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# Preliminary Injunctions in West Virginia--Discretionary Notice and Due Process

William Wade Pepper
*West Virginia University College of Law*

# PRELIMINARY INJUNCTIONS IN WEST VIRGINIA—DISCRETIONARY NOTICE AND DUE PROCESS

Preliminary injunctions are a major form of equitable relief which are made available under Rule 65 of both the Federal Rules of Civil Procedure and the West Virginia Rules of Civil Procedure. The primary distinguishing characteristic between the two is that a preliminary injunction in West Virginia may be issued without notice to the party sought to be enjoined. Because of that characteristic, the West Virginia rule is of questionable constitutionality. To understand why, it is helpful to compare the West Virginia rule with the federal rule.

Essentially, the federal rule provides for the granting of temporary restraining orders which can last up to ten days and which may be granted *ex parte* under limited situations as sworn to by the plaintiff.[1] The basic requirements are (1) certification of at-

[1] FED. R. CIV. P. 65 provides:

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless

tempts made to notify the other party; and (2) an allegation that immediate and irreparable injury will occur before the adverse party can be notified and heard. When a temporary restraining order is granted without notice, the motion for a preliminary injunction is heard as soon as possible and given preference over all other matters. If the affiant fails to proceed with an application for a preliminary injunction, the court dissolves the temporary re-

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within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

straining order. The federal rule provides that *no* preliminary injunction shall be issued without notice to the adverse party and allows consolidation of the hearing for a preliminary injunction with the trial of the action on the merits (the hearing for a permanent injunction).

The West Virginia rule, on the other hand, simply states that "[t]he practice respecting preliminary injunctions shall be in accordance with the practice heretofore followed in this State, including the use of a verified complaint or supporting affidavit." The general statutory provision concerning the issuance of preliminary injunctions is Chapter 53, Article 5, Section 8 of the West Virginia Code.

The West Virginia rule differs most with the corresponding federal rule in respect to the stringent federal requirements of notice and hearing as conditions precedent to the granting of interlocutory injunctive relief. The failure of the West Virginia rule to require some notice to the other side has rendered it constitutionally suspect.

According to the West Virginia statute, "[A]ny court or judge may require that reasonable notice shall be given to the adverse party, or his attorney at law, or in fact, of the time and place of moving for it, before the injunction is awarded, if in the opinion of the court or judge it be proper that such notice should be given."[2] While the trial court rule[3] is somewhat different, the effect is the same, in that any requirement of notice or hearing is left to the discretion of the court.

Despite the possible constitutional deficiency of the West Virginia procedure, the related case law supports the discretionary notice requirement, which has had a relatively unfettered existence since its inception in 1849.[4] The first constitutional attack was quelled in 1903, when the West Virginia Supreme Court of Appeals held that a trial judge has authority to exercise sound discretion

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[2] W. VA. CODE ANN. § 53-5-8 (1966).

[3] W. VA. TRIAL CT. R. V(c) provides, "No application for an injunction . . . shall be considered by the Court, unless interested parties or their counsel are notified of the place where and the time when such application shall be made. This rule, however, *for reasons deemed sufficient to the court* may be disregarded . . . ." (emphasis added). This rule was promulgated by an order entered July 22, 1960, thereby superceding W. VA. CODE ANN. § 53-5-8 which was enacted in 1955.

[4] *Compare* VA. CODE 1849, c. 179, §3, with W. VA. CODE ANN. § 53-5-8 (1966).

in the matter of notice to the adverse party.[5] Historically, the justification has been that a preliminary injunction is an extraordinary proceeding and that the legislature expressly dispenses with some procedural requisites normally indispensible in regular proceedings.[6] To date the West Virginia court has consistently upheld the statutory delegation of discretion concerning the notice requirement.[7]

However, an interesting parallel appears in a 1906 case, *Powhaton Coal and Coke v. Ritz.*[8] At issue in this case was a preliminary injunction, and the court stated that when the effect of such an interlocutory decree is to deprive one of property without notice and hearing it is violative of the West Virginia Constitution.[9] The court relied heavily on the reluctance of equity courts to grant mandatory interlocutory relief except in cases where there is a showing of "extreme hardship"[10] and a "clear right" to the relief,[11] and where "extreme or very serious damage will ensue from withholding that relief."[12]

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[5] Kalbitzer v. Goodhue, 52 W. Va. 435, 438, 44 S.E. 264, 265 (1903).

[6] Owens v. Evans, 104 W. Va. 102, 104, 139 S.E. 476, 477 (1927); Lamp v. Locke, 89 W. Va. 138, 149, 108 S.E. 889, 894 (1921); Cooper v. Bennett, 70 W. Va. 110, 112, 73 S.E. 260, 261 (1911).

[7] Highland v. Empire Bank, 114 W. Va. 473, 172 S.E. 544 (1933); Owens v. Evans, 104 W. Va. 102, 139 S.E. 476 (1927); Lamp v. Locke, 89 W. Va. 138, 108 S.E. 889 (1921); Powhaton Coal and Coke v. Ritz, 60 W. Va. 395, 56 S.E. 257 (1906); Kalbitzer v. Goodhue, 52 W. Va. 435, 44 S.E. 264 (1903).

[8] 60 W. Va. 395, 56 S.E. 257 (1906).

[9] "[A]n injunction, awarded without notice or hearing, requiring the defendant to yield to the plaintiff the possession of property, real or personal, which at the time of the awarding of the injunction was in possession of the former under a perfect title thereto, or a *bona fide* claim of title, is null and void." *Id.* at 405, 56 S.E. at 261. W. VA. CONST. art. 3, § 10 states, "No person shall be deprived of life, liberty, or property, without due process of law, and a judgment of his peers." In Crossland v. Crossland, 53 W. Va. 108, 44 S.E. 424 (1903), a preliminary injunction which was awarded without notice to the defendant, enjoining him from interfering with the sale of certain personal property, and which was served on him on the morning of the sale, was held violative of this section. *See also* Bertman v. Harness, 42 W. Va. 433, 441, 26 S.E. 271, 273 (1896).

[10] 60 W. Va. 395, 401, 56 S.E. 257, 259 (1906).

[11] *Id.*

[12] *Id.* at 402, 56 S.E. at 259. But the Court also recognized that the function of a preliminary injunction is to preserve the status quo until a final hearing, where the court can grant full relief, and therefore, when maintaining the status quo requires action, a mandatory preliminary injunction is warranted. *Id.* at 403, 56 S.E. at 260.

More recently, in *State* ex rel. *Payne v. Walden,*[13] the Supreme Court of Appeals reviewed the constitutionality of another *ex parte* procedure, the statutory distress warrant.[14] By an *ex parte* affidavit presented to a justice of the peace, a landlord, by statute, could effect the issuance of a "distress warrant" allowing a constable to levy and seize the personal property of the tenant and sell it at a public auction in order to satisfy the rent allegedly in arrears.[15] The statute did not provide the tenant any notice and hearing prior to the deprivation of his property. The tenant's only recourse prior to the sale was to post a bond with the levying officer in an amount up to twice the amount of the distrained property or to exempt from execution up to $200 worth of personal property.[16]

The prior cases had held that such taking of property without notice was not violative of the West Virginia Constitution because all that was involved was a temporary inconvenience which could be rectified by subsequent proceedings.[17] But in *Payne* the Court reversed its prior decisions by declaring the statute unconstitutional. The Court found the *ex parte* procedure to be a "legitimized form of harrassment to bring the tenant to the landlord's out stretched hand"[18] that denies the tenant due process of law guaranteed by the West Virginia Constitution and the fourteenth amendment to the United States Constitution.[19]

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[13] 190 S.E.2d 770 (W. Va. 1972).

[14] W. VA. CODE ANN. § 37-6-12 (1966).

[15] W. VA. CODE ANN. § 37-6-14 (1966). *See also* W. VA. CODE ANN. § 50-14-19 (1966).

[16] W. VA. CODE ANN. § 38-8-1 (Supp. 1974). However, this exemption was not available to an unmarried adult tenant without children.

[17] State *ex rel.* Myers v. Hodge, 129 W. Va. 820, 42 S.E.2d 23 (1947); Beirne v. Snyder, 114 W. Va. 691, 173 S.E. 570 (1934); Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932); Anderson v. Henry, 45 W. Va. 319, 31 S.E. 998 (1898).

[18] 190 S.E.2d 770, 778 (W Va. 1972).

[19] *Id.* The court has defined the term due process of law as "the due course of legal proceedings . . . security to every person a judicial trial before he can be deprived of life, liberty, or property." McHenry v. Humes, 112 W. Va. 432, 435, 164 S.E. 501, 503 (1932). It requires that such persons shall have notice and a reasonable opportunity to be heard *before* any adjudication of his rights is made. State v. Blevins, 131 W. Va. 350, 48 S.E.2d 174 (1948). It requires that every defendant be given his day in court. State *ex rel.* Staley v. Hereford, 131 W. Va. 84, 45 S.E.2d 738 (1947). *But see* Cook v. Lilly, 208 S.E.2d 786 (W. Va. 1974) where Justice Neely, by dicta, interprets Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) as permitting *ex parte* self-help, in the form of taking possession "without breach of the peace," as a product of a rational legislative balancing of the interests of the debtor and creditor. For discussion of *Mitchell* see notes 61-71 and accompanying text.

Coupling the due process considerations discussed in *Payne* with the Court's holding in *Powhaton,* a convincing argument emerges that the West Virginia preliminary injunction procedure is inconsistent with the West Virginia Constitution. Notice of the time and place of the motion for the preliminary injunction is discretionary with the presiding judge, thus not guaranteeing the constitutionally mandated due process. Justice Maxwell of the Supreme Court of Appeals of West Virginia was concerned about the possibility of abuse of discretion, and in 1933 urged judges across the state not to dispense with notice and hearing except in the cases of "greatest urgency."[20] He advised that there be "greatest hesitancy on the part of the trial chancellor in granting injunctions without notice."[21]

In *Payne* and *Powhaton* the deprivations without notice involved personal property, but the question arises as to the constitutionality of these procedures when one is, without notice, preliminarily enjoined from indulging in some behavior or activity not related to "property." As a practical matter, "property" has been held in West Virginia to include such a myriad of interests that few preliminary injunctions could be said not to deprive one of "property."[22] But in the pure nonproperty case, where a preliminary injunction is issued and "liberty" or "life" is deprived without notice or hearing, the constitutional mandate is equally clear.[23]

The term "liberty," as defined in West Virginia, includes nearly all legal behavior and activity, including "the right of man to be free in the enjoyment of the faculties with which he has been endowed . . . the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."[24] Although

[20] Highland v. Empire Bank, 114 W. Va. 473, 486, 172 S.E. 544, 550 (1933) (dissenting opinion).

[21] *Id.*

[22] In Fruth v. Board of Affairs, 75 W. Va. 456, 84 S.E. 105 (1915), property was deemed to include not only tangible or real property but the *right to use and enjoy it* to its full extent. *But see* State *ex rel.* Thompson v. Morton, 140 W. Va. 207, 84 S.E.2d 791 (1954) and Moore v. Strickling, 46 W. Va. 515, 33 S.E. 274 (1899) where public office was held not to be "property" within the meaning of the due process clause.

[23] W. VA. CONST. art 3, § 10.

[24] State v. Memorial Gardens Dev. Corp., 143 W. Va. 182, 190, 101 S.E.2d 425 429-30 (1957); Lawrence v. Barlow, 77 W. Va. 289, 292, 87 S.E. 380, 381 (1915). But the Court expressly subordinates this right to liberty to "such restraints as are

the current procedure would allow speedy termination of unlawful behavior or speedy appropriation of property into the proper hands, it also allows unconstitutional termination of life, liberty, and property. Balancing the two interests, as the Court did in *Payne* and *Powhaton,* one can only conclude that a statute that permits *ex parte* deprivation of essential rights without notice and hearing is constitutionally infirm.

The West Virginia statute allows procedures essentially identical to others which have historically been abused and subsequently invalidated or eliminated. For example, a marked similarity exists between the *ex parte* proceeding provided for in the West Virginia statute and rule and the procedure used by employers against striking employees prior to the Norris-LaGuardia Act,[25] where upon affidavit they were able to obtain temporary restraining orders which resolved labor disputes and strikes in their favor.[26] This "government by injunction"[27] became the target of great public uproar which culminated in the passage of the Norris-LaGuardia Act, limiting the jurisdiction and power of federal courts to enjoin picketing, strikes and boycotts connected with "labor disputes" and requiring a hearing before an injunction can be granted. Notice to the adverse party is required as well, except in cases where "irreparable injury" would ensue.[28]

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necessary for the common welfare." State *ex rel.* Bowen v. Flowers 155 W. Va. 389, 184 S.E.2d 611 (1971) acknowledges that notice and hearing are fundamental due process requirements, but may be postponed for a reasonable time, where there is an overriding public interest involved. *See also* Christhilf v. Annapolis Emergency Hospital Ass'n, Inc., 496 F.2d 174 (4th Cir. 1974), and Hubel v. West Virginia Racing Comm'n, 513 F.2d 240 (4th Cir. 1975). Is the common welfare or an overriding public interest promoted by *ex parte* preliminary injunctions without notice? If so, does W. VA. CODE ANN. § 53-5-8 (1966) promote a public interest or the common welfare as narrowly as possible in order to effectively preserve the common welfare without overextending against other individual rights?

[25] 29 U.S.C. §§ 101-15 (1964); *see* Perlman, *The Little Norris-LaGuardia Act and the New York Courts,* 25 N.Y.U.L. REV. 316 (1950); Milk Drivers' Union v. Lake Valley Co., 311 U.S. 91, 102 (1940).

[26] The union's activity was effectively terminated because of lack of funds, loss of public support, and loss of morale and the necessary critical timing. F. FRANKFURTER AND N. GREENE, THE LABOR INJUNCTION 79, 80 (1930); M. SHARP AND C. GREGORY, SOCIAL CHANGE AND LABOR LAW 130 (1939). *See generally* 35 BROOKLYN L. REV. 504, 506-7 (1969).

[27] Milk Drivers' Union v. Lake Valley Co., 311 U.S. 91, 102 (1940).

[28] Annot., 29 A.L.R.2d 323 (1953); CCH LAB. L. COURSE ¶4301, at 5311, ¶4327, at 5316, ¶4328, at 5317 (17th ed. 1967); CCH LAB. L. REP. 1530, at 5314-15.

Other examples of the more flagrant abuses upon which the United States Supreme Court has felt compelled to rule involve deprivation of an individual's first amendment rights without notice. In two cases involving state statutes permitting search and seizure of purportedly obscene materials without prior adjudication or hearing on their alleged obscenity, the lack of prior adversary hearing was held determinative of the unconstitutionality of the statutes.[29] In *Friedman v. Maryland*,[30] the Court held that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, [and] only a procedure requiring a judicial determination suffices to impose a valid final restraint."[31]

In *Carroll v. President and Commissioners of Princess Anne*,[32] the Court again considered a state statute which involved deprivation of an individual's first amendment rights. In that case, a Maryland statute which allowed the *ex parte* issuance of a ten day temporary restraining order, without notice or a showing that it was impossible to notify the opposing party, was applied unconstitutionally. The Court reaffirmed the previously announced "heavy presumption" against the validity of a system of prior restraints.[33] The Court then conceded that "[t]here is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration,"[34] and left open the question of when such orders are valid.[35] However, the Court mentioned only two situations where such issuances might be constitutional. One is where the adverse party or its counsel is unavailable[36]

[29] *See* Marcus v. Search Warrant, 367 U.S. 717 (1961) and A Quantity of Books v. Kansas, 378 U.S. 205 (1964). *Cf.* Heller v. New York, 413 U.S. 483 (1973) where the Court upheld seizure of allegedly obscene film without a prior adversary hearing. The distinguishing factor, however, between that case and *A Quantity of Books, supra* and *Marcus, supra,* was, according to the court, that the copy of the film was temporarily detained as evidence and was not "subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction." 413 U.S. at 490.

[30] 380 U.S. 51 (1965).

[31] *Id.* at 58.

[32] 393 U.S. 175 (1968).

[33] *Id.* at 181. *See also* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51, 57 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931).

[34] 393 U.S. 175, 180 (1968).

[35] *Id.* at 184-85.

[36] *Id.*

and the other is where speech is so interlaced with violence that it loses its first amendment protection.[37]

The West Virginia statute[38] is inconsistent with the Court's constitutional interpretation in two vital respects. First, while the *Carroll* decision deals with temporary restraining orders of short duration (ten days), the West Virginia statute permits *ex parte* issuance of preliminary injunctions which do not necessarily last for a "short duration." The *ex parte* preliminary injunctions issued in West Virginia without notice last until "any party to the proceedings . . . move[s] for a hearing on any particular issues or phases of the case which may properly be heard interlocutorily." Only then may the court or judge dismiss the injunction.[39] Thus in West Virginia, the *ex parte* deprivation of life, liberty or property is not necessarily temporary, but may last for months or years.

A second inconsistency between the West Virginia provision and the constitutional mandates in *Carroll* concerns the Court's implied holding that a statutory provision that requires a showing of impossibility of finding or notifying the adverse party or its counsel would "save" the Maryland statute from unconstitutionality.[40] In West Virginia no such impossibility need be shown. Nor are there statutory safeguards requiring allegations of "irreparable harm," "speech interlaced with violence," or some other

[37] *Id.* at 180. The Court quoted Cantwell v. Connecticut, 310 U.S. 296 (1940): "[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot." *Id.* at 308. The Supreme Court has allowed deprivation without notice or hearing of certain *property* interests in a few limited situations: to collect the internal revenue taxes due the United States, Phillips v. Commissioner, 283 U.S. 589 (1931); to meet the needs of war, Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); Central Union Trust Co. v. Garvon, 254 U.S. 554 (1921); Stoeher v. Wallace, 255 U.S. 239 (1921); United States v. Pfitsch, 256 U.S. 547 (1921); to protect the economy from bank failure, Fahey v. Mallonce, 332 U.S. 245 (1947); to protect the public from misbranded drugs, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); and to protect the public from contaminated food, North American Storage Co. v. Chicago, 211 U.S. 306 (1908). *See also* Krohn-Hite Corp. v. Berube, 372 F. Supp. 1262 (D. Mass. 1974), where the *ex parte* granting of a temporary restraining order under Massachusetts law was held unconstitutional because there existed no extraordinary situation where some valid governmental interest was at stake.

[38] W. VA. CODE ANN. § 53-5-8 (1966).

[39] *Id.*

[40] 393 U.S. at 180. See FED. R. CIV. P. 65(b)(2) where a condition precedent to the issuance of a temporary restraining order without notice is certification by the applicant's attorney in writing of the efforts, if any, which have been made to give the adverse party notice.

situation where the preliminary injunction could be constitutionally issued.[41] The only criterion that must be set in West Virginia in that the court or judge must be "satisfied . . . of the plaintiff's equity."[42] Furthermore, there need not even be affidavits filed, since the judge may be satisfied by "affidavits or otherwise."[43]

The primary distinction of the *Carroll* case is that the conduct enjoined there was the holding of political rallies or meetings protected by the first amemdment. A good deal of the language in *Carroll* is couched in terms of basic first amendment rights. "[T]here is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or notify the opposing parties and to give them an opportunity to participate."[44] As opposed to other first amendment modes of expression, the notice requirement was deemed more compelling in *Carroll* because it involved a rally and a *political* speech rather than books, literature or other forms of "*social* expression." The distinguishing feature there was the element of timeliness inherent in *political* expression.[45] The apparent

[41] W. VA. CODE ANN. § 53-5-8 (1966). Federal rule 65 requires "a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition . . . ." FED. R. CIV. P. 65(b)(1).

[42] W. VA. CODE ANN. § 53-5-8 (1966).

[43] *Id.* The requirement of anything that satisfies the judge of the plaintiff's equity has been held sufficient under this section. McGregor v. Camden, 47 W. Va. 193, 34 S.E. 936 (1899). Even if the affidavit is not in itself sufficient, the judge may be satisfied by other documents filed with the affidavit. Oil Run Petroleum Co. v. Gale, 6 W. Va. 525 (1873). *But see* Shonk v. Knight, 12 W. Va. 667 (1878) where the court held that no injunction can be awarded upon an affidavit filed by a third party.

[44] 393 U.S. at 180. "In the present case, it is clear that the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding before the holding of the rally was restrained, is incompatible with the First Amendment." *Id.* at 185. "The facts in any case involving a public demonstration are . . . difficult to evaluate. In the absence of evidence and argument offered by both sides and of their participation . . . there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." *Id.* at 183.

[45] *Id.* at 182. The Court quoted favorably from A Quantity of Books v. Kansas, 378 U.S. 205 (1964), where Mr. Justice Harlan distinguished political and social expression. "It is vital in the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest." *Id.* at 224. *See also* New York Times Co. v. United States, 403 U.S. 713 (1971). *But see* Schenck v. United States, 249 U.S. 47 (1919).

fear was that minority expression and political input could be stifled by a majority by means of the *ex parte* injunction.

It is conceivable that the application of this case to the West Virginia statute could be limited to situations where the target of the preliminary injunction is first amendment behavior, or, in the extreme, situations involving timely first amendment political expression. Even if *Carroll* were considered a due process mandate, it could still be interpreted as applicable only when first amendment rights are abridged, and its impact upon the West Virginia procedure would be limited.

On the federal level, three West Virginia statutes have been declared unconstitutional by the United States District Court for the Southern District of West Virginia: the summary distress warrant, an attachment and garnishment procedure, and the improver lien statutes.

In *Shaffer v. Holbrook*,[46] the court ruled unconstitutional the West Virginia summary distress procedure, basing the holding on the absence of an opportunity to be heard prior to seizure, which deprived the tenant of his property without due process of law as required by the fourteenth amendment.[47] Although the defendant had a right to get a quick hearing on the merits after the taking, the three-judge court held that such postseizure remedy is not a constitutionally adequate substitute for a prior hearing.[48]

Similarly, the West Virginia attachment and garnishment procedure was declared unconstitutional in *Union Barge Line Corp. v. Marble Cliff Quarries Co.*[49] There a corporation had garnished the receipts of a sale through which the defendant corporation sought to transfer its assets. Although the court recognized that protection of creditors from fraudulent alienation of assets *could* reach the level of an "important governmental or general public interest" allowing *ex parte* deprivation, the crucial factor was the absence of a provision for a prior consideration by a state official of the probable validity of the claim.

The third federal district court decision, *Straley v. Gassaway Motor Company*,[50] invalidated the West Virginia improver's lien

[46] 346 F. Supp. 762 (S.D. W. Va. 1972).
[47] *Id.* at 766.
[48] *Id.*
[49] 374 F. Supp. 834 (S.D. W. Va. 1974).
[50] 359 F. Supp. 902, 906 (S.D. W. Va. 1973).

statutes,[51] under which the improver-lien holders had an "automatic lien" on the improved property in their possession and could, without prior adjudication or hearing, advertise and sell the property to satisfy whatever debt they claimed. Citing heavily from *Shaffer,* the court declared the statutes void under the due process provisions of the fourteenth amendment, since the improver was not required to institute an action or to even make an affidavit prior to depriving one of his property.

These federal decisions, as well as the West Virginia case of *State* ex rel. *Payne v. Walden,*[52] relied heavily on two recent United States Supreme Court decisions, *Sniadach v. Family Finance Corp.*[53] and *Fuentes v. Shevin.*[54] These Supreme Court cases, and their relation to *ex parte* deprivation of property rights,[55] merit a close examination and then re-evaluation in light of the more recent Supreme Court decision in *Mitchell v. W. T. Grant Co.*[56]

In *Sniadach,* a Wisconsin prejudgment garnishment procedure was declared unconstitutional as violative of due process. Determinative of the statute's unconstitutionality was that it submitted an alleged creditor *ex parte* to garnish and freeze the defendant debtor's wages without notice or a chance to be heard. The debtor had no opportunity to tender any defense prior to being deprived of what the Court called "wages—a specialized type of property presenting distinct problems in our economic system,"[57] the deprivation of which "may impose tremendous hardship on wage earners with families."[58]

In *Fuentes,* the Court declared unconstitutional the prejudg-

[51] W. VA. CODE ANN. § 38-11-3 (1966) and W. VA. CODE ANN. § 38-11-14 (Supp. 1974). The latter *does* require notice to the owner of when his property is going to be sold; however, the legal right of the improver to sell is established without notice and hearing. *See generally* Note, *Post*-Fuentes *Constitutionality of Garagemen's Liens,* 54 BOST. U.L. REV. 542 (1974).

[52] 190 S.E. 770 (W. Va. 1972).

[53] 395 U.S. 337 (1969).

[54] 407 U.S. 67 (1972).

[55] Other Supreme Court cases requiring notice and hearing prior to property deprivation include Goss v. Lopez, 95 S. Ct. 729 (1975); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelley, 397 U.S. 254 (1970); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); United States v. Illinois Central R. Co., 291 U.S. 457 (1934); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915). See 26 U. MIAMI L. REV. 823 (1972) for a basic overview.

[56] 416 U.S. 600 (1974).

[57] 395 U.S. at 340.

[58] *Id.*

ment replevin statutes of Florida and Pennsylvania,[59] which allowed the creditor, *ex parte* without notice or prior hearing, to obtain a writ of replevin by posting a bond for double the value of the property to be replevied. The sheriff, by statute, was then required to seize the property, thereby executing the writ. The Court, in a 4-3 decision,[60] declared these statutes unconstitutional under the fourteenth amendment as deprivations of property without due process of law.

Both *Sniadach* and *Fuentes* deal at length with the right to notice and hearing as a prerequisite to deprivation of one's constitutionally protected property rights. However, the current state of the law in this area and the import of these cases has been seriously altered, or at least confused, by the 1974 case of *Mitchell v. W. T. Grant Co.*[61] The fact situation there was similar to that in *Fuentes,* but the Court held the Louisiana procedure for obtaining writs of sequestration constitutional. The determinative elements of the statute in *Mitchell*[62] were: (1) the writs of sequestration were issued by judges, not clerks, as in *Fuentes*; (2) the plaintiff creditor had to allege in his affidavit "specific facts" which clearly show a ground for relief; (3) there was an immediate hearing and dissolution of the writ when the plaintiff could not prove the grounds upon which the writ was issued; and (4) under Louisiana law, if there were a transfer by the debtor of the property, the creditor lost his lien.

*Sniadach* was distinguished from *Mitchell* mainly because of the emphasis on the special property nature of wages. However, the Court also emphasized the added statutory protections assured the debtor in *Mitchell,* and that the creditor had a prior interest in the property attached.[63] This distinction is essential to a consideration of the constitutionality of the West Virginia preliminary injunction statute.[64]

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[59] Like the West Virginia injunction statute, W. VA. CODE ANN. § 53-5-8 (1966), the Pennsylvania statute considered in *Fuentes* did not require that there *ever* be an opportunity for a hearing on the merits of the claim. The party whose property is taken, like the preliminarily enjoined party in West Virginia, had to initiate legal action himself in order to regain the property he owned.

[60] Justices Powell and Rehnquist did not participate in this case.

[61] 416 U.S. 600 (1974).

[62] 416 U.S. 600, 604 (1974).

[63] *Id.*

[64] W. VA. CODE ANN. § 53-5-8 (1966).

The West Virginia statute allows *ex parte* deprivation of property and nonproperty interests, and the application of *Mitchell, Fuentes,* and *Sniadach* is limited to deprivation of property. *Mitchell* allowed state protection of the creditor's present property interest through statutory, *ex parte* writs of sequestration. The existence of a vendor's lien and the creditor's current real interest in the property sequestered are material distinctions to be noted when applying the Court's holding in *Mitchell* to the deprivation of property allowed under the West Virginia rule.[65] It would, of course, be possible to posit a situation where a preliminary injunction under the West Virginia provisions would be used to protect a present property interest, but such use of the statute would not be exclusive and, consequently, one could expect frequent usage where no pre-existing property interest was involved.[66] While the effect of the West Virginia statute is to allow the protection approved in *Mitchell,* it is overly broad in that it also permits deprivation of property (as well as life and liberty) in which the affiant has no real, current property interest.[67]

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[65] "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the debtor. . . . The reality is that both seller and buyer had current, real interests in the property . . . .

With this duality in mind, we are convinced that the Louisiana sequestration procedure is not invalid . . . ." 416 U.S. at 604. The Court expressed great concern for the need for protection of the vendor's interest since that interest is subject to daily use and erosion, and because if given notice, the debtor could convey the property to someone else who would receive clear title. *Id.* at 608. An ancillary argument arises to bolster the constitutionality of issuance of no-notice preliminary injunctions. In some situations, a defendant given notice could act to the detriment of the plaintiff thereby fostering injustice and effectively settling the issue in behalf of the defendant. The difference is that *Mitchell* involved an easily proven, ordinarily uncomplicated interest, worthy of protection, effectively established by affidavit, specific facts, and documentary proof before a judge. *Id.* at 609. But an applicant for an injunction would rarely have this discernible type of interest warranting protection from a debtor armed with notice. Of course, under the federal rule the judge could consider the chances of debtor malfeasance as the section (b)(1) "immediate and irreparable harm."

[66] A common "property application" of W. VA. CODE ANN. § 53-5-8 (1966) would involve the preliminary enjoining of a defendant from selling certain goods or dealing with certain concerns or, more commonly, enjoining the *use* of one's property.

[67] But in further distinguishing *Sniadach* the Court summarized the usual rule as, "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination is adequate." 416 U.S. at 611. The Court also quoted favorably from Ewing v. Mytinger and Casselberry, 339 U.S. 594 (1950), which dealt with misbranded drugs: "[W]e have repeatedly held that no hearing at the preliminary

The main distinction between *Fuentes* and *Mitchell,* both of which involve creditors with current property interests, is that *Fuentes* "was decided against a factual and legal background sufficiently different" from that in *Mitchell.*[68] The Court pointed to the four determinative elements listed above as adequate safeguards missing in *Fuentes* and also denied that there must be a final adjudication before even a temporary deprivation of possession would be allowed. The criterion for allowing deprivation of possession without final adjudication is that the issues decided at the *ex parte* hearing are "ordinarily uncomplicated matters that lend themselves to documentary proof."[69] Such reasoning is inapplicable to the issuance of a preliminary injunction under the West Virginia statute. More is involved than simple allegation of a few facts; many of the determinative issues involve equitable defenses such as "laches" or "unclean hands" which warrant consideration in an adversary context. The issues are complex, dependent upon questions of fact, subject to many defenses, and less readily proven by documents such as contracts or lien agreements actually signed by the absent party. Moreover, the chance of severe harm to the defendant by an *ex parte* preliminary injunction is generally greater than any harm an individual could suffer from a sequestration of an item of personal property encumbered with a vendor's lien. Since the scope of preliminary injunctions is virtually unlimited, the potential is great for abuse and catastrophic prejudgment deprivation.

In *Mitchell,* the Court emphasized that the debtor was protected by a mandatory bond provision which required a bond *sufficient* to protect the vendee against all damages in the event the sequestration is later found to be improper.[70] In West Virginia, however, the judge awarding the injunction has wide discretion as

stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.* at 598. "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and some judicial determination." *Id.* at 599. These and other cases cited by the Court allowed prejudgment deprivation, but involved extraordinary governmental and public interests which impliedly justified the deprivation. See note 37, *infra,* for other such unique cases. But *Mitchell* protects a purely *private* interest; collection of a debt allegedly due a creditor. It is unclear whether the Court will adopt the rationale of these extraordinary cases as the controlling due process standards or will limit any such application to the facts, as in *Mitchell.*

[68] 416 U.S. at 615.

[69] *Id.* at 609.

[70] *Id.* at 608.

to the amount of the bond, or whether to require one at all, with no statutory guarantee of sufficiency.[71] Therefore, there is no safeguard in West Virginia, as was found in *Mitchell,* against procurement of wrongfully issued judicial orders.

## Summary and Proposals

Recent case law in West Virginia and on the federal level reflects a disdain for summary deprivations. Armed with *Sniadach* and *Fuentes,* even the most conservative of judges has found himself elaborating on the woes of the unfortunate defendant, who watches in surprise as men waving pieces of paper signed by the creditor and clerk cart off the new television, haul out the old couch, or skim a percentage off the weekly pay check. But with the *Mitchell* case, a new counter-interest, worthy of protection, emerged: the pre-existing property interest of a creditor. While the West Virginia provisions allowing preliminary injunctions could be used to effectively protect that interest, it would constitutionally require a judge whose concept of equity is satisfied only by an affidavit alleging "specific facts" warranting *ex parte* deprivation. But this one constitutionally permissible use of the statute exists in the face of unlimited possibilities for unconstitutional use reminiscent of the "government by injunction" days. The statute permits a simple affidavit to serve as the basis for a judicial order which could resolve an issue in dispute or even change ownership of property. Furthermore, there is no requirement that the other party be notified or heard from, and no guarantee that the affiant will be ordered to post bond "just in case" he is mistaken.

Other than possible protection of *Mitchell*-like interests (or interests deemed to be protectable under *Mitchell* through later decisions), what other public or state interests could be furthered by the West Virginia procedure? Arguably, there are situations where there is no time to notify the adverse party or there is a likelihood that, if notified, the adverse party will act unjustly to the affiant's detriment. This is a "reality" similar to the one in *Mitchell* against which the Supreme Court permitted state protection. An example is debtor alienation or destruction of property after notice of repossession being initiated.

Rule 65 of the Federal Rules of Civil Procedure allows issuance of a temporary restraining order for up to ten days followed by an

[71] W. VA. CODE ANN. § 53-5-9 (1966).

adversary hearing on the equity of a preliminary injunction. As a prerequisite to issuance, however, the court must have "specific facts" as to the merits of the claim and some justification for not notifying the other side as well as a bond security. Under this rule the absent parties are afforded minimum constitutional safeguards, shielding them somewhat from prolonged deprivation.

Perhaps a radical shift to the federal rule is not warranted, given the fact that in practice, nearly all West Virginia judges *do* require notice to be given to the other party (even though they are not required to), and because the West Virginia statute is not unconstitutional on its face. A compromise position could permit retention of the preliminary injunction in such a way that temporary restraining orders would not be needed and, at the same time, preclude unconstitutional application. To achieve this, several changes would be necessary. First, require more than "satisfying the judge of the plaintiff's equities by affidavit or otherwise." A specific allegation (by affidavit) of determinative facts would be necessary. The facts required would vary from case to case, given the unlimited scope of the statute and the myriad interests affected.[72] Second, require specific allegations of why the other party should not or could not be notified. Third, require posting of a bond by the affiant in a sum necessary to compensate the defendant in case of misapplication of the statute in every case, except those expressly exempted by statute.

The major problem which would remain after these changes would be the unlimited duration of the preliminary injunction absent affirmative action by the party enjoined. A balancing test could be utilized here which might tip the scales in favor of the state's interest in allowing *ex parte* deprivation as opposed to a guaranteed right to prior notice and hearing. However, it may be argued that such a statute does not further such interest as narrowly as is possible. The same state interest could be furthered by a federal rule-oriented approach using temporary restraining orders of short duration in lieu of indeterminate preliminary injunctions. Such a process would shift the burden of affirmative action to the affiant, who must, under the federal rule, apply for a preliminary injunction or face dissolution of the temporary restraining

[72] See W. VA. R. CIV. P. 4(e)(1) for a listing of the specific facts which may be alleged by affidavit in order to institute constructive service and process by publication. See also W. VA. CODE ANN. § 56-3-23 (1966).

order, and would restrict the length of the *ex parte* deprivation to a statutory period.*

*William Wade Pepper*

*Editors Note: After this article was prepared for publication, the United States Supreme Court decided the case of *North Georgia Finishing Inc. v. Di-Chem, Inc.* 95 S. Ct. 719 (1975). The Court declared unconstitutional the prejudgment garnishment of a debtor corporation's bank account because the statutory procedure: (1) authorized prejudgment garnishment after the filing of a conclusory affidavit, rather than one based on "specific facts" as required in *Mitchell*; (2) failed to provide for an early hearing to require the creditor to prove the grounds upon which it was granted; and (3) provided for filing of the affidavit and issuance of the writ by a clerk of the court rather than a judge.

The important effects of *Di-Chem* on this article are that: first, the procedural due process protections present in *Mitchell* were upheld by the Court and cited in *Di-Chem* to distinguish the two cases while the procedure in *Di-Chem* did not provide the protection afforded in *Mitchell* and was struck down; second, the Court rejected the contention that the posting of a double bond adequately protects the debtor from improper *ex parte* deprivations on the ground that "the probability of irreparable injury . . . is sufficiently great so that some procedures are necessary to guard against the risk of initial error," 95 S. Ct. at 723; and, third, the Court expressly refused to distinguish among different kinds of property in applying the due process clause. Referring to *Sniadach* and *Fuentes* the Court stated that, "although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort." *Id.* at 722.