Volume 56 | Issue 1 Article 8

February 1954

Insurance--Subrogation--Waiver

R. H. R.
West Virginia University College of Law

quarterly, while in the principal case, the settlor reserved the power to accumulate the income and invest it in trust property. This might render the *Clifford* doctrine more applicable in the principal case than in the *Branch* case. Conversely, to the extent that the intimate family relationship is in the *Clifford* doctrine, it was more evident in *Commissioner v. Branch* than in the principal case.

Jones v. Norris, 122 F.2d 6 (10th Cir. 1941) like the *Branch* case, holds that the power to manage trust property, however unlimited, may not, in itself, operate to bring the grantor within provisions of INT. REV. CODE § 22 (a). However, in it, as in the *Branch* case, distribution of the trust income to the cestui was required and that was not true in the principal case. Had the trust instrument in the principal case required such distribution of the income to the cestui, that might have sufficed to change its tax consequences.

The problem is currently dealt with in U. S. Treas. Reg. 118, § 39.22 (a)-21, promulgated in an attempt to resolve the difficulties in the application of the *Clifford* doctrine by defining and specifying those factors which demonstrate the retention by the grantor of such complete control of the trust that he is taxable on the income therefrom under INT. REV. CODE § 22 (a). The regulation was not applicable to the trusts in the principal case which terminated before its adoption.

Its provision, U. S. Treas. Reg. 118, § 39.22 (a)-21 (e) (i), for taxability of the settlor on trust income where he retains power to "exchange or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate and full consideration in money or moneys worth", a power retained in the principal case, would probably indicate a result in line with that which was reached in the principal case.

J. L. A.

INSURANCE—SUBROGATION—WAIVER.—*P*'s automobile was damaged as a result of *X*'s negligence. The vehicle was insured by *D* company. *P* and *A,* an adjuster of *D,* agreed that *P* should sue *X* and that *D* would remain liable for the difference between the recovery against *X* and the damage incurred. A judgment was recovered in a justice's court for nearly the whole amount sought, but to avoid further litigation a compromise figure of half the

judgment was reached between *P* and *X* to which *A* agreed. *A* further assured *P* that *D* would pay the difference between the compromise figure and the actual damages. *P* then executed a complete release of *X*. This action was brought to recover under the insurance policy. *D*'s primary defense was that *P* violated the subrogation clause in the policy whereby *D* was to be subrogated to any rights *P* had against a third party. Judgment was rendered for *P* from which *D* appealed. *Held,* affirming the lower court, that the adjuster's knowledge of the transaction was imputed to the company and that it was bound by his acts unless the insured knew that such acts were beyond the scope of authority granted the agent. Under the circumstances of the case, the company was estopped to deny the agent's authority to pursue the course of action taken which amounted to a waiver by the company of its right to set up the breach of the subrogation clause as a defense. *Runner v. Calvert Fire Ins. Co.,* 76 S.E.2d 244 (W. Va. 1953).

The effect of this decision is to bring West Virginia into line with the generally accepted principles of subrogation. The case is also authority for the proposition that an adjuster's indiscretion may serve as a waiver by an insurance company of valuable rights reserved to it, either by the policy itself or by operation of law.

Subrogation, being an equitable doctrine and subject to the peculiar rules governing equities, can arise logically only after one party pays a liability which, in all fairness, should have been paid by another. In the case of automobile insurance, if a loss is occasioned by the wrongful act of a third person, the insurer's position is that of surety and the wrongdoer's that of principal debtor, and until the insurer has paid the claim under the policy no right of subrogation arises in its favor. *Fidelity & Deposit Co. v. Shaid,* 103 W. Va. 432, 137 S.E. 878 (1927); *Atlantic Coast Line R.R. v. Campbell,* 104 Fla. 274, 139 So. 886 (1932). Although the rule, as here stated, is a proper one in that the company has no vested right of subrogation until after it has paid the insured's claim, provisions in policies as well as court decisions have imposed upon the insured definite obligations in protecting the insurer's prospective right of subrogation. The insured cannot settle with and release a wrongdoer before payment of his claim by the company and then attempt to collect under the policy. Authorities uniformly hold that such action by the insured destroys the company's prospective right of subrogation and thereby releases

the insurer from any liability under the policy. *Universal Credit Co. v. Service Fire Ins. Co.,* 69 Ga. App. 357, 25 S.E.2d 526 (1943); *Packham v. German Fire Ins. Co.,* 91 Md. 515, 46 Atl. 1066 (1900). The rule is a sound one, for it not only prevents a double recovery by the insured, but it relieves the company from the burden of paying damages which in equity and good conscience, should be paid by another. *Auto Owners' Protective Exchange v. Edwards,* 82 Ind. App. 558, 136 N.E. 577 (1922).

A more complicated problem is involved where, as in the principal case, the insured receives part payment from the tort-feasor and claims the remainder under the policy. Clearly, if upon receiving such payment as damages from the wrongdoer, the insured gives a full release, without exception, the company will be completely relieved from any liability under the policy. *American Auto. Ins. Co. v. Clark,* 122 Kan. 445, 252 Pac. 215 (1927). However, if the insured gives no release (hardly probable as a practical matter) or releases as to only so much of the claim as is paid, a survey of the cases discloses that the insurer is relieved *pro tanto* under the policy. *Maryland Motor Car Ins. Co. v. Haggard,* 168 S.W. 1011 (Tex. Civ. App. 1914); *Auto Owners' Protective Exchange v. Edwards, supra.* The decision in *Holbert v. Safe Ins. Co.,* 114 W. Va. 221, 171 S.E. 422 (1933), seems to imply that this state would follow the same rule if the question ever arose.

The destruction, by the insured, of the company's right of subrogation, either vested or prospective, is a complete defense to any action on the policy. *Globe & Rutgers Fire Ins. Co. v. Cleveland,* 162 Tenn. 83, 34 S.W.2d 1059 (1931). The purpose of equity would be defeated if the insured were allowed to enrich himself unjustly by a double recovery. However, where the insurer condones the acts of the insured, either expressly or by implication, the company may be estopped to assert otherwise valid defenses. Any other holding would not be in keeping with equitable theory. The principles of subrogation are never employed where they will work injustice to the rights of others, as the rule finds support in the maxim that he who seeks equity must do equity. *Bank of Marlinton v. McLaughlin,* 123 W. Va. 608, 17 S.E. 213 (1941).

The insurer may be held to have waived important rights under the insurance policy if its adjuster, as a representative of

the company, makes commitments within the actual or apparent scope of his authority. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S.E. 389 (1916). This is true whether the company actually knows of the adjuster's acts or not, and through him conditions in the policy may be waived, including the right to subrogation. *Everett v. Metropolitan Life Ins. Co.*, 129 Neb. 386, 261 N.W. 575 (1935); *Weber v. United Mutuals Co.*, 75 N.D. 581, 31 N.W.2d 456 (1948); *Powers v. Calvert Fire Ins. Co.*, 216 S.C. 309, 57 S.E.2d 638 (1950).

The principal case is of interest primarily because it settles, in this jurisdiction, a question heretofore unadjudicated. The soundness of the decision is unquestionable as evidenced by the cases discussed above. The case will serve as a convenient starting point on questions of subrogation involving tort liability, decisions on which, as the court noted, are lacking in West Virginia.

R. H. R.

LABOR LAW—AMBULATORY EMPLOYER—PICKETING.—Suit by a sign painting corporation to enjoin peaceful picketing by a union in front of a service station at which employees of the corporation were painting a sign. The picketing climaxed a long struggle to unionize the corporation's employees. Previously, picketing had been done at the company's premises. The placard carried by the single picket stated that the men working on the sign were not members of the local sign painters' union. Picketing occurred both while the men were working and after they had left. While the picketing continued, the service station did no business. *Held,* reversing the lower court, that the injunction should not have been issued, since this was peaceful primary picketing protected by the free speech provision of the Federal Constitution. *Ohio Valley Advertising Corp. v. Union Local* 207, 76 S.E.2d 113 (W. Va. 1953).

The legality of peaceful picketing, in the absence of a strike, was doubted before the decision in *Thornhill v. Alabama*, 310 U.S. 88 (1940). That case established that peaceful picketing is protected under the Fourteenth Amendment, but can be enjoined where a clear and present danger of substantive evil exists. It was said that that states might "set the limits of permissible contest open to industrial combatants" subject only to the constitutional