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Procedure–Demurrer to Misjoinder of Parties Under the Revised Code

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extraordinary remedy of sequestration is asked on the basis of legal title, that the plaintiff must come forward with fairness and set out a title, which, *prima facie*, is a good one. The court here apparently was not satisfied that the bill brought by X and the other heirs, in view of A's answer, set up that *prima facie* case, hence it followed a sound rule in refusing the harsh decree sought. However, it must be stated that since sequestration is a conservative process, error in issuing the writ does not prejudice the hearing on the merits in the main case.

It is submitted, that the court in refusing to uphold the decree issued by the trial court followed the dictates of a sounder policy and reached a proper and just decision.

H. G. W.

**PROCEDURE — DEMURRER TO MISJOINDER OF PARTIES UNDER THE REVISED CODE.** — A bond was executed by Doddridge County Bank, as principal, and other defendants as sureties, to secure deposits of the plaintiff. On an action on this bond the defendants moved to dismiss the case because of misjoinder of parties plaintiff. *Held*, that this procedure was irregular, since under the West Virginia statute all challenges of the sufficiency of pleadings should be by demurrer. *Lawhead v. Doddridge County Bank.*

Prior to the 1931 Revised Code of West Virginia it was definitely established that a demurrer was the correct procedure for raising an objection to misjoinder of parties. The new statute, however, indicates that such a method is no longer proper. Under the Virginia code provision which served as a model for the West Virginia statute it has been held consistently that the only method

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8 Griffin v. Carter, 40 N. C. 413 (1848); Parker v. Grammer, 62 N. O. 28 (1866).
9 See Note (1900) 49 L. R. A. 773; Ross v. Colville, 3 Call 382 (Va. 1803).
1 W. VA. REV. CODE (1931) c. 56, art. 4, § 36.
2 194 S. E. 79 (W. Va. 1937).
4 "No action . . . shall abate or be defeated by the misjoinder or non-joinder of parties, plaintiff or defendant. Whenever such misjoinder shall be made to appear by affidavit or otherwise, the parties misjoined shall be dropped by order of the court, entered of its own accord or upon motion, at any stage of the cause." W. VA. REV. CODE (1931) c. 56, art. 4, § 34.
5 VA. CODE (Michie, 1936) § 6102.
of objecting to misjoinder of parties is by a motion to abate as to
the parties improperly joined, and that a demurrer does not lie to
this defect. It is generally recognized that a provision similar to
the one now in force in this state abolishes all the common law
methods of objecting to misjoinder of parties, and West Virginia
decisions, in referring to the Virginia statute, appear to affirm
this proposition.

It is a familiar rule of statutory interpretation that when a
statute of another state is adopted, the interpretation put upon it
by the courts of that state come with it; this rule is reinforced by
the Revisers' Note to the provision in the West Virginia Code.
Furthermore, in the draft of the statute, the words "may be
dropped" are changed to "shall be dropped" so as to comply more
strictly with the interpretation set down by the Virginia courts.
West Virginia commentators have expressed the opinion that un-
der the revised section a demurrer is not the proper method of ob-
jecting to misjoinder of parties.

In the principal case the court states that under our present
practice all challenges of the sufficiency of pleadings should be by
demurrer. The code section as to joinder, however, states that no
action shall abate or be defeated by the misjoinder or nonjoinder
of parties plaintiff or defendant. It seems, therefore, that a mis-
joinder does not produce an insufficiency. To be the subject of a
demurrer in West Virginia the defect must be one which goes to
the operative effect of the pleading, as a pleading, and not to some-
thing which constitutes a mere extraneous condition precedent to
its availability. Also, a demurrer is in its nature a plea to the

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9 See cases cited supra note 6; BURK, PLEADING AND PRACTICE (2d ed. 1920) 63.
10 Stewart v. Tams; Hunt v. Mounts, both supra n. 3.
11 As the revised section is similar to the Virginia statute, it is probable that
a similar holding will follow in this state thus changing our present decisions
as to misjoinder and possibly as to nonjoinder.
13 W. Va. REV. CODE (1931) c. 56, art. 4, § 34.
action,\textsuperscript{13} the effect of which is to defeat the action as stated.\textsuperscript{14} Applying these principles to the phraseology of the code, it is evident that a demurrer to misjoinder of parties is improper.

The statute provides that whenever the misjoinder is made to appear by affidavit or otherwise, the misjoined parties shall be dropped. Because of this wording, the court might treat a demurrer as merely a notice of the misjoinder, abating the action as to improper parties, but proceeding to final judgment as to all parties properly in the case.

J. H. H.

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**Release of Claim for Personal Injury — Right in Action at Law to Avoid Release Based on Mutual Mistake of Fact.** Through the negligence of $D$, $P$, brakeman for $D$, was injured February 25, 1935, while in discharge of his duties. On June 25, 1935, $P$ for valuable consideration released $D$ from all claims of every kind for damages and injuries sustained. $P$ sues for injuries and seeks to avoid the effect of the release by alleging that at the time the release was executed he believed under advice of physicians, including physicians in employ of $D$, that his injuries were not serious, but merely temporary whereas it later developed that the injuries were serious and permanent. 

_Held_, that in the absence of fraud in procurement of a release of liability for personal injuries, such release, if for valuable consideration, may not be repudiated in an action at law by releasor for damages for the injury. _Janney v. Virginian Railway Co._\textsuperscript{1}

As suggested by the court in its opinion, there is a square split of authority as to whether such a release may be repudiated in an action at law for damages for injuries for which the release was given. If you assume, as our court does, that there is an absolute right to relief in equity on these facts,\textsuperscript{2} then we must con-