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Partition--Jurisdiction of Equity Court to Determine Question of Title Arising Therin

John V. Sanders
West Virginia University College of Law

as a court. The cases examined do not attempt to differentiate judicial and administrative duties of the court when it is acting as such.

On the other hand, the authority is to the effect that any interference with property in the hands of a receiver, without leave of court, or any criticism within the rule[9] directed toward the judge accusing him of bias or prejudice, is a contempt of court.[10] If the essential elements of contempt (as required by the Judicial Code) had been present in the Craig Case, *supra*, the appellate court would probably have sustained the judgment below.

Is, then, the contention sound on principle? It is believed that it would be impractical to draw a line between administrative and judicial functions in a case involving a receivership. Court supervision, apparently, is necessary to protect the rights of all parties at every stage in the proceedings. In this respect, a judge passing on the management of a business in the hands of a receiver differs in no practical way from a judge presiding in a trial between two individuals. Moreover, if such a distinction should be made between the two duties, confusion must inevitably arise. It would be exceedingly difficult to make a rule applicable to all cases. The judge, consequently, would be hampered in his work, and thereby would be rendered less efficient.

—H. F. PORTERFIELD.

PARTITION—JURISDICTION OF EQUITY COURT TO DETERMINE QUESTION OF TITLE ARISING THEREIN.—Section 1, Chapter 79 of the WEST VIRGINIA CODE provides that "Tenants in common, joint tenants and co-parceners shall be compellable to make partition, and the circuit court of the county wherein the land lies shall have jurisdiction of partition, and in the exercise of such may take cognizance of all questions of law affecting the legal title that may arise in any proceeding." This statute does not indicate whether the proceed-

[9] *Supra*, n. 7.
[10] Kneisel *v.* Ursus Motor Co., 316 Ill. 336; 147 N. E. 243; 39 A. L. R. 1 (1925).

ing should be at law or in equity. However, on account of the inconvenience and difficulty of proceedings at law, equity early assumed jurisdiction in partition proceedings under this statute and determines questions of title, but only where such questions are incidental to the partition proceedings.[1] For example, the courts have not gone so far as to allow partition proceedings to be used as a substitute for ejectment, or where title is denied under which partition is sought, or where title depends on doubtful questions of law or facts. In such cases the equity court will dismiss the bill or refuse relief until the right to partition is determined at law, because one claiming under a strange title should not be compelled to submit his title to a court of equity.[2] The statute above quoted has been construed many times. In its most recent construction[3] our Supreme Court has held that equity had jurisdiction by virtue of this section under the following facts: Plaintiff and defendant were heirs at law of X. Plaintiff's bill alleged that X, by a will, left a life estate in realty to Y, and Y, having died, plaintiff sought partition. Defendant claimed that Y did not take a life estate, but that the will gave her the land in fee, and that the defendant was the owner of the land sought to be partitioned by virtue of a deed from Y. The lower court dismissed the bill for lack of jurisdiction, and was reversed by the Supreme Court on the ground that the lower court should have considered on its merits the question whether or not Y acquired a fee simple under the will of X. Before this case the cases which had been presented to the court were, roughly speaking, of two classes. (1) Where an admitted tenant in common claims the whole of the common title for some reason, such as actual ouster or sole possession for the statutory period. In such a case, both, or all parties are claiming under a common title, the only question being as to the extent of the estate claimed. Here the statute would clearly seem to confer jurisdiction.[4] (2) There were those cases where one of the parties claims, not the whole of the *common* title, but claims from a different source, *i.e.*, an independent, hostile claim, going to the whole of the prop-

[1] Wiseley *v.* Findlay, 3 Rand. 361, 15 Am. Dec. 712 (1825).
[2] Carberry *v.* Railroad Co., 44 W. Va. 260, 28 S. E. 694 (1897); Smith *v.* Vineyard, 58 W. Va. 98, 51 S. E. 871 (1905).
[3] Hamrick *v.* Dodrill, 104 W. Va. 490, 140 S. E. 479 (1927).
[4] Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216 (1898).

erty involved, and adverse to the title under which partition is sought to be made. In such case it seems equally clear that the adverse claimant should not be compelled to submit his title to a court of equity, but the parties should first determine their rights at law.[5] The principal case, however, presents a new situation, and seems to be a combination of the two cases. The defendant is a tenant in common with the plaintiff, if there is any property to be divided, and if the plaintiff's construction of the will is correct the defendant would be entitled to his share under the common title from X. But the defendant is not claiming under this common title. In fact he denies that a common title exists. And if the defendant's construction of the will is the correct one, he is not compellable under the statute to make partition because his claim is under a deed from a stranger. Therefore he says that the court has no jurisdiction to settle the controversy. To justify the decision of the principal case, namely that equity can determine the question of title that is raised therein, it must appear *as a jurisdictional fact* that the party or parties against whom partition is sought are tenants in common, joint tenants or co-parceners.[6] But that is the very thing that the defendant denies, since he claims the whole of the title under a deed from a stranger, whose title, if any, is adverse to the one under which partition is sought to be made. Therefore, upon the determination of the controversy as to the construction of the will, the basis of the court's jurisdiction must rest. In the principal case the court first assumes jurisdiction because the plaintiff and defendant *are* tenants in common. Then, after having made the assumption which is necessary to give jurisdiction, it proceeds to decide the very question on which the basis of its jurisdiction rests. This seems to be arguing in a circle. The decision, in reasoning at least, appears to be a departure from the line of past decisions[7] construing the jurisdiction of a court of equity in partition proceedings under the statute above

[5] Davis *v.* Settle, 43 W. Va. 18, 26 S. E. 557 (1896); Carberry *v.* R. R. Co., *supra*, n. 2; Smith *v.* Vineyard, *supra*, n. 2.

[6] CODE, ch. 79, §1; Smith *v.* Vineyard, *supra*, n. 2; Davis *v.* Settle, *supra*, n. 5.

[7] Carberry *v.* Railroad Co., *supra*, n. 2; Cecil *v.* Clark, *supra*, n. 4; Irvin *v.* Stover, 67 W. Va. 356, 67 S. E. 1119 (1910); Wright *v.* Pittsman, 73 W. Va. 81, 79 S. E. 1091 (1912); Mahan *v.* Ferrell, 98 W. Va. 67, 126 S. E. 409 (1925); Woodrum *v.* Price, 100 W. Va. 639, 131 S. E. 550 (1926); Smith *v.* Vineyard, *supra*, n. 2.

quoted.[8] While the logic of the result is at least questionable, the practical result is not undesirable because it settles in one suit a question which would otherwise require two proceedings.

—JOHN V. SANDERS.

PRINCIPAL AND AGENT—AGENT ACTING FOR UNDISCLOSED PRINCIPAL—AUTOMOBILE CORPORATION HELD "TRADER" UNDER CODE §13, CH. 100.—A number of automobiles were delivered by the owner to a private corporation, engaged in the general automobile business, under a verbal contract to store with power to sell. *Held,* corporation is a "trader" under Code, §13, c. 100, and the automobiles are subject to *fieri facias* lien of the creditors of the corporation. *Midland Investment Corporation* v. *May et al.,* 140 S. E. 5 (W. Va. 1927).

This decision raises the question of whether recordation of the contract would protect the owner from the creditors of the one to whom he had delivered cars for sale, when the latter was engaged in the general automobile business. There have been few West Virginia decisions construing this statute, but as the Virginia Statute (Virginia Code, 1919, §5224) is the same as that of West Virginia we can look to the Virginia decisions for construction. Recent Virginia cases in which the agent was held "trader" repeatedly speak of the contract of assignment "not having been recorded." *Capitol Motor Corporation* v. *Lasker,* 138 Va. 630, 123 S. E. 376; *Nusbaum* v. *City Bank,* 132 Va. 54, 110 S. E. 363. These decisions indicate that recordation should be sufficient to protect the interests of the principal, although earlier decisions seem contra. *Hoge* v. *Turner,* 96 Va. 624 at 632, 32 S. E. 291; *Partlow* v. *Lickliter,* 100 Va. 631, 42 S. E. 671. The principal case itself indicates that the creditor might be estopped from asserting his lien, thereby inferring that actual notice would protect the principal. It is submitted that constructive notice should be sufficient. The object of the statute is to prevent any evasion of own-

[8] W. VA. CODE, ch. 79, §1.