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## Workmen's Compensation—Award as a Proper Subject for Remittitur in an Action Against Third Parties

James William Sarver  
*West Virginia University College of Law*

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shows the testatrix withdrew the second will from the bank stating that she intended to change her will by the making of a new will. The intent to revoke the second will was dependent upon the making of a third will. It appears the doctrine of dependent relative revocation would apply to this set of facts and the second will would not have been revoked. However, this line of reasoning was apparently not advanced by counsel and so is merely parenthetical to the scope and purpose of this comment.

The plain language of the West Virginia statute on revocation puts revocation by subsequent will on the same footing as revocation by some other writing, and revocation by physical destruction. There is no distinction made and none is suggested by the statute. Instead all three methods of revocation appear equal. Revocation by some other writing and revocation by physical destruction undeniably take effect immediately. There is no basis to suppose that the legislature intended to allow two methods of immediate revocation while the third method could not take effect until death. Furthermore, if revocation could not take effect until death then the revival statute allowing revival only by reexecution or republishing would be meaningless in the case of revocation by a later revoking will since the testator would not be alive to revive it.

The dissenting opinion of the principal case takes the view that the first will was revoked at the time of execution of the second will by virtue of the express clause of revocation. The first will would then be null and void, and since it had never been revived under the provisions of the revival statute, the testatrix died intestate. This appears to be the more reasonable of the two views since the expressed intent of the testatrix would be carried out and the purposes of the statute would be accomplished.

*John James McKenzie*

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**Workmen's Compensation—Award as a Proper Subject for  
Remittitur in an Action Against Third Parties**

*A*, while working for *B*, a subscriber to the West Virginia Compensation Fund, was electrocuted due to the alleged negligence of *C*. *A*'s administratrix, after recovering workmen's compensation through *B*, received a judgment against *C*, no part of which was offset by the workmen's compensation award. *Held*, reversing the verdict upon other grounds, that the amount of compensation received for the

death under workmen's compensation was not a proper subject for remittitur on retrial. *Jones v. Appalachian Elec. Power Co.*, 115 S.E. 2d 129 (W. Va. 1960).

The ruling in the principal case disapproves the decision in *Brewer v. Appalachian Constructors, Inc.*, 135 W. Va. 739, 65 S.E.2d 87 (1951). In the *Brewer* case, the plaintiff was injured by an explosion caused by the combined negligence of B, his employer, a subscriber to the West Virginia Compensation Fund and C, a third party. The plaintiff recovered a workmen's compensation award, then joined B and C as joint tort-feasors in an action to recover for the injury. The employer's demurrer was sustained when the plaintiff failed to show that an intentional injury was inflicted. However, it was stated that the award the plaintiff recovered from the workmen's compensation fund on account of one of the joint tort-feasors being a subscriber to the workmen's compensation fund, was a satisfaction, *pro tanto*, as to the others.

The soundness of the holding in the principal case, which overrules *Brewer v. Appalachian Constructors, Inc.*, *supra*, is obvious when the language of the *Brewer* case is examined. The rule there stated is that a plaintiff can have only one recovery for an injury. The major premise of the rule is that an award from the workmen's compensation fund is a recovery; and hence the logical conclusion is that part of the injury compensated by sums from workmen's compensation should apply as partial payment of the injury. The authority for the major premise was taken from *New River & Pocahontas Consol. Coal Co. v. Eary*, 115 W. Va. 46, 176 S.E. 573 (1934). However, the *New River* case did not involve a claim for workmen's compensation. It simply repeated that partial satisfaction of an injured person by one joint tort-feasor was a satisfaction, *pro tanto*, as to all.

In the instant case, the West Virginia Supreme Court of Appeals clearly settled the question of an injured party's right to a double recovery.

The Workmen's Compensation Act in West Virginia, W. Va. CODE ch. 23 (Michie 1955), contains no provision concerning the employee's remedy against negligent third parties. The majority of workmen's compensation acts either assign the rights of employees against negligent third parties, or allow for the subrogation of the employee's cause of action. See 2 LARSON, WORKMEN'S COMPENSATION § 74 (1st ed. 1952). Only West Virginia, Ohio and New

Hampshire fail to permit the reimbursement of the payor of compensation by third party tort-feasors in some manner. See 3 SCHNEIDER, WORKMEN'S COMPENSATION § 476 (3rd ed. 1943).

Three theories have been advanced in support of the principal case. First, that the right of the employee under the act arises *ex contractu* not *ex delicto*. See Comment, 54 W. VA. L. REV. 172 (1952). The basis of this theory is that the employer has breached a promise, rather than a duty, growing out of the employment contract. Therefore, it must follow that the recovery for the tort from third parties arises separately, and that such recovery can in no way be offset by a compensation award. Secondly, that the award from workmen's compensation is solely for statutory benefits while the action against a third party tort-feasor results from common law liability. In *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277 (4th Cir. 1940), the court stated that an employer subscribing to the workmen's compensation fund cannot be joined in a tort action to pay his employee because the employer is liable whether he be negligent or not. The claim against the third party is for damages. The two are different in kind and cannot result in common liability. Thirdly, that the award recovered from workmen's compensation is to be treated as a type of insurance which does not amount to a recovery, in as much as it is an award to a beneficiary through an indemnification of an insurance policy. In *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S.E. 112 (1917), which was apparently overruled, although not commented on, by *Brewer v. Appalachian Constructors, Inc.*, *supra*, the court held "an employe who receives compensations for an injury from Workmen's Compensation fund, is not thereby estopped to sue a third person, not his employer, whose negligence caused his injury." Speaking of an injured party's dual remedies as set out in the insurance theory, the court continued, ". . . if occasioned by the negligence of a third person, his right to compensation out of the fund is not thereby affected, nor is his right of action against third persons causing the injury impaired. The provision of the act is somewhat in the nature of life and accident insurance."

Where a workman is killed while in the course of his employment, ". . . and a tort-feasor other than his employer is responsible therefor, the right to compensation. . . is not lost by a recovery of damages against the tort-feasor, by the personal representative of the deceased." *Mercer v. Ott*, 78 W. Va. 629, 89 S.E. 952 (1916). The Mercer case further noted that the money recovered from a third

party tort-feasor would be distributed according to the law of distribution of personal property left by the employee dying intestate, while the award from the workmen's compensation fund would be paid to the dependents of the deceased. It follows that if a remittitur had been allowed, as in *Brewer v. Appalachian Constructors, Inc.*, *supra*, either the amount recovered through workmen's compensation by the dependents would be denied as a result of the distributees recovery from third parties or the distributees of the employee would be denied full recovery of the judgment entered in their behalf, as a result of the dependent's claim through workmen's compensation.

The conclusion in the principal case solves the dilemma regarding who may recover, and the limit of the negligent third party's liability can no longer be gauged by the statutory, *ex contractu*, insurance feature of an award from workmen's compensation. The rule thus established, although appearing to be against the weight of authority in the United States, is supportable by sound reasoning and pages of historic record, the common law.

*James William Sarver*

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## ABSTRACTS

### Criminal Law—Witnesses—Compulsion of Spouse to Testify

*D* was tried and convicted of knowingly transporting a woman in interstate commerce for the purpose of prostitution, in violation of the Mann Act. In the District Court, the woman, who had since the date of the offense married *D*, was ordered, over her objection and that of *D*, to testify on behalf of the prosecution.

The Court of Appeals affirmed the ruling of the District Court. *Held*, judgment affirmed. Prosecution under the Mann Act constituted exception to the common law rule ordinarily permitting a party to exclude adverse testimony of his or her spouse, and in such a prosecution, witness who was victim of offense as well as *D*'s wife, could be compelled to testify against him. *Wyatt v. United States*, 80 Sup. Ct. 901 (1960).

The United States Supreme Court, in upholding the continued validity of the common-law rule of evidence ordinarily permitting a party to exclude the adverse testimony of his or her spouse,