# Effect of Partial Invalidity of Statute

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gence of the plaintiff, and it is a case to which the last clear chance doctrine is applicable, and the plaintiff wishes to take advantage of it, the burden is on him to show that the defendant had the last clear chance to avoid the injury to him, notwithstanding his own contributory negligence.[24]

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### EFFECT OF PARTIAL INVALIDITY OF STATUTE

The decision of the North Carolina Supreme Court in the recent case of *State v. Barkley*[1] is interesting not only to those who wish to hunt or fish, because it removes all discriminations between citizens of the State in favor of local hunters as to license fees, but the case also merits comment as to the ingenious method by which the court arrived at its decision upholding part of the Act in question.

The provisions of the statute, section 7, subsections (a) and (b), ch. 573—Public Local Laws 1925, under which the defendant was indicted, pertinent to this discussion, are as follows:

"(a) All persons who shall hunt with a gun, *and who shall have been a resident of Cabarrus county for three months,* and who shall be sixteen years of age or over, shall, before entering any field for the purposes of hunting any wild bird or animal, be required to procure a hunter's license from the game warden or other officer or person authorized to issue said license, and, for said license the person procuring same shall pay to the person issuing such license the *sum of one dollar,* and the license so issued shall be good for one year from the first day of May of the year in which it is issued."

"(b) All persons *living in another county,* and who shall be sixteen years of age or over, shall pay the *sum of three dollars* for a hunter's license in Cabarrus county, which shall be good for one year from the first day of May of the year in which it is issued."

The defendant, a resident of Mecklenburg county, was prosecuted under the Act for hunting in Cabarrus county without having paid the three dollar fee or having secured the license.

From a judgment entered upon a special verdict finding defendant not guilty the State appealed, under C. S. 4649. The Supreme Court held that subsection (b) was an arbitrary discrimination against persons living in another county and held it to be unconstitutional and

[24] *Hudson v. Railroad* (1926) 190 N. C. 116, 129 S. E. 146.
[1] *State v. Barkley* (1926) 192 N. C. 184, 134 S. E. 454.

void *in toto*. But after subsection (b) was thus stricken out, the court found that subsection (a) referred only to the required fee of one dollar which, by the terms of the subsection, was imposed only on residents of Cabarrus county of three months standing and, if left as enacted, would require residents of the county to pay one dollar and non-residents nothing. This obviously made subsection (a), as enacted, discriminatory and therefore unconstitutional. However, instead of striking the whole of subsection (a), as was done when subsection (b) was found to so offend, the court in an endeavor to carry out the supposed legislative intent and to support the presumption of validity of the statute, struck from subsection (a) only the clause "and who shall have been a resident of Cabarrus county for three months." Under the remainder of the paragraph, after thus being operated on, the court held that, all discriminations being removed, the minimum license tax of one dollar was left to apply uniformly to all the residents of the State.

In addition to relying on the presumption that the General Assembly intended a valid constitutional enactment, the court leans heavily upon section 20 of the Act in question which provides, "If any clause, sentence, paragraph or other part of this Act shall for any reason be adjudged by a court of competent jurisdiction to be invalid, it shall in no way affect or impair the remainder of said Act.

Such "saving clauses" as the above section 20 are generally held to be applicable only where the offending portion of the statute may be eliminated without affecting the general application of the remainder. Such is the case where the valid and invalid parts are clearly and obviously separable and independent as in *Keith v. Lockhart*,[2] where one chapter of the Act provided for the establishment of a free-range by vote of the people in Pender county and another chapter provided for a special tax to pay the cost of a line fence between Pender and adjoining counties, with a proviso exempting from payment of the tax certain localities within the county. The court held the valid chapter establishing the free range policy distinct and severable from the invalid chapter providing for the special tax. Not so where they are indivisible and dependent one upon another. In the same case, the court refused to strike out the invalid proviso exempting certain localities and allow the special tax to apply

[2] *Keith v. Lockhart* (1916) 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918 D 916.

uniformly throughout the county. The same was true in the *Employers' Liability Cases*[3] where the court held that the parts of the Act referring to the regulation of interstate commerce by Congress, while valid in themselves, were so blended with the parts relating to subjects over which Congress had no power as to be indivisible and therefore the whole Act was unconstitutional.

If the striking out of one clause and retaining the remainder does change the application of the remainder of the Act, it must be clear that the legislature would have desired this result.[4]

The vice in the present act is the discrimination created by setting up two independent classes of persons in two independent paragraphs, each being complete in itself and each imposing a different fee on its respective class. The court, to avoid the unconstitutionality and discrimination and yet preserve a part of the Act eliminates one entire paragraph which applied to one class (non-residents), and reconstructs the paragraph creating the other class (residents) by striking out the clause which specifies such other class (residents) so as to allow the emasculated paragraph to apply to both classes. Conceding the desirability of this plastic surgery upon a wounded statute, is it reconcilable with the theory of separation of legislative and judicial powers? The difficulties are suggested by the following questions:

How does the court know that the General Assembly would not have preferred to impose no tax at all if it could not discriminate? How does the court know that the General Assembly would prefer to impose the one dollar tax on all rather than the three dollar tax? Why eliminate the whole of subsection (b) and seize upon the clause pertaining to residents of Cabarrus county in subsection (a) for deletion? Why not, rather, wipe out subsection (a) *in toto,* amputate the clause in subsection (b) referring to all persons living in another county, and thus leave the three dollar tax to apply uniformly to all residents of the state? In what way does subsection (b) constitute any more of a discrimination against all persons living in another county, than subsection (a) constitutes a conferring of exclusive

[3] *Employers' Liability Cases* (1908), 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297.

[4] *Pollock v. Farmers' Loan and Trust Co.* (1895) 158 U. S. 601, 635-637, 15 Sup. Ct. 912, 39 L. Ed. 1108; *Poindexter v. Greenhow* (1885) 114 U. S. 270, 304, 5 Sup. Ct. 903, 962; *Spraigue v. Thompson* (1886) 118 U. S. 90, 95, 6 Sup. Ct. 988.

or separate privileges upon the residents of Cabarrus county contrary to the state constitution? (Art. I, sec. 7).

The general trend, in cases involving analogous problems seems toward a reluctance to decide such uncertain and doubtful questions, and toward a preference rather to strike out the whole statute as unconstitutional.[5] In *State v. Mitchell*[6] it was held that a statute undertaking to exact a license from all hawkers and peddlers, but to exempt all residents of the town who pay taxes amounting to $25 on their stock of goods, being void because of this unreasonable discrimination, could not be given effect by disregarding the exemption and exacting a license from all persons.

In the recent case of *Yu Cong Eng v. Trinidad,* Collector of Internal Revenue,[7] where the Philippine statute known as the Chinese Book-keeping Act, enacted to aid collection of taxes, prohibiting the keeping of account books in any language except English, Spanish or the Filipino dialects, was attacked as invalid as taking property of Chinese merchants without due process of law; the court in reply to the contention that what the legislature meant to do was to *require* the keeping of such account books in English, Spanish or the Filipino dialects as would reasonably enable the taxing officers to prevent and detect the evasion of taxes, said:

"We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

P. J. RANSON.

## COLLATERAL ATTACK ON VALIDITY OF ADOPTION PROCEEDINGS

In a recent case[1] the Supreme Court of North Carolina had its first chance to give an opinion on the nature of adoption

[5] *United States v. Reese* (1875) 92 U. S. 214, 221; *Trade Mark Cases* (1879) 100 U. S. 82, 98; *Poindexter v. Greenhow* (1885) 114 U. S. 270, 304, 5 Sup. Ct. 903, 962; *Spraigue v. Thompson* (1886) 118 U. S. 90, 95, 6 Sup. Ct. 988; *Illinois Central Railroad Co. v. McKendree* (1906) 203 U. S. 514, 27 Sup. Ct. 153, 52 L. Ed. 298; *Yu Cong Eng et al v. Trinidad et al* (1926) 46 Sup. Ct. 619.

[6] *State v. Mitchell* (1902) 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481.

[7] *Yu Cong Eng v. Trinidad* (1926) 46 Sup. Ct. 619.

[1] *Truelove v. Parker* (1926) 191 N. C. 430, 132 S. E. 295, Stacy, C. J., dissenting.

and the jurisdictional requirements for adoption under the North Carolina statute.[2] In that case J. A. Weathers filed a petition before the clerk of the Superior Court which set out, *inter alia,* that Irma Johnson is a child five years old, at present residing with the petitioner; that her mother has been living away from her husband and the child for the past two years and takes no interest in the child; that the father of the child is not capable of properly providing for said child, and that he consents to this adoption. The petition had the caption, "J. A. Weathers vs. L. J. and Martha Johnson." This caption was followed throughout the various papers in the proceedings. An order of adoption followed, signed by the clerk, stating, in part, "This cause coming on to be heard upon the allegations of the petition, and being heard, and it appearing to the court that Irma Johnson is a child without any estate, and that Martha Johnson, mother of the child, is living away from her husband and child and takes no interest whatever in said child, and that L. J. Johnson, father of the child is not capable of properly providing for said child and consents to the adoption of said child by said J. A. Weathers, who is a proper and suitable person to have the custody of said child, and who desires to adopt said child for life. . . ." The letters of adoption followed. These three papers constitute the entire record of the proceedings.

Thereafter, for 10 years, Irma lived with J. A. Weathers as his child, and no objection was made, directly or collaterally, to the adoption proceedings. Then an automobile accident caused the death of J. A. Weathers followed in a few hours by the death of Irma, the adopted child. There being no lineal descendants, the collateral heirs of J. A. Weathers, contending that the adoption proceedings were void, now claim his property, and institute an action to try title to the land against defendants who claim the title to the land of J. A. Weathers through Irma.

The court held that the adoption proceedings were void and therefore subject to collateral attack. Arguing that the statute was not complied with, the court states: "The parent or guardian, or the person having charge of such child, must be a party of record in this proceeding." As stated above, the record in this case, which consists only of the petition, the order of adoption and the letters of adoption, finds that the father consented to the adoption and that the mother

[2] C. S., sec. 182 et seq.

"is living away from her husband and child and takes no interest whatever in said child." The court finds that the statute is not complied with for that "it does not affirmatively appear that the father and mother of the child were parties of record in the proceeding."

This raises the question, is it necessary that the record contain recital of service of process on the parents? The court answers this question affirmatively and states that failure to do so is proof that the court had no jurisdiction of the parties. But the statute does not provide for process. "Upon filing of such petition, and with the consent of the parents, if living, or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, the court may, if the petitioner is a proper and suitable person, sanction and allow such adoption by an order granting letters of adoption."[3] It seems that it was in the mind of the legislature to vest a large amount of discretion in the clerk in this particular proceeding, and that his findings as they appear in the record —and the petition, order and letters of adoption constitute the only papers provided for in the adoption proceedings—should be taken to be true. It is a well known rule that the record imports verity.[4] There is no reason why this rule should not apply in adoption proceedings. But the court said, "In the order there is a recital of the father's consent to the adoption, and from this, it is said, his appearance may be inferred; but as the order purports to repeat and approve each allegation of the petition, including that of the father's consent, in the absence of any other suggestion of the father's presence or appearance in the proceeding, we may reasonably infer that the clerk assumed the petition to be true and upon this assumption adjudged the adoption without further inquiry or investigation." This statement is in conformity with that line of cases which declares that everything in an adoption proceeding which does not affirmatively appear to be within the jurisdiction will be presumed to be without the jurisdiction.[5] But to rest the decision on an inference that the clerk made no investigation at all in deciding upon the adoption is doubtful. It is submitted that the opposite inference is just as reasonable, that the clerk made a proper investigation and

[3] C. S., sec. 184.

[4] *Conradt v. Lepper* (1905) 13 Wyo. 473, 81 Pac. 307; *State v. Berry* (1925) 190 N. C. 363, 130 S. E. 12; *State v. Wheeler* (1923) 185 N. C. 670, 116 S. E. 413.

[5] *Ferguson v. Jones* (1886) 17 Ore. 204, 20 Pac. 842.

was satisfied of the father's consent. The presumption should be in favor of the clerk's action being proper.[6] To say that it is reasonable for a judicial officer to act not in accordance with the law would place a serious impediment on all judicial action.

The court further says that the jurisdiction of the clerk is limited and special. This is granted; but standing on the premise that the clerk must adhere strictly to the statute, it may well be argued that, from the language of the statute itself, this record does affirmatively show that the clerk had jurisdiction of the parties. No summons is provided for, as in ordinary civil actions, but "upon finding of the petition, and with the consent of the parent or parents, if living, or of the guardian . . . the court may, if petitioner is a proper and suitable person, sanction and allow such adoption by an order granting letters of adoption."[7] This is complied with. "When a court has attained the dignity of a court of record, there is a presumption in favor of its jurisdiction, and the rightfulness of its decrees, when it assumes to act, and, until it has attained such dignity, it has no record by which it may speak at all. In the second place, even if its jurisdiction be special in such cases, unless the statute require some written evidence of its jurisdiction to be made and preserved, the general rule, respecting judicial officers, and courts of limited authority, is that the jurisdictional facts, upon which their decrees rest, may be shown by extrinsic evidence, oral or written, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings."[8] The extrinsic evidence here referred to was brought into the instant case to show that the mother had been, for two years prior to the order of adoption, living in adultery and away from her daughter "and takes no interest whatever in said child." This fact would dispense with her consent to the adoption and would forfeit her right to "the care, custody and services of the child."[9]

The court cites 1 Ruling Case Law 603, sec. 11, in support of the rule that nothing will be presumed in favor of the jurisdiction in adoption proceedings. Stacy, C. J., questions whether this view is supported by the better cases on the subject. Corpus Juris, on the other hand, after stating that there is considerable conflict in the

[6] *Jossey v. Brown* (1904) 119 Ga. 758, 47 S. E. 350.
[7] C. S., sec. 184.
[8] Stacy C. J., dissenting in *Truelove v. Parker* (1926) 191 N. C. 430, 445, 132 S. E. 295.
[9] C. S., sec. 189.

authorities on this point, adds, "But the tendency of the courts is away from this harsh doctrine, and the better rule would seem to be that the adoption will be upheld against a collateral attack unless the want of jurisdiction is affirmatively shown. The burden of proof is on the person attacking the validity of the adoption where the proceedings are regular upon their face. Recitals in the order of adoption of facts necessary to the jurisdiction of the court may not be impeached in a collateral proceeding."[10]

Adoption was unknown at common law; it is a creature of the Roman law. Massachusetts was the first of the common law states to permit adoption, that commonwealth passing such a statute in 1851.[11] Courts have construed adoption statutes very harshly and have justified their decisions by saying that such statutes are in derogation of common law principles.[12] But it is submitted that the fact that these statutes have spread so widely is in itself proof of their usefulness and calls for a liberal treatment by the courts to the end that uncared for children may find homes.

Although the court decided the question upon the narrow ground of the construction of the adoption statute, it seems that there is a divergence between the attitude of the majority and minority as to the essential nature of adoption proceedings. The majority speaks of an adverse proceeding requiring personal service of process and cites cases of other actions *in personam* as authority. The minority speaks of an *ex parte* proceeding. The true nature of adoption is not clear. Its purpose is to create the relationship of parent and child between strangers. It is not to destroy the relationship between the child and its natural parents. The child still inherits from them and they from the child. But it does create a new relation of parenthood and childhood, a status permanent in its nature. For a court to have power to create such a status, the domicile of the child is the most important jurisdictional requirement. The adopting parents are before the court with their petition and the court's concern is for the welfare of the child who is domiciled in the state or county of the forum. Of course, the statute must be observed, but in construing it, the court should keep before it the essential nature of adoption proceedings, which are more like proceedings *in rem* than proceedings *in personam.*

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[10] 1 C. J. 1394, sec. 114.
[11] Brosnan, *The Law of Adoption,* 22 Col. L. Rev. 332, 335.
[12] *Kennedy v. Borah* (1907) 226 Ill. 243, 80 N. E. 767; *Ferguson v. Jones* (1886) 17 Ore. 204, 20 Pac. 842.