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Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

INFANTS—PROCEEDINGS AS TO CUSTODY—REPUDIATION OF RELINQUISHMENT TO PRIVATE CHILD AGENCIES.—Plaintiff, State Department of Public Assistance, entered into a written agreement with defendant whereby defendant agreed to accept custody for foster care of children placed through the Department of Public Assistance. Defendant agreed to give plaintiff not less than two weeks' notice if defendant decided to return the infants to plaintiff. Defendant also consented to cooperate in carrying out any change in plans regarding the child and agreed that the infant placed in home of defendant was not available to defendant for adoption. Approximately six weeks later an unmarried mother of a newly born child legally relinquished the custody of her child to the plaintiff who, three weeks later, delivered the baby to defendant in accordance with their agreement. Several months later defendant and the mother of the infant appeared at the office of plaintiff and attempted to surrender the child, but plaintiff refused since sufficient notice had not been given under terms of the agreement between plaintiff and defendant. Thereafter the mother, by an executed and acknowledged instrument attempted to give her consent to the adoption of the child by defendant. Plaintiff brought this habeas corpus proceeding to recover custody of the infant from defendant. Defendant contended that the mother's relinquishment to defendant is in effect a repudiation of the prior relinquishment of such custody to plaintiff and in substantial compliance with the pertinent provisions of W. VA. CODE c. 49, art. 3, § 1 (Michie 1955). This statute deals with the regulation of private institutions and organizations licensed as child welfare agencies and provides that "an unwed mother may repudiate a relinquishment of her child within one hundred and twenty days from day of such relinquishment by a written and acknowledged notice and statement to said child welfare agency to such effect." *Held,* that the provision of the statute relating to repudiation of relinquishment of custody of the infant by an unwed mother applied only where the original relinquishment had been made to a licensed child welfare agency and not where such relinquishment was made to the State Department of Public Assistance. Writ awarded. *State Department of Public Assistance v. Pettrey,* 92 S.E.2d 917 (W. Va. 1956).

This case is noteworthy because it points out the distinction drawn by the legislature between the limitations placed on repudiation of relinquishment proceedings as to private child welfare

agencies and the State Department of Public Assistance. The holding stands as a warning that our statutory rules for repudiation of relinquishment of custody do not apply to relinquishments made to the Department of Public Assistance. Query as to whether and why the State Department of Public Assistance should be given such an advantage.

T. E. P.

PHYSICIANS AND SURGEONS—CHIROPODIST NOT A DULY LICENSED PHYSICIAN WITHIN MEANING OF THE STATUTE.—This was a declaratory judgment proceeding. Plaintiff, a nonprofit corporation operated a medical service plan. Under its plan plaintiff agreed to pay a certain percentage of medical expenses incurred by its subscribers. Defendants, who were subscribers, received treatment from practicing chiropodists and submitted bills for the payment of such treatment to plaintiff which it refused to pay. Plaintiff claimed that a chiropodist is not a duly licensed physician within the meaning of the applicable statute and that treatment by a chiropodist is not within the scope of the medical service plan operated by plaintiff. The circuit court held that a duly licensed chiropodist was eligible to participate in plaintiff's plan and found plaintiff obligated to pay the bills of defendant. Thereafter the question was certified to this court. *Held,* that a duly licensed practitioner of chiropody is not a duly licensed "physician" within the meaning of the statute relating to hospital and medical service plans. The court reasoned that a duly licensed physician and surgeon, within the scope of the broad field in which he is authorized to practice as defined by the statute may, of course, engage in the practice of chiropody. But a duly licensed chiropodist may not practice medicine and surgery except within the limit expressly imposed by the statute. This does not go so far as to permit a chiropodist to be considered a duly licensed physician. W. VA. CODE c. 30, art. 3, § 2; art. 11, § 2 (Michie 1955). The court went on to state that a medical service corporation is authorized to contract with the public and duly licensed physicians only for such medical and surgical care as may be furnished by duly licensed physicians and it is proper to exclude from such contracts any charge made by a duly licensed chiropodist for treatment which he has furnished to any subscriber of such corporation. Reversed. *Medical Care v. Chiropody Ass'n of West Virginia,* 93 S.E.2d 38 (W. Va. 1956).

The instant decision in effect spells out that chiropody is not equivalent to the practice of medicine and surgery, thereby following the generally accepted view in this country. 41 AM. JUR., *Physicians and Surgeons* § 29 (1942). This view is further supported by Dr. G. H. Follansbee in a report to the House of Delegates of the American Medical Association in 1939, cited by the court, in which he referred to chiropody as "a hand maiden to medical practice in a limited field considered not important enough for a doctor of medicine to attend." 93 S.E.2d at 42.

For a discussion of the general subject of the regulation of chiropody see Annot., 33 A.L.R. 841 (1924).

T. E. P.

VENUE—PROCEDURAL RATHER THAN JURISDICTIONAL—VENUE STATUTES TREATED AS RULES OF THE COURT.—A collision occurred between a motor vehicle owned by a corporation and an automobile owned and operated by one Raymond Ellis. The collision took place about March 2, 1955, in Mason County, West Virginia. As a result of this collision Ellis instituted an action against the corporation in the common pleas court of Kanawha County on August 18, 1955. Ellis is a resident of *Putnam* County. On the first of October, 1955, the corporation instituted an action against Ellis in Mason County. Original and an alias summons were issued by the clerk of circuit court of Mason County, but Ellis was not to be found in that county. Thereafter a pluries summons was issued and served on Ellis in Putnam County. On the calling of the docket of the common pleas court of Kanawha County the judge, having been informed of the alleged pendency of an action in Mason County circuit court, overruled a motion to have the action pending in Kanawha County transferred to Mason County circuit court. A writ of mandamus was awarded by the Supreme Court of Appeals, requiring the common pleas court of Kanawha County to transfer the case to the circuit court of Mason County.

It was contended in the mandamus proceeding that under a rule promulgated by the Supreme Court of Appeals the action should be transferred to the circuit court of Mason County and there be consolidated and tried with the litigation therein instituted involving the accident. 121 W. VA. xxiii, §§ 1(a), (c) (1940). The court held the rule is valid; that venue is procedural and the statutes relating

thereto are so treated. The majority of the court felt that denial of application of the rule to the facts would seem to emasculate the rule.

Two judges dissented vigorously, arguing that the circuit court of Mason County did not have jurisdiction over Ellis since he was not properly served in order to give the court venue over the action as required by statute. W. VA. CODE c. 56, art. 1, § 2 (Michie 1955). The dissent felt that the rule applied by the majority was valid if properly applied, but felt such was not the case here, preferring emasculation of the rule instead of giving it the effect of contravening and superseding express provisions of valid statutory law. *State v. Davis*, 93 S.E.2d 28 (W. Va. 1956) (3-2 decision).

As the court was aware, it is stated in one of the leading legal encyclopedias that "while there are holdings under certain venue statutes that their requirements are jurisdictional, by the weight of authority, and by express provisions in some judisdictions, statutes with respect to venue are merely procedural and not jurisdictional in the strict sense." 92 C.J.S., *Venue* § 75 (1955). West Virginia, therefore, under the ruling in the instant case, seems to follow the weight of authority.

T. E. P.

WORKMEN'S COMPENSATION—INJURY BY CO-EMPLOYEE—IMMUNITY OF EMPLOYER EXTENDED TO THIRD PARTY.—This was an action for the recovery of damages alleged to have resulted from the negligence of defendant in the operation of an automobile in which plaintiff, at the time of the injury, was riding as an invited guest. Plaintiff and defendant were employed by the same company and at the time of the accident were on company business. Both parties were protected by the workmen's compensation law of West Virginia. Plaintiff was awarded compensation and received payments for his injuries. Defendant contended that by virtue of the laws of West Virginia the employer's immunity from liability should be extended to him. W. VA. CODE c. 23, art. 2, § 6(a) (Michie 1955). It was argued by the plaintiff that since being employed as a branch manager he was not an employee within the meaning of the compensation statutes and, therefore, defendant's immunity did not prevent this action. Plaintiff attacked the constitutionality of this statute, claiming it to be violative of section thirty of article VI of the state constitution since the purpose of the act was not adequately covered in the title, and also argued that the section was violative

of the due process clauses of the state and federal constitutions. *Held,* that plaintiff was not an employee within the meaning of the workmen's compensation statute, thereby reaffirming the view adopted in a prior case [*West Virginia Coal & Coke Corp. v. Commissioner,* 116 W. Va. 701, 182 S.E. 826 (1935)] that whether or not a corporation representative is a "manager" must be determined upon the facts presented. *Crawford v. Parsons,* 92 S.E.2d 913 (W. Va. 1956).

The court also ruled that W. VA. CODE c. 23, art. 2, § 6(a) was not violative of any provision of either the state or federal constitutions stating that a statute relating to immunity from liability of officers, managers, agents, representatives and employees of employers electing to subscribe to workmen's compensation fund is not violative of due process. Although it does deprive an injured employee of his common law action to sue a tort-feasor for his negligent conduct, it is not arbitrary and capricious legislation.

Thus, West Virginia holds constitutional a statute extending to a third party the immunity of the employer from liability under the workmen's compensation law, so long as that third party is an employee within the meaning of the compensation law.

For an explanation as to why the employer's immunity from liability under the compensation act should be extended to a co-employee in this situation, see 2 LARSON, WORKMEN'S COMPENSATION § 72.20 (1952).

T. E. P.