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Administrative Law--Res Judicata--Determination of the Jurisdictional Fact

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transactions, it is to be expected that there will be a substantial amount of litigation in this field in the future.

J. H. M., Jr.

CASE COMMENTS

ADMINISTRATIVE LAW—*Res Judicata*—DETERMINATION OF THE JURISDICTIONAL FACT.—*P* was injured while employed by *D*. He applied for and received workmen's compensation. Later he sued under the F.E.L.A. for his injuries. *D* claimed that *P* was engaged in intrastate commerce and therefore was not covered by the F.E.L.A. and sought to assert the award of compensation as *res judicata* on this issue. *Held*, on appeal, that the award of compensation was not *res judicata* on the issue of the character of *P*'s employment. *Pritt v. West Virginia Northern R. R.*, 51 S. E.2d 105 (W.Va. 1948).

Intrastate employment is necessary to give a compensation commissioner jurisdiction to make a valid award. *Hoffman v. N. Y., N. H. & Hartford R. R.*, 74 F.2d 227 (2d Cir. 1934), *cert. denied* 294 U. S. 715 (1935). *Contra: Dennison v. Payne*, 293 Fed. 333 (2d Cir. 1923). Where the character of employment is determined by the commissioner and approved by a court the award is not collaterally attackable for lack of jurisdiction, and the determination is *res judicata*. *Chicago, R. I. & R. Ry. v. Schendel*, 270 U. S. 611 (1926). Where the character of employment is neither raised nor decided the award is collaterally attackable for lack of jurisdiction, and is not *res judicata*. *Hoffman v. N. Y., N. H. & Hartford R. R.*, *supra*. Where the issue of the character of employment is raised but not passed on the award is not *res judicata* being collaterally attackable on the basis of lack of jurisdiction. *Bretsky v. Lehigh Valley R. R.*, 156 F.2d 594 (2d Cir. 1946). If the character of employment is raised and determined by the commissioner the award is *res judicata* and not subject to collateral attack for lack of jurisdiction. *Williams v. Southern P. Co.*, 54 Cal. App. 571, 202 Pac. 356 (1921), *cert. denied* 258 U. S. 622 (1921); see *Dennison v. Payne*, *supra* (jurisdiction erroneously determined). When a commissioner makes an award he silently decides that he has jurisdiction; and the award is *res judicata* not being subject to collateral attack for lack of jurisdiction. *Landreth v. Wabash R. R.*, 153 F.2d 98 (7th Cir. 1946), *cert. denied* 328 U. S. 855 (1946).

In the instant case the West Virginia court determined: (1) that intrastate employment is necessary to give the commissioner jurisdiction to make a valid award; and (2) this jurisdiction is subject to collateral attack, preventing the award from being *res judicata*, where it does not appear that the question of jurisdiction was determined. An administrative determination is capable of being *res judicata*. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943). This result, however, as in the instant case, has been avoided by holding that the administrative unit lacked jurisdiction. *Hoffman v. N. Y., N. H. & Hartford R. R.*, *supra*. This raises the problems of the power of administrative bodies to determine if they have jurisdiction and the effect of such a determination. When a court decides that it has jurisdiction the decree is not subject to collateral attack on the ground of lack of jurisdiction, the decision being *res judicata* of that issue. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940); *Baldwin v. Iowa Traveling Men's Ass'n*, 283 U. S. 522 (1931). This "bootstrap doctrine" has given a partial solution to the problem, for courts. *Dennison v. Payne* is an application of this to administrative determination. This doctrine is objected to on the ground that it permits the court, or administrative body to "lift itself by its bootstraps" or confer jurisdiction on itself. The arguments in its favor are: (1) the question of jurisdiction must be raised at some time and an early determination is to be favored; (2) the court or administrative tribunal of first impression is as likely to decide the issue correctly as the tribunal where the collateral attack occurs; and (3) if the court of collateral attack erroneously determines the question it is conferring jurisdiction where there is none. Schopflocher, *Doctrine of Res Judicata in Administrative Law*, [1942] Wis. L. Rev. 5, 31. The West Virginia Supreme Court did not have to pass upon this "doctrine" in the instant case; but by dicta indicate that it would be rejected. What was rejected was an application of the *Chicot County* case doctrine to an administrative determination. Where a court decides a case on its merits it impliedly determines the question of jurisdiction and the decree is not subject to collateral attack for lack of jurisdiction. *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940). Essentially this is an extension of the "bootstrap doctrine" and the arguments for and against it are equally applicable. In addition it might be argued that here there is nothing to indicate that the issue was even considered or that the parties were even aware of it. However,

the problem could have been raised by the parties and their failure to do so should not give them a right of collateral attack. Any attack should be limited to direct attack by appeal. See Comment, 60 HARV. L. REV. 305 (1946). The *Landreth* case, *supra*, would seem to be an application of this to administrative determinations. *Contra: Bretsky v. Lehigh Valley R. R.*, *supra*. See Boskey & Braucher, *Jurisdiction and Collateral Attack: October Term 1939*, 40 COL. L. REV. 1006, 1012 (1940); Schopflocher, *supra*.

In conclusion it is submitted that the West Virginia Supreme Court in failing to apply the *Chicot County* case principle rejected a sound doctrine. It is hoped that they will give a fuller consideration to the "bootstrap doctrine" as applied to administrative determinations when the problem arises. It should also be noted that were the problem to arise in a federal court they would give the same effect to administrative determinations as the West Virginia court, being bound by our rule. *Hoffman v. N. Y., N. H. & Hartford R. R.*, *supra*.

D. A. B.

ATTORNEY AND CLIENT—ATTORNEY NOT DISQUALIFIED TO NOTARIZE CLIENT'S AFFIDAVIT.—*A*, who was *C*'s attorney in an equity suit, administered an oath to *C* for the purpose of verifying an answer. *Held*, on appeal, that an attorney may act as notary for his client if his interest in the litigation goes no further than that normally arising from the attorney-client relationship. *Calhoun County Bank v. Ellison*, 54 S. E.2d 182 (W. Va. 1949). Affirmed.

The principal case presents for the first time in West Virginia the question whether or not an attorney who is qualified to act as a notary may take the oath of his client in making affidavits for pleadings. In reaching its conclusion, the West Virginia Supreme Court of Appeals stated that there is no statute or rule of court which would disqualify *A* from taking *C*'s oath. Nor does the Canon of Ethics of the American Bar Association, nor any rule of the West Virginia State Bar, nor the constitution or by-laws of the West Virginia Bar Association forbid this action. The court adopted dicta from *Richardson v. Ross*, 111 W. Va. 464, 163 S. E.2d (1932), which affirms the proposition but seems to disapprove of it. Apparently this is the view taken in a number of jurisdictions where the practice is allowed but frowned upon. *Yeagley v. Webb*,