November 1917

Bills and Notes–Validity of a Stipulation for an Attorney's Fee

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Legal Profession Commons

Recommended Citation

Bills and Notes–Validity of a Stipulation for an Attorney's Fee, 25 W. Va. L. Rev. (1917). Available at: https://researchrepository.wvu.edu/wvlr/vol25/iss1/12

This Recent Case is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
RECENT CASES

BILLS AND NOTES—VALIDITY OF A STIPULATION FOR AN ATTORNEY’S FEE.—In an action upon a promissory note one of the questions was whether a stipulation for a 10 per cent. attorney’s fee could be enforced. Held, that it was enforceable. Triplett et al. v. Second National Bank, 92 S. E. 897 (Va. 1917).

Whether such a stipulation is enforceable is a question upon which there is a square conflict of authority. The Negotiable Instruments Law, adopted in a great majority of the states including Virginia and West Virginia, provides (§ 2) that the negotiability of an instrument is not affected by the fact that “it is to be paid with cost of collection or an attorney’s fee in case payment shall not be made at maturity.” Under this statute a few states, including Virginia, have overruled former decisions in which they had held such a stipulation unenforceable. Colley v. Summers Co., 119 Va. 439, 89 S. E. 806. West Virginia, however, has held three times that notwithstanding this provision of the Negotiable Instruments Law, such a stipulation is usurious, contrary to public policy and void. Bank v. Poteet, 74 W. Va. 511, 82 S. E. 332 (two judges dissenting); Bank v. Bank, 76 W. Va. 356, 85 S. E. 541 (two judges dissenting); Bank v. Sanders, 88 S. E. 187. The first West Virginia case passing on this point relies largely upon the case of Pearre Bros. v. Rixey, 89 Va. 113, 15 S. E. 498. That case, however, has since been overruled. Colley v. Summers Co., supra. With this foundation stone thus removed from under the West Virginia decisions, the reasons upon which those decisions purport to stand, may, it would seem, be properly re-examined. (1) Is such a provision usurious? Usury is charging an unlawful rate of interest on a loan. This fee is not interest, it is an additional amount agreed to be paid, in consideration of additional trouble and expense inflicted on the holder. 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed. § 62a. (2) The remaining argument in favor of the West Virginia holding seems to be that the provision is contrary to public policy; but there are twenty-two states which hold that such a provision is valid and it is difficult to see how such a provision contravenes any principle of public policy. The courts by allowing only a reasonable fee in each case have it within their power to prevent enforcement of the stipulation from being oppressive. This is pointed out in Campbell v. Worman, 58 Minn. 561, 60 N. W. 668. The attorney’s fee, if payable at all, is an expense inflicted upon the holder by the wrongful
act of the maker in failing to live up to his agreement, and it would therefore seem to be just that this reasonable expense should be borne by the party at fault.

For a citation of authorities and a more extended discussion of the principle involved in this case, see THE BAR, Jan., 1916, 41.

**Damages — Entire or Separable Damages — Basis for Recovery of Entire Damages.** — Under authority of law defendant city had constructed a municipal incinerating plant on land adjoining the lot occupied by plaintiff as her residence. The jury found that plaintiff's property was injured by smoke and odors incident to the operation of the plant, although it was constructed in the most approved manner and operated with due care and diligence. Held, that entire damages for a permanent injury be allowed. Keene v. City of Huntington, 91 S. E. 119 (W. Va. 1917).

In order to assess entire damages in cases of this kind, it is necessary (1) that the structure causing the damage be authorized by law, City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388, 392; (2) that there be no negligence either in the construction or in the operation of the plant, and (3) that either the damage be permanent or the cause of damage be of reasonably definite continuance. See 4 Sutherland, Damages, 4 ed., §§ 1017, 1042; and 3 Sedwick, Damages, 9 ed., § 924. All three elements exist in the principal case. If the plaintiff's injury had been due to negligent operation of the plant, City of Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, or had the location been temporary, City of Chattanooga v. Dowling, 101 Tenn. 342, 47 S. W. 700, only separable damages could have been recovered. If its maintenance were unauthorized and it was therefore a nuisance, besides equitable relief, plaintiff might recover separable damages in successive actions in case to compel its abatement. Watts v. Norfolk & Western Ry. Co., 39 W. Va. 196, 19 S. E. 521; Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 19 S. E. 401. Since in the principal case it was authorized by law, there was no possibility for its compulsory abatement and therefore the reason is lacking for successive actions in case for separable damages to compel abatement. Whether at his option the plaintiff should be allowed to recover entire damages which would operate to license its future operation so far as plaintiff's property is concerned is to be questioned. See 4 Sutherland, Damages, 4 ed., § 1039. Although not so stated in the principal case, it is said in earlier West Virginia cases, Smith v. Pt. Pleasant & Ohio River Ry. Co., 23 W. Va. 451, 452; Guin et al. v. Ohio River Co., 46 W. Va. 151, 33 S. E. 87, and in cases in other jurisdictions, Park Com'r of Louisville v. Donahue, 140 Ky. 502, 181 S. W. 285, 286; Stodghill v. C. B. & Q. Ry. Co., 53 Ia. 341, 5 N. W. 495, 497; Highland Avenue & B. R. Co. v. Matheus et al., 99 Ala. 24, 10 So. 267, 269; Fowle v. New Haven & Northampton Company, 112 Mass. 334, 339, that the granting of entire damages