Volume 36 | Issue 4 Article 12

June 1930

Pleading--Misjoinder of Parties Defendant

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the policy was intended to protect the insured in his conduct as a deputy.

The court, further, in its opinion, laid down the familiar rule of construction that "in a case where it can be fairly claimed that two constructions can be placed upon the language used in the policy, it is equally well settled that the one is to be adopted which is most favorable to the insured, and, in case of doubt as to the meaning of the terms employed by the company, they are to be construed most strongly against the insurer." The rule is the same as that adopted by the American Law Institute in its Restatement of the Law of Contracts, 232 (d), and is one that is frequently cited by our courts. *Milam* v. *Norwich Union Indemnity Company,* 107 W. Va. 574, 149 S. E. 668; *Copen* v. *Fire Insurance Company,* 107 W. Va. 608, 149 S. E. 830; *Pacific Mutual Life Insurance Company* v. *Turlington,* 140 Va. 748, 125 S. E. 658.

There is hardly any question but that the words of the policy here could, by a liberal interpretation, be held to cover the hazard involved in the principal case; yet the court found against the insured. The court has evidently disregarded the rule for the particular case, and yet wished to approve of it so that they might be able to use it in another case if they find need of it.

—HARRIET L. FRENCH.

PLEADING—MISJOINDER OF PARTIES DEFENDANT.—In a recent case the assignee of a non-negotiable instrument sued the maker and his assignor jointly. The maker alone appeared and demurred to the declaration on the ground of mis-joinder of parties defendant. The lower court sustained the demurrer, and the Supreme Court of Appeals of West Virginia affirmed the ruling. In so holding, the court expressly disapproved of syllabus 1 of *Hunt* v. *Mounts,* 101 W. Va. 205, 135 S. E. 323, and syllabus 2 of *Urton* v. *Hunter,* 2 W. Va. 83, "in so far as they may be construed as holding that a mis-joinder of parties defendant in an action *ex-contractu* must be made the subject of a plea in abatement". *Stewart* v. *Tams,* 151 S. E. 849 (W. Va. 1930).

The opinion of the court in overruling these two cases upon this point follows closely the criticism of them published by Mr. Leo Carlin in an article in 33 WEST VIRGINIA LAW QUARTERLY 101. In his discussion of the case Mr. Carlin collected the decisions in the state, and pointed out that these two cases were inconsistent

with other decisions of our court as well as with the common law rules of mis-joinder. *Harris* v. *North*, 78 W. Va. 76, 88 S. E. 603; *Bolyard* v. *Bolyard*, 79 W. Va. 554, 91 S. E. 529.

The case, however, is an interesting illustration of the injustices that can arise from following the technical common law rules of mis-joinder. In this case, a party, against whom the plaintiff undoubtedly had a just claim, was allowed to take advantage of a mis-joinder that was in no way prejudicial to him and, if anything, was in his favor. It rather shocks our sensibilities to see the plaintiff's case thrown out of court upon such a technicality.

There has been a decided move in this country, following the lead to England, to liberalize rules of procedure in regard to joinder of claims and allowing counter-claims. Mr. E. R. Sunderland in an article in 18 MICHIGAN LAW REVIEW 571, and Mr. William Wirt Blume in an article in 26 MICHIGAN LAW REVIEW 1, have very forcefully answered any arguments in favor of the technical common law rules, and, with equal force, have advocated unlimited freedom of joinder. Their argument is that in considering a question of joinder, or in allowing a counter-claim in a case the only questions to be decided are (1) Can the court conveniently despatch the matters joined in this action? and (2) Will there be any resulting prejudice to the parties involved? If the question is argued from these standpoints, and the court is of the opinion that it can conveniently decide the issues involved, and that there will be no prejudice caused thereby, it is submitted that there is no good reason for objecting to the joinder or to the allowance of the counter-claim. A case should stand or fall upon its merits—not upon some technical rule of procedure.

This view has been advocated by the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association in its reports before the Association last fall, and published in 36 WEST VIRGINIA LAW QUARTERLY 1.

The proposed draft of the REVISED CODE, ch. 56, §34, changed our rules on non-joinder and mis-joinder to some extent, but as this issue goes to press it is not known just what rule was finally passed. The proposed law was to this effect: "No action or suit shall abate or be defeated by the mis-joinder or non-joinder of parties, plaintiff or defendant. Whenever such mis-joinder shall be made to appear by affidavit or otherwise, the parties mis-joined shall be dropped by order of the court, entered of its own record, or upon motion, at any stage of the cause".

It is submitted that, although this proposed change will probably alleviate the difficulties to some extent, it does not go far enough. It still requires the court to determine whether or not

there is a mis-joinder or non-joinder. The emphasis is still upon the old rules of joinder, and not placed where it is believed that it should be, that is upon the basis of conveniency of the court and prejudice to the parties.

—HARRIET L. FRENCH.

TRANSFER OF PROPERTY IN TRUST AS A METHOD OF ESCAPING TAXES.—Is it possible to transfer property to a non-resident in trust for a resident and thus escape taxes altogether? No. But might it thus be possible to substitute the taxation law of a foreign state for that of our own? In a case recently decided by the United States Supreme Court the facts and holding were as follows: One K, a resident of Virginia, transferred and delivered to a trust company of Baltimore, Maryland, stocks and bonds of various corporations to the amount of $50,000 with power to change the investments, collect and accumulate the income, and pay the same together with the principal in this manner: One-half to each of K's sons (residents of Virginia) when they should respectively become of the age of twenty-five years. Virginia assessed taxes for the years 1921, 1922, 1923, 1924 and 1925 upon the whole corpus of the estate against the trust company. The United States Supreme Court, citing authorities, *stated* that the property as such was only taxable at the residence of the owner, and that the trust company, having the legal title and control, was the owner, and, therefore, that these intangibles were taxable in Maryland. The court *held* that the cestuis, not having present control of the property, were not the owners, and, therefore, the property was not taxable in Virginia. The court did state, however, that the question of whether Virginia could tax the equitable interest of the cestuis, was not presented for adjudication, but intimated that "Virginia, following its own view of vested and contingent interests, might tax the interests of these beneficiaries as though they were the whole, but it is sufficient for present purposes that it has not assumed to do so."

Thus it seems certain that one may not dodge taxes altogether by transferring the property, title, and control to a foreign trustee, for by so doing the property is made subject to taxation at the trustee's residence. There is a possibility, however, that the application of the tax laws of a foreign state may be substituted for that of one's own state, provided the latter state would not assume to tax the equitable interest remaining, in which case the