that the legislature intended the magistrate statute to operate any differently.

¹⁹¹ New W. VA. CODE ANN. § 50-5-2 (Cum. Supp. 1976).

The practitioner will recall that no default judgment may be entered against a person who is under any of these disabilities unless such person is represented by another in the appropriate fiduciary capacity.¹⁹² There is no reason why the party who opposes the incompetent should not move the appointment of a guardian *ad litem* if necessary to protect any judgment obtained in the proceeding. The failure to appoint a guardian *ad litem* for an insane person in circuit court does not render a judgment void, but merely reversible, if a meritorious defense to the claim can be shown.¹⁹³

2. *Evidentiary Depositions: § 50-5-6*

The Act provides for the taking of the deposition of a witness who resides out of the county or is "unable to attend court." The prior statute differed somewhat in wording but the provisions were essentially the same. It allowed the taking of depositions when the witness resided out of the county, was about to leave the county, was sick, or was "otherwise unable to attend."¹⁹⁴ Presumably, a witness who is sick is to be considered "unable to attend" under the new statute. It is less certain that a party should be allowed to take the deposition of a witness who is about to leave the county. Perhaps it is not always true that such a witness is unable to attend, but, as a practical matter, such a witness should be permitted to be deposed because of the inherent difficulty of enforcing a subpoena against a person who is not within the magistrate's territorial jurisdiction.

Since there are no discovery procedures in magistrate court, the purpose of the deposition is the perpetuation of testimony. The former statute was more specific on the proper use of depositions as evidence,¹⁹⁵ the notice requirement,¹⁹⁶ and the right to cross examine the witness at the deposition.¹⁹⁷ It is anticipated that these details will be supplied by the rules to be promulgated by the Supreme Court of Appeals.

¹⁹² New W. VA. CODE ANN. § 50-4-10(b) (Cum. Supp. 1976).

¹⁹³ *Beckley Nat'l Bank v. Boone*, 115 F.2d 513 (4th Cir. 1940); *Chasman v. Branch*, 72 W. Va. 54, 78 S.E. 235 (1913).

¹⁹⁴ Former W. VA. CODE ANN. § 50-6-14 (1976 Replacement Volume).

¹⁹⁵ Former W. VA. CODE ANN. § 50-6-15 (1976 Replacement Volume).

¹⁹⁶ Former W. VA. CODE ANN. § 50-6-16 (1976 Replacement Volume).

¹⁹⁷ *Id.*

3. *Appeals in Civil Cases: § 50-5-12*

This section of the Act is significantly different from former article fifteen of chapter fifty. Any person may appeal the judgment of a magistrate court to the circuit court as a matter of right, regardless of the amount in controversy.¹⁹⁸ The time in which the appeal must be requested is increased from ten¹⁹⁹ to twenty days²⁰⁰ after the judgment is rendered or a decision is rendered on a motion to set aside a judgment.

Two important changes have been made in the appeal bond requirements which should serve to alleviate the often oppressive bonding requirements in the justice of the peace courts. The double bond (twice the amount of the judgment, plus costs of appeal) formerly required to be posted for an appeal²⁰¹ is replaced with a bond "in a *reasonable amount not less than* the reasonable court costs of the appeal *nor more than* the sum of the judgment and the reasonable court costs of the appeal"²⁰²

The magistrate now possesses the discretion to vary the appeal bond to best fit the statutory standard of reasonableness in each individual case, but the bond can never be more than fifteen-hundred dollars, plus costs and interest, because that sum is the jurisdictional limit in magistrate court.²⁰³ The reputation of the appellant, his financial situation, and relationship to the community should all be relevant considerations in the magistrate's determination of "reasonableness." A magistrate's failure to exercise his discretion by refusing to consider relevant factors of reasonableness might be challenged in a writ of mandamus forcing

¹⁹⁸ Former W. VA. CODE ANN. § 50-15-1 (1976 Replacement Volume) allowed appeals in civil cases "when the amount in controversy on the trial before the justice exceeds fifteen dollars, exclusive of interest and costs, or the case involves the freedom of a person, the validity of a law or of an ordinance of any corporation, or the right of a corporation to levy tolls or taxes."

¹⁹⁹ Former W. VA. CODE ANN. § 50-15-2 (1966).

²⁰⁰ W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

²⁰¹ Former W. VA. CODE ANN. § 50-15-2 (1966). The double bond on appeal provision was held to be constitutional in *Patterson v. Warner*, 371 F. Supp. 1362 (S.D.W. Va. 1972) and *State ex rel. Reece v. Gies*, 198 S.E.2d 211 (W. Va. 1973). *But see* the joined concurring opinions of Justice Haden, finding the double bond requirement to violate W. VA. CONST. art 3, § 17, *citing* *State ex rel. Payne v. Walden*, 190 S.E.2d 770, 776 (W. Va. 1972), and *Sprouse*, finding the double bond requirement violative of equal protection.

²⁰² New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976) (emphasis added).

²⁰³ New W. VA. CODE ANN. § 50-2-1 (Cum. Supp. 1976).

him to exercise his statutory discretion.²⁰⁴ The bond requirement is forgiven entirely for a person who files a "pauper's affidavit"²⁰⁵ and for any governmental agency.²⁰⁶

If the appeal is not perfected within twenty days of judgment, the circuit court may still grant the appeal within ninety days after judgment if the party seeking the appeal makes a showing of good cause why the appeal wasn't perfected within twenty days. "Good cause" can best be given meaning by reference to the cases construing the corresponding statute for J. P. courts.²⁰⁷ The application within ninety days and the showing of good cause are jurisdictional,²⁰⁸ and the circuit court cannot grant an appeal after ninety days.²⁰⁹

As in J. P. courts, either the filing or granting of an appeal automatically stays any proceedings to enforce the judgment, and a de novo trial is granted in circuit court.²¹⁰

D. Provisions Applicable Only to Criminal Trials

1. *Right to Trial in Criminal Cases: § 50-5-7*

The Act gives "[e]very defendant charged in a magistrate court in a criminal proceeding . . . the right to a trial on the merits in the magistrate court."²¹¹ No corresponding provision appears in the former statute. This section is apparently intended to prevent an accused from losing his chance at acquittal at the magistrate

²⁰⁴ Mandamus is a proper remedy to compel the exercise of discretion by a public official who has refused to act, but cannot be employed to control or direct the discretion once exercised. *E.g.*, *Wiley v. Mercer County Court*, 111 W. Va. 646, 163 S.E. 441 (1932); *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924); *cf. United States v. Daniels*, 446 F.2d 967, 970-72 (6th Cir. 1971) (a district judge's mechanical imposition of a five-year maximum sentence on all draft evaders without further inquiry into relevant circumstances was held to be a failure to exercise discretion as required by statute and case law).

²⁰⁵ W. VA. CODE ANN. § 59-2-1 (1966).

²⁰⁶ New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

²⁰⁷ Former W. VA. CODE ANN. § 50-15-6 (1976 Replacement Volume) had the same "good cause" standard as new W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976). The failure to file for appeal must be the result of fraud, accident, mistake, or surprise. *Powell v. Miller*, 41 W. Va. 371, 23 S.E. 557 (1895).

²⁰⁸ *Johnson v. Ridgley*, 64 W. Va. 130, 61 S.E. 42 (1908); *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540 (1886).

²⁰⁹ *Worley v. Easley*, 123 W. Va. 1, 13 S.E.2d 158 (1941).

²¹⁰ New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

²¹¹ W. VA. CODE ANN. § 50-5-7 (Cum. Supp. 1976).

level. There can be no judgment before trial in criminal actions, absent a guilty plea by the defendant.²¹²

This section may be invoked by a defendant to prohibit the prosecutor from dropping a criminal action once it has been initiated in magistrate court. The prosecutor might find it preferable to seek an indictment and trial in circuit court if he becomes certain that the defendant will seek a trial de novo. Under this section, the defendant can demand that the prosecution carry through with an already initiated trial in magistrate court. The obvious advantage to the defendant is that the prosecutor might, in an attempt to secure a conviction in magistrate court, expose parts of his case that the defendant might never have obtained through the rather limited pretrial discovery techniques available in criminal cases.²¹³ The defendant may also feel he has a better chance for acquittal at the magistrate level.

2. Appeals in Criminal Cases: § 50-5-13

Significant changes are also made in the section on criminal appeals. Whereas under the old statute, the right of appeal was available if the fine was ten dollars or more,²¹⁴ with an absolute right to have any fine increased to that amount,²¹⁵ the Act avoids this cumbersome device and allows criminal appeals regardless of the amount of the fine.²¹⁶ The time in which the appeal must be sought has been changed from "a reasonable time"²¹⁷ to twenty days after sentencing. The application of the code provisions on bail²¹⁸ has been eliminated and replaced with a bond not exceeding the maximum amount of any fine which could be imposed for the offense; further, the bond may be on the defendant's own recognition. A completely new provision allows the granting of an appeal

²¹² There is no express provision for a guilty plea in the present statute, nor was there in the prior statute. If a person wishes to plead guilty he should be permitted to do so under the same procedure as in circuit court. See W. VA. CODE ANN. § 62-3-1a (1966).

²¹³ See W. VA. CODE ANN. § 62-1B-2 (1966), and cases annotated thereunder. See also *Brady v. Maryland*, 373 U.S. 83 (1963) (discovery right guaranteed by the United States Constitution); *United States v. Agurs*, 96 S. Ct. 2392 (1976) (due process requirements of pretrial discovery in criminal cases).

²¹⁴ Former W. VA. CODE ANN. § 50-18-10 (1976 Replacement Volume).

²¹⁵ *State v. Nangle*, 82 W. Va. 224, 95 S.E. 833 (1918).

²¹⁶ New W. VA. CODE ANN. § 50-5-13 (Cum. Supp. 1976).

²¹⁷ See note 214 *supra*.

²¹⁸ W. VA. CODE ANN. §§ 62-1C-1 *et seq.* (1966).

by a judge of the circuit court within ninety days from sentencing, and unlike the similar provision for civil appeals,²¹⁹ no showing of good cause is specifically required. As was the practice in justice of the peace courts, the filing or granting of an appeal automatically stays the sentence, and trial in circuit court is *de novo*.²²⁰

VI. ENFORCEMENT OF CIVIL JUDGMENT: ARTICLE 6

A. Generally, Including Collection of Costs and Fines

West Virginia Code provisions relating to judgment liens,²²¹ executions,²²² proceedings in aid of executions,²²³ suggestions of salary and wages of persons engaged in private employment,²²⁴ suggestions of state and political subdivisions and garnishments and suggestions of public officers,²²⁵ and indemnifying, suspending and forthcoming bonds²²⁶ are incorporated by reference in the provision on enforcement of judgments except as they conflict with the Act or clearly apply to courts of record.²²⁷ This is in contrast to the J. P. system, in which specific provisions were made for suggestions on judgments²²⁸ and executions.²²⁹

Process to enforce judgments must be issued within twenty days of judgment and conform to both the incorporated code sections and the rules of the Supreme Court of Appeals. It is anticipated that these rules will determine which, if any, of the incorporated sections cannot apply in magistrate courts.

Execution may be employed by the magistrate to collect fines and costs levied in magistrate court, and the sheriff must collect and pay over the monies.²³⁰ All judgments rendered by a magistrate may be filed in the circuit court and docketed in the judgment lien books kept for circuit court judgments.²³¹

²¹⁹ New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

²²⁰ New W. VA. CODE ANN. § 50-5-13 (Cum. Supp. 1976).

²²¹ W. VA. CODE ANN. §§ 38-3-1 *et seq.* (1966).

²²² W. VA. CODE ANN. §§ 38-4-1 *et seq.* (1966).

²²³ W. VA. CODE ANN. §§ 38-5-1 *et seq.* (1966).

²²⁴ W. VA. CODE ANN. §§ 38-5A-1 *et seq.* (1966).

²²⁵ W. VA. CODE ANN. §§ 38-5B-1 *et seq.* (1966).

²²⁶ W. VA. CODE ANN. §§ 38-6-1 *et seq.* (1966).

²²⁷ New W. VA. CODE ANN. § 50-6-1 (Cum. Supp. 1976).

²²⁸ Former W. VA. CODE ANN. §§ 50-13-13 *et seq.* (1976 Replacement Volume).

²²⁹ Former W. VA. CODE ANN. §§ 50-14-1 *et seq.* (1976 Replacement Volume).

²³⁰ New W. VA. CODE ANN. § 50-3-6 (Cum. Supp. 1976).

²³¹ New W. VA. CODE ANN. § 50-6-2 (Cum. Supp. 1976).

VII. DO MAGISTRATE COURTS "UNIFY" THE COURT SYSTEM?

The concept of a unified court system was introduced by Roscoe Pound in 1906,²³² and has since emerged in several model acts and has been implemented in varying degrees in several states.²³³ "Court unification" refers to improvement in both court organization, reflected in the number and jurisdiction of courts, and judicial administration through the exercise of administrative and supervisory power over judicial and non-judicial personnel.²³⁴ In the simplification of the West Virginia court system,²³⁵ the overlapping jurisdiction of justice of the peace and circuit courts²³⁶ has been significantly changed in the new magistrate courts system. The jurisdictional amount of the lay-judge courts has increased from three hundred to fifteen-hundred dollars,²³⁷ and the general jurisdiction of circuit courts has been changed to amounts in controversy exceeding one hundred dollars.²³⁸ Many of the inefficiencies and inequities characteristic of the limited jurisdiction courts²³⁹ can be eliminated, despite the increased overlap in jurisdictional amounts, by effective use of certain provisions of the new Act.

²³² R. POUND, *THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE*, reprinted in 46 J. AM. JUD. SOC'Y. 55 (1962).

²³³ Ashman and Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1, 2-18 (1974), surveys the evolution of the concept and its adoption by the states.

²³⁴ *Id.* at 24.

²³⁵ W. VA. CONST. art. 8, § 5, provides, in pertinent part:

[E]ach statutory court of record of limited jurisdiction existing in the State . . . shall become part of the circuit court for the circuit in which it presently exists

²³⁶ Under former W. VA. CODE ANN. § 50-2-1 (1966), justice of the peace courts had jurisdiction of all civil actions for the recovery of money or the possession of property where the amount in controversy did not exceed three hundred dollars. Circuit courts had general jurisdiction of all civil actions of a value exceeding fifty dollars. Former W. VA. CONST. art. 8, § 12 (1972).

²³⁷ New W. VA. CODE ANN. § 50-2-1 (Cum. Supp. 1976).

²³⁸ W. VA. CONST. art. 8, § 6.

²³⁹ *E.g. State ex rel. Shrewsbury v. Poteet*, 202 S.E.2d 628, 630-32 (W. Va. 1974) (discussing the preference of creditors for a certain justice).

[B]etween . . . 1969 and 1973, 874 cases were instituted by the principal creditors of the area in the court of Justice of the Peace Poteet, while a total of 49 cases were instituted in the courts of the other five Justices of the Peace in Greenbrier County Most significantly, of the above 874 cases the following tabulation appears:

Judgments for the plaintiff [creditor]	874
Judgments for the defendant [debtor]	0

Id. at 630-31.

One such provision is the right of any party to remove to circuit court where the amount in controversy exceeds one hundred dollars.²⁴⁰ This has the practical effect of creating a "small claims court," within the magistrate court-circuit court overlap. A claim for less than one hundred dollars can be brought only in magistrate court; a claim of between one hundred dollars and fifteen hundred dollars may be brought in either forum. In areas where a particular magistrate court is "known" to be favorable to creditors,²⁴¹ as an example, defendants in collection suits might be wise to remove the cause of action to circuit court. An adverse consequence in some circuits could well be the clogging of circuit courts with cases previously heard originally in J.P. or magistrate courts. Equally important is the discretion given to the magistrate in the setting of bond on appeals in civil cases, as well as the waiver of the bond if a party files a pauper's affidavit.²⁴² Whereas before, many litigants were denied a de novo appeal because of their inability to pay the bond, these litigants will now be able to exercise their right to appeal. The resultant increase in appeals may further burden the circuit courts.

The greatest improvement made by the Judicial Reorganization Amendment and the Magistrate Courts Act has been in the area of judicial administration and supervisory control over the courts of limited jurisdiction. The Act gives litigants in West Virginia every right to expect a more responsive and fair judiciary at the lowest level by providing for centralized supervision of magistrates by the Supreme Court of Appeals,²⁴³ creating training programs for magistrates, allowing the temporary reassignment of magistrates to counter unbalanced case loads, and defining proscribed conduct for magistrates. The necessary mechanisms exist, and it is the responsibility of every court officer and employee to ensure that the intent becomes a reality.

John C. Purbaugh
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²⁴⁰ New W. VA. CODE ANN. § 50-4-8 (Cum. Supp. 1976).

²⁴¹ See note 239 *supra*.

²⁴² New W. VA. CODE ANN. § 50-5-12 (Cum. Supp. 1976).

²⁴³ Since the writing of this article, the American Academy of Judicial Education, acting under the direction of the Supreme Court of Appeals of West Virginia, has prepared several publications for use in magistrate courts. Currently available are: a Bench Book, an Evidence Manual, and a Civil Procedure Manual for West Virginia Magistrates. These rules have been officially promulgated by the Supreme Court of Appeals of West Virginia.

