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Res Judicata—Collateral Attack on Decree for Sale of Land for School

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Thus far this statute has provoked no litigation reaching the supreme court.

It is settled law in this state that the violation of a statute is prima facie negligence, but only if the violation is the proximate cause of the injury. See e.g., State Road Comm'n v. Ball, 138 W. Va. 349, 76 S.E.2d 55 (1953); Somerville v. Dellosa, 133 W. Va. 435, 56 S.E.2d 756 (1949); Oldfield v. Woodall, 113 W. Va. 35, 166 S.E. 691 (1932); Tarr v. Lumber Co., 106 W. Va. 99, 144 S.E. 881 (1928). The proximate cause of an injury is the last negligent act contributing thereto and without which the injury would not have resulted. Webb v. Sessler, 135 W. Va. 341, 63 S.E.2d 65 (1950); Anderson v. Baltimore & O.R.R., 74 W. Va. 17, 81 S.E. 579 (1914). Where there is a sole, effective intervening cause, there can be no other proximate cause of the injury. Webb v. Sessler, supra.

The most pertinent of all West Virginia cases holds that while the negligent act of one person may naturally cause injury to another, yet if before the injury results, the negligent act of a third party intervenes and produces the injury, the latter alone is responsible, although but for the first negligent act the injury could not have occurred. Anderson v. Baltimore & O.R.R., supra. Following such a holding, the court could not hold the car owner liable in a case such as the principal case even though he violated a statute.

In view of the foregoing, there seems to be no reason to believe that the West Virginia court would not follow the majority rule, absolving the owner of liability when a thief negligently injures a third person; the act of the thief constituting the intervening and proximate cause of the injury.

J. S. T.

RES JUDICATA—COLLATERAL ATTACK ON DECREE FOR SALE OF LAND FOR SCHOOL FUND.—Plaintiff brought suit to cancel two deeds made by the deputy commissioner of forfeited and delinquent lands conveying certain lands to the defendant. The deeds were made pursuant to orders of the circuit court in a chancery suit brought by the deputy commissioner directing and confirming the sale of the land for the benefit of the school fund. Plaintiff alleged
that the taxes had been paid and that there was no real delinquency so that the state had acquired no title which could be sold. The defendant interposed a demurrer on the ground, inter alia, that the former suit, in which plaintiff was a party defendant, was res judicata as to plaintiff's alleged cause of action. The trial judge overruled the demurrer and certified the question to the supreme court. Held, that the suit formerly pending in the circuit court must be considered as regularly brought and determined and, with no appeal therefrom, that it adjudicated with finality the issues of delinquency, the sale to the state, and the sale to the defendant. *Robinson Improvement Co. v. Tassa Coal Co.*, 101 S.E.2d 67 (W. Va. 1957).

The importance of the decision lies in its determination that the former owner of land which has been sold to the state for delinquent taxes and subsequently sold by the deputy commissioner pursuant to orders of the circuit court in a proceeding instituted under W. VA. CODE c. 11A, art. 4 (Michie 1955), cannot attack the validity of the transfer in a collateral proceeding. The decision would seem to dispel some of the doubt which has too long existed with regard to the reliability of land titles so transferred. Before passing upon the soundness of the holding, there are serious questions which should be considered.

It is well settled law that an adjudication by a court having jurisdiction of the subject-matter and the parties, no matter how erroneous, is final and conclusive, not only as to matters actually determined in the action, but as to every matter which might have been properly adjudicated therein. *Adkins v. Adkins*, 97 S.E.2d 789 (W. Va. 1957); *Walker v. West Virginia Gas Corp.*, 121 W. Va. 251, 3 S.E.2d 55 (1939); *Zirkle v. Moore, Keppel & Co.*, 110 W. Va. 531, 158 S.E. 785 (1931); *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890). To be res judicata it is not essential that the matter should have been formally put in issue in the former suit. *Sayre's Adm'r v. Harpold*, supra. Nor is it necessary that precisely the same parties be before the court in the different suits, if the subject-matter of the controversy is the same. *Corrothers v. Sargent*, 20 W. Va. 351 (1882).

Where the judgment or decree is rendered by a court of general jurisdiction, there is a presumption in favor of its jurisdiction. Unless the record discloses a want of jurisdiction the presumption is conclusive, and the judgment cannot be collaterally attacked. *Lemley v.

Where the court is one of limited jurisdiction, the rule is different and the record must show affirmatively every fact necessary to give the court jurisdiction before any presumption arises as to the validity of the proceedings. Nelson Transfer & Storage Co. v. Jarrett, 110 W. Va. 97, 157 S.E. 46 (1931); Mayer v. Adams, 27 W. Va. 244 (1885). Several cases state the rule that although the court is one of general jurisdiction, if, in the particular proceeding, it is not acting according to the course of the common law, but under some special statute giving a summary remedy, it stands on the same footing with a court of limited jurisdiction and its jurisdiction must be affirmatively shown. And unless its proceedings are in conformity to the statute, they must be considered as void and open to attack whenever any right is asserted thereunder. Cruikshank v. Duffield, supra; County Court v. Brammer, 68 W. Va. 25, 69 S.E. 450 (1910).

It is submitted that a circuit court entertaining a proceeding under W. Va. Code c. 11A, art. 4 (Michie 1955), is not acting pursuant to its general jurisdiction, but pursuant to a special jurisdiction conferred by the statute and, if the above statement is a valid rule of law, failure to proceed according to the statute would deprive the court of jurisdiction to enter a valid decree. Query as to the effect of the statement in W. Va. Code c. 11A, art. 4, § 33 (Michie 1955), that “... no irregularity, error or mistake in respect to any step in the procedure leading up to and including confirmation of the sale or delivery of the deed shall invalidate the title thereby acquired.” This provision may cure any irregularity which is not jurisdictional but it cannot supply a lack of jurisdiction.

In the principal case, plaintiff sought to show, by the allegation that the taxes had been paid, that there was no title in the state and that the court was therefore without jurisdiction to order the sale. In Sims v. Fisher, 125 W. Va. 512, 536, 25 S.E.2d 216, 227 (1943), the court, in striking down certain provisions of a prior statute, held that W. Va. Const. art. XIII, §§ 4 and 5 require that
before a sale of land may be ordered, there must be a judicial finding that the title to the land sought to be sold is, in fact, in the state, and is therefore subject to sale. This, said the court, is "the first necessary step in any proceeding to sell lands for the benefit of the school fund." The following statement appears in syllabus 3 of *State v. Gray*, 132 W. Va. 472, 52 S.E.2d 759 (1949): "Under section 4 of Article XIII of the Constitution of this state, the proceeding therein required to be instituted in the circuit courts, for the sale of land for the benefit of the school fund, must be a judicial proceeding, and may be instituted only after the title to the land proceeded against has become vested in the state."

The import of these decisions is that title in the state is a jurisdictional fact, and a judicial finding that the fact exists is a prerequisite to acquisition of jurisdiction by the court. It is submitted that without such finding, a decree of sale rendered by the court would be not merely erroneous and voidable, but void. And the record being silent, the want of jurisdiction could be shown by extraneous evidence in a collateral proceeding.

There is language in the principal opinion intimating that the presumption of jurisdiction may be rebutted by evidence de hors the record. This was strongly argued by the dissenting judge in *Adkins v. Adkins*, supra. The general rule, supported by a decided majority of cases in this state, is to the contrary. See cases cited in *Adkins v. Adkins*, supra. However, the rule of those cases has application to proceedings wherein the court is not acting pursuant to a special statute, but pursuant to its general jurisdiction. Perhaps the rule limiting attacks on the court's jurisdiction to matters on the record is the better one since it is more in accord with the policy favoring the security of land titles. Nowhere in the law is there greater need for stability than in cases involving land titles. That stability cannot be achieved unless proceedings for the sale of land to enforce the state's lien for taxes is accorded the same degree of finality accorded to other judicial proceedings.

Although the tenor of the opinion in the principal case is to consider the former proceeding as conclusive of all issues which could have been determined therein, the holding is specifically limited to the issues of delinquency, the sale to the state and the sale to the defendant. These are the jurisdictional issues referred to in the *Fisher and Gray* cases, supra. Thus, an interesting question is presented. Where all interested parties were properly before the
court in the former suit, would the holding of the principal case, making these issues res judicata in a collateral proceeding, plus the language of W. VA. Code c. 11A, art. 4, § 33, to the effect that procedural irregularities shall not invalidate the title transferred, operate to give the purchaser a good title? While a definite answer must depend upon the course of future decisions, the principal case is such as to encourage greater reliance on the validity of land titles transferred under W. VA. Code c. 11A, art. 4 (Michie 1955).

L. L. P.

TORTS—LANDOWNER'S LIABILITY TO CHILD TRESPASSERS.—Action on the case was brought by P, a ten year old lad, who was injured following an explosion of a mixture contained in a can or filter found by the boy on or near a playground located on D coal company's leasehold. D and other coal companies customarily dumped rubbish and refuse on or near the playground area. Judgment for P. On appeal, held, reversed and new trial ordered. Although D, in the absence of the exercise of ordinary care, would be liable for injuries sustained by a foreseeable child trespasser who is injured by a dangerous instrumentality D maintains on his land, P here failed to prove by substantial evidence that D had dumped the can or filter on or near the playground. Justice v. Amherst Coal Co., 101 S.E.2d 860 (W. Va. 1958).

At early common law no duty of care, other than to refrain from inflicting willful and wanton injury, was owed the trespasser, whether he be a child or adult. Prosser, Torts § 76 (2d ed. 1955).

As society became more highly industrialized and urbanized it became apparent that the harsh effects resulting from the strict common law rule invited modification of the rule itself, particularly in respect to child trespassers, since the value of the child to the community was quite as important as the private right of the landowner to the unfettered use of his land. See James, Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L.J. 144, 161 (1953).

An affirmative duty of care was first imposed upon the landowner in Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873). Here the child trespasser, coming upon the land to play, was injured by D's unlocked unguarded turntable. The Stout case,