Volume 58 | Issue 2 Article 15

February 1956

Juries--Change of Venue--Discretion of Trial Judge

T. E. P.
West Virginia University College of Law

It is submitted, however, that the power of a soliciting agent to make contracts of insurance is limited. "So far as the insured himself is concerned the agent must be held to have possessed apparent authority commensurate with the business intrusted to him." *Green v. American Life & Accident Ins. Co.*, 93 S.W.2d 1119, 1124 (Mo. 1936). It is difficult to conceive how the deceased could have relied in good faith upon the statement of the agent in the instant case. The agreements of the parties may be expressed in many papers, and in which paper the condition is expressed makes no difference. See *Iowa Life Ins. Co. v. Lewis*, 187 U.S. 335, 346 (1902). "Any notice of limitation upon the agent's power, which a prudent man is bound to regard, is equivalent of knowledge to the insured." *Davis v. Metropolitan Life Ins. Co.*, 161 Ga. 568, 573, 131 S.E. 490, 492 (1926). Such notice in the receipt would put the act of the agent not only beyond the scope of his actual authority, but also beyond the scope of his apparent authority. *Thompson v. Equitable Life Assur. Soc'y of the U.S.*, 199 N.C. 59, 65, 154 S.E. 21, 24 (1930).

Illustrative of the application of agency law to the problem of the instant decision is the statement that one who deals with the soliciting agent of a life insurance company must look to his authority. *Massachusetts Mut. Life Ins. Co. v. Nat'l Bank of Commerce*, 95 F.2d 797 (4th Cir. 1938). Again, basic rules were applied where the court held that plain and unambiguous language in the application *and* receipt as to the condition of the insurance contract would be ample notice to the insured. *Peoples Life Ins. Co. v. Parker*, 179 Va. 662, 20 S.E.2d 485 (1942).

It is difficult to conceive of a decision other than in favor of the insurer upon the facts of the instant case had the court seen fit to make a practical application of the law of agency. However, the court based its decision upon an unreported majority opinion reconstructed from the reported dissent of a lower court and as such there may be some question as to the weight to be accorded the decision in the instant case.

H. G. U.

JURIES—CHANGE OF VENIRE—DISCRETION OF TRIAL JUDGE.—*D* was indicted for murder arising out of a violent labor dispute. The trial judge, being of the opinion that qualified jurors could not be found in the county of venue, ordered jurors to be drawn from a neighboring county, under authority of West Virginia statute. W.

VA. CODE c. 52, art. 1, § 20 (Michie 1955). This opinion was based upon the personal knowledge of the judge of the circumstances and prejudices surrounding the labor dispute. *D* attacked this procedure by writ of error on the ground that the record did not clearly show that it was necessary to order such change of venire, declaring that the personal opinion of the judge was not sufficient to show that a qualified jury could not be impaneled from the county of venue. The issue was whether, under the statute authorizing a change of venire, the court may rest its determination on personal knowledge and opinion. *Held,* that the decision of the trial judge to call for a change of venire must not be based on personal opinion, but must be shown to be clearly necessary from the facts appearing on the record. Reversed and remanded. Dissent pointed out that the majority furnished no practical test to determine the necessity for change of venire. *State v. Bail,* 88 S.E.2d 634 (W. Va. 1955).

The West Virginia Constitution requires that trials of crimes shall be by a jury of twelve men in the county where the alleged offense was committed, unless on the petition of the accused for good cause the venue is changed. W. VA. CONST. art. 3, § 14. Thus our constitution leaves the matter of the method of procuring and impaneling the jury to be dealt with by the legislature. As a result it has been provided by the legislature that if it appears, in the opinion of the trial court, that qualified jurors cannot be found in the county of venue, then it will be permissible to summon jurors from another county. W. VA. CODE c. 52, art. 1, § 20 (Michie 1955). West Virginia, in effect, provides two alternatives in the situation where it appears that an impartial jury cannot be found in the county of venue. One remedy would be a petition for a change of venue on the part of the defendant which is authorized by the West Virginia Constitution and is addressed to the sound discretion of the trial judge. *State v. Beal,* 104 W. Va. 617, 141 S.E. 7 (1927). The second possibility would be for a motion for a change of venire on the part of the prosecution or defendant, or a grant of such change by the court itself. This motion, from the very language of the legislature, also seems to be addressed to the sound discretion of the trial judge. The problem in the principal case is what limitations were meant to be placed upon this discretion of the court to order a change of venire.

After a review of the West Virginia decisions the court in the instant case arrived at the conclusion that it was not the intention of the legislature to base the exercise of discretion on the part of the court upon its personal knowledge and opinion. It must be

shown from the facts appearing on the record that a change of venire is clearly necessary in order to obtain an impartial jury. In the principal case there remained in the jury box at the beginning of these proceedings fifty names. There were approximately 3700 other persons in that county available for jury service. The facts show that the trial judge made no attempt to impanel a jury of the county of venue, but in ordering a change of venire relied upon his personal knowledge of the prejudices surrounding the labor dispute. Also, in two previous trials growing out of this labor controversy, the judge noted that there was some difficulty in obtaining a jury. The supreme court felt that the above facts were not sufficient to show the necessity for a change of venire in order to provide *D* with a fair trial. It was stated by the majority that some effort to impanel a jury should be made in order to determine the necessity for a change of venire. But the court does not attempt to furnish a guide to show to what extent the judge must go in this effort, the opinion being that it must depend upon the circumstances of each particular case. Judge Haymond, in a dissenting opinion, pointed out that this lack of a practical guide places the circuit court in an "unnecessary and intolerable position of doubt and uncertainty."

In other states with similar statutory provisions for change of venire the cases seem to offer no definite test, the consensus being that there must be at least some fair effort made in good faith to impanel a jury from the county of venue. *Newberry v. Commonwealth,* 192 Va. 819, 66 S.E.2d 841 (1951); *Gross v. Commonwealth,* 294 Ky. 492, 172 S.W.2d 78 (1943). In considering what constitutes a fair effort, the Kentucky court held it to be such honest effort as the circumstances show needful to satisfy itself upon this point where considered in connection with all the evidence and other informing circumstances at such time before it. *Williams v. Commonwealth,* 258 Ky. 574, 80 S.W.2d 573 (1935). New Jersey ruled that the exercise of discretion cannot be arbitrary, vague, or fanciful and must be in consonance with well established principles of law. *State v. Collins,* 2 N.J. 406, 67 A.2d 158 (1949). These decisions, while requiring some effort to impanel a jury of the county of venue, appear to indicate that the extent to which the trial court must go in determining whether a change of venire is clearly necessary, will depend upon the facts and circumstances of each case.

What, then, must the trial judge do in order to find a change of venire to be clearly necessary? As was previously stated, a motion

for change of venire may be made by the defendant or the state, or such change may be granted by the court itself. Thus we have the possibility of the situation where the defendant may be opposed to such change, as is exemplified by the principal case. In this situation the court would be faced with the necessity of making a more thorough investigation before finding it clearly necessary for a change of venire, than it would in the situation where the defendant himself moved for such change. The reason for this difference is that it is the indefeasible right of the defendant to a fair trial that must be protected and, generally, it will take a great deal of effort on the part of the trial judge, where the defendant opposes the change, to find that the defendant is not entitled to be tried by jurors of the county of venue. It appears that the case will be reversed on appeal if there is the slightest possibility that the defendant was deprived, through the exercise of the discretion of the trial judge in changing venire, of this right of a fair trial by an impartial jury.

If the trial judge is to be sure in every case that the order for change of venire is justified, it appears that he must definitely make some effort to impanel a jury of the county of venue. Perhaps in West Virginia he would be wise to examine more than twenty-five per cent of the current jury list since one decision has held that an examination of 128 of 513 persons who were listed on the current jury list without obtaining a jury was not sufficient evidence to show it to be clearly necessary to call for a change of venire in order to get an impartial jury. *State ex rel. Cosner v. See,* 129 W. Va. 722, 42 S.E.2d 31 (1947). The trial judge should consider this attempt in connection with all the facts appearing on the record, particularly in regard to community prejudices, publicity of the alleged offense, prior trials of defendant, size of community and size of the family of defendant or that of the prosecuting witnesses. In the case where the defendant opposes a change of venire, it seems that the trial court should approach the problem with the presumption that an impartial jury can be found in the county of venue. This *might* lead to the conclusion that a change of venire should never be granted in the situation where defendant opposes such change, since it is the right of the defendant which must be protected. However, where defendant advocates or agrees to such change of venire, it seems that a different rule must be applied by the court. In that instance a change of venire should be granted if the trial court finds that an impartial jury cannot be found in the county of venue after an attempt to impanel such

jury has been made and considered in connection with all the circumstances appearing on the record.

T. E. P.

UNFAIR COMPETITION—INFRINGEMENT OF TRADE NAME—PREREQUISITES TO ENJOIN.—*P* used the trade name "Safeway" to designate each of its grocery stores in its national chain. *P* had used the name continuously in Virginia since 1942 and elsewhere since 1926. *D* in 1954 adopted the term "Saveway" as part of a trade name for a local grocery store at Norfolk, Virginia. *P* has no store in Norfolk or the immediate area. *P* seeks to enjoin the use of the term "Saveway" by *D* as an infringement on its trade name. *Held,* that the infringement of a trade name alone was sufficient to invoke equitable relief and the actual loss of business, diversion of trade, competition, or "palming off" of defendant's goods as the plaintiff's, were not prerequisites to such a decree. Injunction granted. *Safeway Stores v. Suburban Foods,* 130 F. Supp. 249 (E.D. Va. 1955).

The principal case was an action for unfair competition based upon the right of a first user of a trade name to protection from infringement. In deciding the case the court laid down the very broad proposition that infringement alone gave the plaintiff the right to enjoin a junior user from using the trade name. Under this rule it is conceivable that two individuals could innocently adopt the same trade name for their businesses, each being in a different area where there would be no injury to the business of the other from the use of the same name, and yet the first to adopt the trade name would be able to enjoin the use of the name by the other. By following such a rule, one person would be denied the use of a name without any corresponding injury to the other. But is this the law of unfair competition in the Virginias? The courts of last resort of Virginia and West Virginia have never directly decided the question. The decisions of other American jurisdictions present two conflicting views.

There is one line of decisions which holds that actual competition is necessary in order to maintain an action for unfair competition. "The right of a given name previously adopted in a business located in one locality does not invest the proprietor of that business with the right to enjoin the use of the same or a similar name by a junior enterprise in another locality where one does not encroach upon the other." *National Grocery Co. v. National Store Corp.,* 95 N.J. Eq. 588, 123 Atl. 740 (1924). In the jurisdictions