North Dakota Law Review

Volume 27 | Number 1 Article 9

1951

Code Pleading - Joinder of Parties and Causes of Action - Right to Join Liability Insurer with Insured as Parties Defendant

there is much variance[7] and the better rule appears to be stated in *Moraitis v. Delany*,[8] which holds that the circumstances of the cases may vary the length of the detention. It is, however, agreed and constantly emphasized that deportation is not a criminal process[9] and the right to confine an alien is merely incidental to the right to exclude and expel.[10] Abuse of this right is imprisonment contrary to the Thirteenth Amendment of the Federal Constitution,[11] although the alien may be held during the deportation proceedings and for a reasonable period thereafter.[12] At least one case, Petition of *Brooks*,[13] sustains the proposition that such conditional release as is found in the instant case is unjustified and the alien must be deported or released. Should the court choose to follow *United States* ex rel. *Doukas v. Wiley*,[14] petitioner might, on the other hand, be subject to deportation as long as 24 years after the issuance of the original order of deportation. It appears that laches does not deprive the order of its effectiveness,[15] although in Petition of *Popper*,[16] the court said a deportation order was *functus officio* where the government failed to exercise its right of deportation. In that case it was held that such an order was not a bar to naturalization.

The deposition of the *Staniszewski* case, however, appears not to be a conclusive adjudication of the rights of petitioner since the government by its own admission cannot dispose of him as the deportation order directs. It would seem that the court has temporarily sidestepped the issue. If, as in Petition of *Popper*,[17] where the fact situation has aspects similar to the instant case, the government is ever to remain silent on the order, then the rule in Petition of *Brooks*[18] would serve the same purpose more efficiently and judiciously.

CODE PLEADING—JOINDER OF PARTIES AND CAUSES OF ACTION—RIGHT TO JOIN LIABILITY INSURER WITH INSURED AS PARTIES DEFENDANT. A Fargo, North Dakota, ordinance[1] requires taxicab operators within that

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[7] Caranica v. Nagle, 28 F.2d 955 (9th Cir. 1928) (two months detention reasonable); United States v. Wallis, supra note 6 (four months detention reasonable); Saksoganski v. Weedin, supra note 6 (30 days reasonable.)

[8] 46 F. Supp. 425 (D. Md. 1942).

[9] Bugajewitz v. Adams, 228 U.S. 585 (1913); Fong Yue Ting v. United States, 1949 U.S. 698, 730 (1893).

[10] Petition of Brooks, 5 F.2d 238 (D. Mass. 1925.)

[11] Petition of Brooks, supra note 10.

[12] Bauer v. Watkins, 171 F.2d 492 (2d Cir. 1948).

[13] Petition of Brooks, 5 F.2d 238 (D. Mass. 1925).

[14] 760 F.2d 92 (7th Cir. 1947).

[15] Restivo v. Clark, 90 F.2d 847 (1st Cir. 1937); Seif v. Nagle, 14 F.2d 416 (9th Cir. 1926).

[16] 79 F. Supp. 530 (S.D.N.Y. 1948).

[17] Ibid.

[18] 5 F.2d 238 (D. Mass. 1925), holding that alien must be deported or unconditionally released.

[1] Fargo Revised Ordinances, art. 22, § 306 (1939), as amended by Ordinance No. 700 (Dec. 29, 1943).

city to carry liability insurance indemnifying the public against injuries. Plaintiff, a paying taxi-passenger injured in a collision, brought suit for damages, joining *inter alia* as parties defendant the taxicab owner and his liability insurer. The insurer demurred for (1) misjoinder of parties defendant, arguing that there exists in North Dakota a public policy against mentioning insurance in a jury trial; and for (2) misjoinder of causes of action, contending that the cause of action in tort for the negligent acts of the taxicab operator could not be joined with the cause of action in contract upon the insurance policy. *Held,* there was a proper joinder of both parties and causes of action under the particular circumstances involved. *James v. Young,* 43 N. W. 2d 692 (N. D. 1950).

This decision is far from a blanket authority to join as defendants any insured and his liability insurer. Only two states, by express terms of statute, permit such a liberal joinder procedure.[2] North Dakota, on the other hand, specifically prohibits joinder of the insurer of a common motor carrier,[3] and impliedly prohibits joinder of the insurer of an ordinary motor vehicle owner or operator.[4] In a situation not covered by these express prohibitions, the right to joinder depends upon an interpretation of general pleading statutes, or in the absence of statute, upon the common law.[5] The instant decision is based upon the general pleading statutes in the North Dakota Revised Code.

The North Dakota statute on joinder of parties defendant declares in sweeping terms that "Any person who has or claims an interest in the controversy adverse to the plaintiff...may be made a defendant."[6] This would seem to make any insurer, whose pecuniary interests are certainly adverse to the plaintiff, a proper *party* defendant; but even so, there is no right to sue the insurer either jointly or separately unless there exists also a *cause of action* against him.[7] In the ordinary voluntary insurance situation there is no cause of action in contract, since there is no privity of contract between the injured

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[2] La. Acts 1930, No. 55; Wis. Stats. § 260.11 (1933).

[3] N.D. Rev. Code § 49-1833 (1943): "In an action for damages resulting from the negligence of such carrier, the insurer...shall not be joined as a party defendant..."

[4] N.D. Rev. Code § 39-1611 (Supp. 1949): "Neither ... the security filed, nor the insurance carried or furnished as provided in this chapter shall be referred to in any w[illegible]y...at the trial of any action at law to recover damages." The purpose of these statutes prohibiting joinder is to protect the insurance companies "against the well-known tendency of jurors to fail to consider merits if a defendant in an automobile accident case is insured." Miller v. Metropolitan Casualty Co., 50 R. I. 166, 146 Atl. 412, 414 (1929).

[5] There is no right to joinder at common law, since an action ex contractu cannot be joined with an action ex delicto. Conwell v. Hays, 103 W. Va. 69, 136 S.E. 604,605 (1927); Shipman, Common Law Pleading 202 (3d ed., Ballantine, 1923).

[6] N. D. Rev. Code § 28-0206 (1943).

[7] Charlton v. Van Etten, 55 F. 2d 418 (D. Minn. 1932) (by implication); Stearns v. Graves, 61 Idaho 232, 99 P. 2d 955, 959 (1940).

party and the insurer;[8] nor is there a cause of action in tort, since the insurer had nothing to do with the negligent acts causing the injuries. In short, in the voluntary insurance situation, the injured party has no cause of action against the insurer, but only against the insured who caused his injuries, and so there is no right to join the insurer as a party defendant.[9]

But the instant case involved *compulsory* insurance under a city ordinance designed expressly to "...indemnify those using such taxi-cab line and the public in general against loss to person and property."[10] Since statutory provisions are written into every policy,[11] the effect of this ordinance was to make the injured plaintiff a third-party beneficiary of the insurance contract;[12] as such he had a right of action in contract against the insurer,[13] in addition to his right of action in tort against the taxi operator. The instant case holds that these two causes of action arose out of the same transaction, and are therefore joinable under North Dakota's liberal code provision on joinder of causes of action,[14] designed to avoid multiplicity of suits.[15] In so holding, the court is in accord with other jurisdictions having similar code provisions.[16]

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[8] Bowers v. Gates, 201 Mich. 146, 166 N. W. 880, 881 (1918); Embler v. Hartford Ins. Co., 158 N. Y. 431, 53 N. E. 212 (1899); 6 Blashfield, Cyc. of Automobile Law and Practice § 4071 (Perm. ed. 1945). It seems fairly obvious that the insured takes out insurance, not to benefit a third person he may injure, but to protect his own pocketbook from suits by that third person.

[9] Charlton v. Van Etten, 55 F. 2d 419 (D. Minn. 1932); Universal Automobile Ins. Co. v. Denton, 185 Ark, 505 S. W. 2d 592, 595 (1932); Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936), **aff'd sub nom.** State **ex rel.** Davidson v. Parks, 129 Fla. 64, 175 So. 792 (1937); Zeigler v. Ryan, 63 S. D. 607, 262 N. W. 200 (1935) (statutes and situation parallel to instant case, except that insurance carried was **voluntary**).

[10] Fargo Revised Ordinances, art. 22, § 306 (1939), as amended by Ordinance No. 700 (Dec. 29, 1943).

[11] Malmgren v. Southwestern Auto Ins. Co., 201 Cal. 29, 255 Pac. 512 (1927); Ducommun v. Strong, 193 Wis. 179, 212 N. W. 289 (1927).

[12] Butler v. Eureka Security Ins. Co., 21 Tenn. App. 97, 105 S. W. 2d 523 (1937) (compulsory school bus insurance); Stusser v. Mutual Union Ins. Co., 127 Wash. 449, 221 Pac. 331 (1923) (compulsory bus driver's bond).

[13] Great American Indemnity Co. v. Vickers, 183 Ga. 233, 188 S. E. 24 (1936).

[14] N. D. Rev. Code § 28-0703 (1943): "The plaintiff may unite in the same complaint several causes of action...when they all arise out of...the same transaction or transactions connected with the same subject of action..."

[15] Stark County v. Mischel, 33 N. D. 432, 440, 156 N. W. 931, 933 (1916).

[16] Temple v. Dugger, 164 Okla. 84, 21 P. 2d 482 (1933); Scott v. Wells, 214 S. C. 511, 53 S. E. 2d 400 (1949); Piper v. American Fidelity and Casualty Co., 157 S. C. 106, 154 S. E. 106, 109 (1930); DeVoto v. United Auto Transp. Co., 128 Wash. 604, 223 Pac. 1050 (1924); cf. American Auto Ins. Co. v. Struwe, 218 S.W. 534 (Tex. Civ. App. 1920). **But cf.** Stearns v. Graves, 61 Idaho 232, 99 P. 2d 955 (1940); Ellis v. Bruce, 215 Iowa 308, 245 I. W. 320, (1932).

The court in the instant case also referred to N. D. Rev. Code (1943) § 22-0206, which states that "One who indemnifies another person against an act to be done by the latter is liable jointly with the person indemnified and separately to every person injured by such act." It is submitted that this is a liability statute found in the code chapter on "Indemnity", and has nothing to do with the procedural question of joinder of parties and causes. Northam v. Casualty Co. of America, 177 F. 981 (D. C. Mont. 1909), **semble.**

The insurer probably could have avoided the result of the instant decision by inserting in its policy a "no action" clause[17] The courts generally hold that such a clause forbids joinder of the insurer in a suit against the insured;[18] and only a specific statute enabling joinder of the insurer will override such a clause within a policy.[19]

The case appears to be one of first impression in North Dakota, although three other cases have been found which consider the related question of the propriety of informing jurors that the defendant has insurance, when no insurer is a party to the record. A careful study of these cases[20] indicates that the North Dakota Supreme Court recognizes the prejudicial effect of such information where it is injected for no purpose other than to encourage a larger verdict against the defendant; but these cases in no way deny the right to join an insurance company as defendant where a direct cause of action exists against that company under a reasonable construction of our pleading statutes.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF ALIEN LAND LAWS—EFFECT OF UNITED NATIONS CHARTER. The California Alien Land Law[1] prohibits, except as prescribed by treaty, the ownership of agricultural land[2] by aliens ineligible to citizenship, and provides for the escheat

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[17] A "no action" clause provides that no action can be brought against the insurer until the liability of the insured is first determined by judgment against him. It is designed to keep the fact of insurance out of a jury trial. See Morgan v. Hunt, 196 Wis. 298, 220 N. W. 224 (1928); Appleman, Insurance Law and Practice, § 4861 (1942).

[18] Stearns v. Graves, 61 Idaho 232, 99 P. 2d 955, 958 (1940). See, holding that a "no action" clause forbids joinder of an insurer even where the policy is written under a compulsory insurance statute: Pageway Coaches v. Bransford, 71 S. W. 2d 561 (Tex. Civ. App. 1934), aff'd 129 Tex. 327, 104 S. W. 2d 471 (1937); Polzin v. Wachtl, 209 Wis. 289, 245 N. W. 182 (1932); cf. Milliron v. Dittman, 180 Cal 443, 181 Pac. 779 (1919). Contra: Thompson v. Bass, 167 S. C. 345, 166 S. E. 346 (1932).

[19] Compare Bergstein v. Popkin, 202 Wis. 625, 233 N. W. 572 (1930), with Lang v. Baumann, 213 Wis. 258, 251 N. W. 461 (1933).

[20] Beardsley v. Ewing, 40 N. D. 373, 168 N. W. 791 (1918) (holding it is within discretion of trial court to declare mistrial if plaintiff so questions witness that jurors learn that defendant is insured); Stoskoff v. Wicklund, 49 N. D. 708, 193 N. W. 312 (1923) (holding trial court must declare mistrial upon defendant's motion, if plaintiff so questions witness that jurors learn that defendant is insured); Jacobs v. Nelson, 67 N. D. 27, 268 N. W. 873 (1936) (holding that where defendant has sought to impeach credibility of plaintiff's witness, plaintiff can by his witness bring out the fact of insurance when necessary to explain the impeaching matter; defendant in effect invited plaintiff to put in prejudicial matter of insurance).

[1] 1 Cal. Gen. Laws, Act 261 (Deering 1944, Supp. 1945). In North Dakota aliens are authorized by N. D. Rev. Code §§ 47-0111 and 56-0116 (1943) to acquire and dispose of land as if they were citizens.

[2] Although the prohibition refers to all "real property" it actually applies only to agricultural land, because of a commercial treaty between the United States and Japan, 37 Stat. 1504 (1911), authorizing citizens of Japan "to lease land for residential and commercial purposes..." Jordan v. Tashiro, 278 U. S. 123 (1928).