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Interpleader--Statutory Construction--Party Defendant

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meticulous in the future in proving all material elements of a criminal offense beyond a reasonable doubt. In cases of the instant nature this should not be difficult.

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INTERPLEADER—STATUTORY CONSTRUCTION—PARTY DEFENDANT.—*A* recovered a judgment against *B* and garnisheed a bank in which *B* had an account. *B* filed an affidavit to interplead *A* and *X*, contending that the money placed in the bank by *B* belonged to *X*. The lower court made *X* a party defendant and found in his favor. On appeal, *held*, that a defendant in an action at law who has resisted the action and who has received an adverse judgment is not a "defendant in an action which he does not wish to defend" and thus can not maintain interpleader. *Cargill, Inc. v. Eastern Grain Growers*, 86 S.E.2d 569 (1955) (3-2 decision).

The majority opinion is based upon two grounds: (1) that *B* was not a defendant in an action which he did not wish to defend since he had ceased to be a defendant when the judgment was rendered against him and (2) that even though *B* were such a defendant he could not file a bill of interpleader because the bank was the proper party to file the bill and not *B*.

W. VA. CODE c. 56, art. 10, § 1 (Michie 1955), reads in part as follows: " A defendant in an action for the recovery of money which he does not wish to defend, but which money is claimed by some third person . . . may file his affidavit stating the facts in relation thereto . . . and the court may thereupon make an order requiring such third person to appear and state the nature of his claim. . . ."

Statutory interpleader was provided to make the equitable remedy available to litigants in law courts in certain types of cases. *Dickeschied v. Exchange Bank*, 28 W. Va. 340 (1886). As a general rule, the statute is merely a substitute for the original bill in equity and is governed by the same doctrines and principles. *Conway v. Kenney*, 273 Mass. 19, 172 N.E. 888 (1930); *McNevin v. Metropolitan Life Ins. Co.*, 160 Misc. 468, 290 N.Y.S. 44 (Sup. Ct. 1936). In *Stone v. Reed*, 152 Mass. 179, 25 N.E. 49 (1890), it was held that the party seeking interpleader must have possession of the subject matter and must allege this possession and a willingness to pay the fund into court if the interpleader is granted. In the principal case *B* was not in possession of the funds and could not have paid them into court. He had only a chose in action against the bank, a right to be paid the money on demand. Since the bank had been gar-

nisheed, *B* could not even obtain the money from it. In *United Fuel Gas Co. v. Caldwell,* 109 W. Va. 85, 153 S.E. 107 (1930), it was held that interpleader was proper only where the plaintiff was uncertain as to whom the right in dispute belongs. The mere assertion of a doubt was not considered sufficient. There must be reasonable grounds for uncertainty. See also the *Dickeschied* case, *supra.* In the principal case *B* knew that the money belonged to *X* and could not be attached by *A*. He had no doubt whatever as to the rights of the parties. From a discussion of these cases, it can be concluded that *B* was not a stakeholder between *A* and *X* and thus could not have filed a bill of interpleader even had he been a proper defendant in an action within the meaning of the statute. However, the majority seems to have based its decision primarily upon the fact that *B* ceased to be a defendant in any action when a judgment was rendered against him and thus could not file for interpleader because the statute applied only to defendants in certain types of actions.

The case of *Town of Summersville ex rel. McCue v. Cooper,* 124 W. Va. 417,.21 S.E.2d 669 (1942), relied upon by the dissenting judges, can be distinguished from the principal case. In the *Cooper* case, *A* recovered a judgment against *B*. P who in a previous action had recovered a judgment against *A* immediately caused an orger of suggestion to be issued naming *B* as suggestee. *B* was permitted to interplead *P* and *A*'s assignee. It was held that *B,* although he had ceased to be a defendant in the original action by *A,* was made a new defendant in a new action, the suggestion proceeding. Thus it was decided that a sugggestee in a suggestion proceeding is a defendant in an action within the meaning of the statute. In the principal case, however, the judgment terminated the original action and *B* was not made a suggestee in a suggestion proceeding, the bank being the party garnisheed. Thus *B* had ceased to be a defendant in any action and, there being no suggestion proceeding against *B,* the *Cooper* case is not a controlling authority.

The effect of the holding in this case is that a defendant must, at the time he is summoned, elect whether he will defend on the merits or whether he will seek to interplead. If he allows a judgment to be rendered against him, he will no longer be a defendant and thus can not file a bill of interpleader. The dissent contends that this is an unjust result because a defendant, if he chooses to defend on the merits, will forfeit his right later to suggest to the court by affidavit that property attached is, in fact, property of another person. What the dissenting judge overlooks, however, is

that there are other methods of contesting attachments. *B* should have informed the bank of the true ownership of the money and then the bank could have defended against the garnishment or could have interpleaded *A* and *X*.

W. A. K.

NEGLIGENCE—DISTINCTION BETWEEN PROXIMATE CAUSE AND CONDITION.—Action by house owners against heating contractors for fire damage allegedly resulting from improper installation of coal furnace in house. Evidence revealed that one of owners had built a fire in the furnace, knowing that thermostats controlling the drafts were not working. Trial court set aside verdict for plaintiffs, ordered new trial, and plaintiffs brought error. *Held,* reversing judgment, that plaintiffs' act was only a remote cause of the fire and merely created a condition under which the fire which destroyed the house was started. *Reese v. Lowry,* 86 S.E.2d 391 (W. Va. 1955).

In primary support of this holding in the principal case, the court cited *Webb. v. Sessler,* 135 W. Va. 341, 63 S.E.2d 65 (1950). That case was an action for injuries received as a result of an automobile being struck by a negligently operated airplane which was attempting to land on an airport which, in violation of Civil Aeronautics Authority regulations, was situated too closely to the highway upon which the automobile was parked. In that case the court also distinguished between the proximate cause of an injury and the condition or occasion of the injury and found the antecedent negligence of the owners, lessees, and operators of the airport to constitute the condition upon which the intervening or postcedent negligence of the airplane operator acted to proximately cause the injury for which only the airplane operator was liable. However, in the principal case ". . . . . notwithstanding no injury would have occurred if it had not happened . . . .", the postcedent or intervening act of the plaintiff was held to be the condition. In both the *Webb* case, *supra,* and the principal case the court made the statement that there is a clear distinction in West Virginia beween the proximate cause of an injury and the condition or occasion of the injury.

In *Snyder v. Philadelphia Co.,* 54 W. Va. 149, 46 S.E. 366 (1903), a teamster's horses became frightened by the negligent blowing off of a gas well, and in the teamster's attempt to control them, a line broke, as a result of which he fell from his wagon, and was injured. The court, in affirming judgment for the plaintiff, held that the weak condition of the line could not be regarded as the cause of