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Abstracts of Recent Cases

James Kilgore Edmundson Jr.
West Virginia University College of Law

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and resulting from the employment without the hindrance of strict rules which might prevent a true determination of whether or not there was an actual abandonment of employment. Of course, the result is a determination of each case on its own peculiar facts, but this would seem to be the intent of the broadly-worded workmen's compensation acts.

Charles Henry Rudolph, Jr.

ABSTRACTS

Criminal Law—Conspiracy—Defendant Has Absolute Right to Separate Trial

D was indicted with five others for conspiracy to commit murder. The trial court overruled his motion for severance, and a writ of prohibition was brought on his behalf. *Held*, writ awarded. A defendant jointly indicted for a felony has the absolute right to elect a separate trial. *State ex rel. Zirk v. Muntzing*, 120 S.E.2d 260 (W. Va. 1961).

At common law severance by either the defendants or the state was a matter of judicial discretion. This rule was modified by the legislature, and the instant case is the first to explicitly interpret the statute, where a defendant's right to separate trial is at issue. W. VA. CODE ch. 62, art. 3, § 8 (Michie 1955). The statute provides that joint defendants must agree on which jurors to strike or the prosecuting attorney will strike for them to reduce the panel to twelve. But if the defendants "elect to be, or are, separately tried . . ." the normal procedure for striking shall be followed. The attorney general contended that taking the statute as a whole, it did not grant an unqualified right to elect a separate trial.

Another statute could have a bearing on the matter of severance in conspiracy cases. Persons who conspire and attempt to inflict injury on another may be indicted for a felony under the provisions of the "Red Men's" statute. W. VA. CODE ch. 61, art. 6, § 7 (Michie 1955). The prosecution may indict the accused either jointly or severally. It is arguable that if the state has the choice of how it may indict, then the defendants can not have the choice of how

they shall be tried. Of what value is a joint indictment if as a matter of right the defendant can defeat it by demanding a separate trial? Further, a special statute providing for the trial of a conspiracy charge is to be preferred over a general statute relating to venire.

Certainly the result of this case was predictable. In two prior decisions involving the venire statute, the West Virginia Supreme Court said in dicta that the defendant's right to separate trial was absolute. In *State v. Roberts*, 50 W. Va. 422, 40 S.E. 484 (1901), the denial of defendant's motion for joint trial was affirmed. In *State v. Prater*, 52 W. Va. 132, 42 S.E. 230 (1902), defendants' attempt to withdraw a motion for severance was properly refused by the trial court since the state had also asked for separate trial.

In comparison, Virginia has a similar statute relating to venire, and includes the phrase "elects to be separately tried. . . ." VA. CODE ANNOT. § 19.1-202 (Repl. Vol. 1960). No decision in point has been reached, but a defendant's right to separate trial is accepted as a matter of course. 46 VA. L. REV. 1495 (1960). This view was affirmed in a case identical in issue to the *Prater* case, *supra*. *Campbell v. Commonwealth*, 201 Va. 507, 112 S.E.2d 115 (1960).

Evidence—View by Jury in Eminent Domain Proceedings

In a jury trial in eminent domain proceedings, condemnor's motion for a view of the premises was denied. *Held*, reversed. A view of the premises is attainable as a matter of right by either party. Such a view is evidence to be considered by the jury in ascertaining just compensation for the land condemned and damages to the residue. *State Road Comm'n v. Milam*, 120 S.E.2d 254 (W. Va. 1961).

Two questions of substantial importance were clarified by this case. First, two sections of the Code apparently conflict as to whether the parties have an absolute right to a view. One provides that a view is proper "when it shall appear to the court . . . necessary to a just decision. . . ." W. VA. CODE ch. 56, art. 6, § 17 (Michie 1955). The other provides that, where a jury is impaneled to arrive at compensation and damages after the submission of the commissioner's report, it shall proceed under the lawful requirements binding on the commissioners, which in part require a view of the

premises. W. VA. CODE ch. 54, art. 2, §§ 9, 10 (Michie 1955). On this point the special statute in the chapter on eminent domain governs over the general statute in the chapter on pleadings and practice. A prior decision, which did not apply the special statute, arrived at a contrary result and to that extent was overruled. *Simms v. Dillon*, 119 W. Va. 284, 193 S.E. 331 (1937).

Second, the findings of a view constitute admissible evidence to be considered by the jury in its determination of compensation and damages in eminent domain proceedings. Some American courts hold that since the findings can not be admitted to record, it is not evidence. McCORMICK, EVIDENCE § 183 (1954). And several West Virginia decisions had implied that a view only enabled a jury to understand and apply the evidence or that a view was ancillary. See *State Road Comm'n v. Sanders*, 125 W. Va. 143, 23 S.E.2d 113 (1942), and cases cited therein. This position is not now approved. In a review of those cases coupled with other decisions that adhere to the position that a view is evidence, Dean Hardman concluded that any seeming inconsistency in the cases is not actual. Hardman, *The Evidentiary Effect of a View: Stare Decisis or Stare Dictis?*, 53 W. VA. L. REV. 103 (1951). The leading case in accord with the present holding approved an instruction as correct which prescribed in part that a view is evidence. *Guyandot Valley Ry. v. Buskirk*, 57 W. Va. 417, 50 S.E. 521 (1905).

Federal Courts—Comity—Enjoining Prosecution of Compulsory Counterclaim in Another District

Lessor brought action in a federal district court for breach of an equipment lease. The lessee answered and counterclaimed, alleging a prior breach by the lessor. Subsequently, the lessee filed suit in an Alabama federal district court, adding a new claim of fraud. Lessor appeared to ask the Alabama district court to stay prosecution which was denied. Lessor then asked the same of the New York district court which granted the stay. *Held*, affirmed. Any claim before the Alabama court would be considered in New York under the compulsory counterclaim rule or be precluded. New York attained first jurisdiction; that court then had the right to enjoin the lessee from furthering his Alabama action. *National Equipment Rental v. Fowler*, 287 F.2d 43 (2d Cir. 1961).

One judge dissented on the ground that the Alabama denial of the stay should be accepted by the New York court, if not under the rule of *res judicata*, then by virtue of comity, and failure to do so was abuse of discretion. Of primary concern is the prevention of a multiplicity of actions. But the result would be to penalize the lessor for protecting his rights in the wrong court. Where plaintiff, after filing suit in one district court actually defended himself on the same matter in a second district court, he did not thereby abandon his first suit and was permitted to proceed after the second one was stymied by a hung jury. *Brooks Transp. Co. v. McCutcheon*, 154 F.2d 841 (D.C. Cir. 1946).

The dissenting judge also took issue with the majority because it based its decision on the compulsory counterclaim rule. FED. R. CIV. P. 13(a). That is, the fraud pleaded in Alabama is pleadable in New York. Therefore, the majority necessarily considered the actions essentially the same, and the court of first jurisdiction should hear the case. *Joseph Bancroft & Sons v. Spunize Co. of Am.*, 268 F.2d 522 (2d Cir. 1959). But the dissent pointed out that this subverts other jurisdictional considerations such as convenience to the parties and witnesses to the priority of action rule. *Hammett v. Warner Bros. Pictures*, 176 F.2d 145 (2d Cir. 1949). The penalty for failure to assert a counterclaim is not to deny the lessee his right of action in Alabama, but the preclusion of that claim in New York.

Federal Courts—Jurisdiction—Claim Under FELA Need Not Involve Minimum Jurisdictional Amount

In federal district court *P* sought and recovered damages less than 10,000 dollars under the Federal Employers' Liability Act for a sprained ankle and loss of earnings. The district court founded its jurisdiction on 28 U.S.C. § 1137 (1958), which grants a district court authority to hear controversies arising under any acts regulating commerce. *Held*, the lower court had jurisdiction, although *P* did not assert the normal minimum claim. *Imm v. Union Ry.*, 289 F.2d 858 (3d Cir. 1961).

Two sections of the federal code which confer substantial original jurisdiction on federal district courts require a minimum claim of 10,000 dollars. These are the general federal question and

the diversity of citizenship provisions. 28 U.S.C. §§ 1331, 1332 (1958). Other provisions grant jurisdiction regardless of the amount in controversy. Among these is one which confers original jurisdiction in "any civil action or proceeding arising under any Act of Congress regulating commerce. . . ." 28 U.S.C. § 1137 (1958). *D* asked the lower court for a special finding that at no time did the amount in controversy exceed 10,000 dollars. *D* then contended that the FELA is not regulatory in nature, although *D* did not thereby challenge its constitutional foundation. The circuit court failed to give any merit to *D*'s argument. In holding the FELA statute constitutional, the United States Supreme Court considered it to be regulatory in nature. *Mondou v. New York, N. H. & H. R.R.*, 223 U.S. 1 (1912).

James Kilgore Edmundson, Jr.