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Abstracts of Recent Cases

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tinues to disallow probable cause as a defense in all false arrest and false imprisonment cases. However, West Virginia has provided a statute making shoplifting a breach of the peace and giving private persons the right to arrest for this act if committed in their presence.

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ABSTRACTS

Adoption — Rights of Inheritance of Natural Child of Adopted Child

C, the natural child of *A* who was adopted, is contesting the will of *A's* adopting mother. The trial court held that *C* was not a lawful lineal descendant of the testator, *A's* adopting mothers, and thus not able to contest the will. *Held,* reversed. The right of adopted children to have their children inherit under the statute of descent and distribution was one of the rights included in the statutory amendment which abolished any remaining distinctions between the legal rights of a natural and an adopted child. *In re Miner's Estate,* 103 N.W.2d 498 (Mich. 1960).

In 1959, the West Virginia Legislature amended the former code provision which deprived adopted children of the rights to take from lineal kindred of the adopting parents by representation. W. Va. Acts 1959, ch. 47. W. VA. CODE, ch. 48, art. 4, § 5 (Michie Supp. 1960). See *Wheeling Dollar Sav. & Trust Co. v. Stewart,* 128 W. Va. 703, 37 S.E.2d 563 (1946), interpreting the section prior to amendment.

The pertinent Michigan statute does not specifically provide for the fact situation presented in the principal case nor does the West Virginia statute as it now reads. However, the West Virginia statute, like the Michigan statute, does entitle the adopted child to "all the rights and privileges of a natural child of the adopting parents. . . ." Further, the West Virginia statute gives the adopted child the same rights of inheritance from his adoptive parents and the parents' lineal kindred as though he were a natural child of the adopting parents. It also provides for the adopted child's intestate property to pass as though he were a natural child of the adopting parents. Thus by analogy with the reasoning of the princi-

pal case, it seems fairly certain that the West Virginia statute would be interpreted to allow a natural child to inherit by representation from his parent's adopting parent.

Criminal Law — Effect of Judgment When One Count Is Improper

Appellant was convicted of larceny and of receiving the same stolen property, the sentences to run concurrently. On appeal, the latter sentence was vacated, but the court stated that this was not sufficient grounds for reversal of the judgment and upheld the larceny sentence. *Held,* affirmed. The case falls within the rule of affirmance of the judgment where one count is proper and is sufficient to support the judgment, even though there is an improper conviction on another count. *Milanovich v. United States,* 215 F.2d 716 (4th Cir. 1960).

There was a vigorous dissent in the principal case on the theory that as the conviction was improper on both counts conjointly, it was for the jury, upon proper instructions, to select the count for conviction, and the court by refusing the reversal exercised a jury function. The dissent distinguishes the principal case where the counts were interrelated from the cases involving independent counts cited by the majority as support for its conclusion. *Hirabayashi v. United States,* 320 U.S. 81 (1942); *Abrams v. United States,* 250 U.S. 616 (1919); *Claassen v. United States,* 142 U.S. 140 (1891). Another case, *Heflin v. United States,* 358 U.S. 415 (1959), was distinguished by the fact that the court was only asked that the receiving sentence be struck down. It was an appeal from a conviction, not an attempt to revive a sentence.

Further, though there appears to be no federal cases exactly in point, there are several state cases which have dealt with the problem. The decided majority of the state cases have granted reversal. *Bargesser v. State,* 95 Fla. 404, 116 So. 12 (1928); *Tobin v. State,* 104 Ill. 565 (1882); *Commonwealth v. Haskins,* 128 Mass. 60 (1880); *In re Franklin,* 77 Mich. 615, 43 N.W. 997 (1889). Though the general rule grants affirmance of a proper count where another count with concurrent sentence is held invalid, a plausible exception to this, following the state cases, would require reversal where the verdict is inconsistent.

Criminal Law — West Virginia Cumulative Sentences Statute

Relator had been sentenced under two prior convictions when convicted a third time. The court made no provision for the beginning of the sentence in the last conviction, believing the sentence to be life imprisonment under the habitual criminal act. However, the habitual criminal act was found inapplicable and thus the life sentence invalid. This case came to the West Virginia Supreme Court on an original habeas corpus proceeding. *Held,* that the case is not within the purview of W. VA. CODE, ch. 61, art. 11, § 21 (Michie 1955), and consequently must be decided from the common law which holds that the sentences are to run concurrently unless expressly provided to the contrary. *State ex rel. Yokum v. Adams,* 114 S.E.2d 892 (W. Va. 1960).

The West Virginia Code provides that sentences will run consecutively unless otherwise expressed "when any person is convicted of two or more offenses, before sentence is pronounced for either. . . ." W. VA. CODE, ch. 61, art. 11, § 21 (Michie 1955). The statute is clearly confined in scope to situations where the last conviction occurs before sentencing for prior convictions. However, two prior West Virginia decisions seem to have overlooked this obvious limitation. The first of these is *State ex rel. Medley v. Skeen,* 138 W. Va. 409, 76 S.E.2d 146 (1953). The fact situation was substantially identical to that of the principal case and though the last conviction was subsequent to sentencing on other convictions, the term for the former was held to run consecutively with the earlier terms. The basis given for the decision was the previously cited statute. The other case is *State ex rel. Kuhn v. Adams,* 143 W. Va. 551, 103 S.E.2d 530 (1958), which relied on *State ex rel. Medley, supra.* The court stated that because of the statute West Virginia is contra to the common law majority which presumes concurrent sentences. 15 AM. JUR. *Criminal Law* § 465 (1938); Annot., 70 A.L.R. 1511 (1931).

Though the principal case did not expressly overrule the prior decisions, it should be considered as properly confining the scope of the West Virginia statute.

Property — Adverse Possession — Mistaken Possession Beyond the True Line

Appellants occupied the land in dispute under the mistaken belief that it was part of the tract covered by their deed. The

trial court below held this insufficient to establish adverse possession. *Held,* affirmed. To gain title by adverse possession it is essential that the possession be hostile which necessarily includes the intention to dispossess the owner. Mistaken possession beyond the true line to which the possessor intends to claim is not hostile. *Lynch v. Lynch,* 115 S.E.2d 301 (S.C. 1960).

The principal case is in accord with the majority view that whether possession is adverse is dependent on the possessor's intent with respect to ownership; possession up to a supposed line beyond the true line with intent to hold only to the latter is only hostile to the true line.

However, there are several cases contra, holding that possession mistakenly beyond the true line is hostile and can ultimately ripen into title. *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 76 N.W.2d 355 (1956).

West Virginia seems to follow the minority view in holding that mistaken possession beyond the true line, though not sufficient to establish adverse possession under the color of title, does give the possessor the requisite hostility for that which he actually possesses. *Greathouse v. Linger,* 98 W. Va. 220, 222, 127 S.E. 31, 32 (1925); *Heavner v. Morgan,* 41 W. Va. 428, 440, 23 S.E. 874, 878 (1895). Though West Virginia requires intent as a necessary element of adverse possession, *Core v. Faupel,* 24 W. Va. 238, 244 (1883), apparently mere intent to possess that actually occupied is sufficient, even though mistaken as to ownership and not actually intending to dispossess anyone.

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