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Torts - Indemnification of Joint Tortfeasor Constructively Liable - Contribution and Indemnity Between Joint Tortfeasors

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of rents[12] and that there should be a specific provision for commercial lessees.[13]

In the principal case, after declaring the lease contract in fact unambiguous, the court correctly held that no stay should be granted when the unequivocal terms of a commercial lease have been broken, as the defendant's presence at the action for eviction is not essential.

Although there are a few weaknesses in the act, such as the provision on rents, it does, nevertheless, provide security for men in military service who might otherwise, by reason of their service, be subjected to injustice and oppression in civil actions.

W.F.M.M., JR.

TORTS—INDEMNIFICATION OF JOINT TORTFEASOR CONSTRUCTIVELY LIABLE—CONTRIBUTION AND INDEMNITY BETWEEN JOINT TORTFEASORS —Due solely to the negligence of the defendant's agent in installing a gas stove sold by the plaintiff's indemnitees, the stove exploded. In an action for personal injuries sustained as a result of the explosion, solidary judgment had been rendered against the defendant and the plaintiff's indemnitee. Plaintiff, as indemnitor, paid one-half the judgment, and, being subrogated to the indemnitee's rights against the joint tortfeasor, seeks restitution. The defendant argued that the judgment rendered against the plaintiff's indemnitee as a joint tortfeasor[1] precluded the plaintiff from showing mere technical liability and recovering the amount paid

12. See Comment (1940) 9 Int. Jurid. Ass'n Bull. 46, 50.

13. Ibid. The English act confers no special privileges upon members of the armed forces as such but applies generally to all persons, including alien enemies. Courts (Emergency Powers) Act, 2 & 3 Geo. VI, c. 67 (1939), as amended by 3 & 4 Geo. VI, c. 37 (1940). Under this act the principle is not established in England that any tenant or mortgagor is entitled to have his ability to pay any particular installment determined by reference to his means at the time it is due. See Comment (1940) 9 Int. Jurid. Ass'n Bull. 46, 50, n. 66; 33 Halsbury's Statutes of England (1940) 547.

1. The term "tortfeasor" is used to describe one who, for any reason, is subject to liability in a delictual action. The word "tort" carries with it, however, the suggestion of wrong-doing. Since in many cases tort liability is imposed on a party where the actual conduct which subjects him to liability is not his own, it is unfortunate that the same broad term is applied to him as to one actually guilty of reprehensible conduct. Bohlen, Contribution and Indemnity Between Tortfeasors (1936) 21 Corn. L. Q. 552. See also Leflar, Contribution and Indemnity Between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130. Louisiana, however, has adopted, together with common law tort rules, common law term "tort" in the place of the civil law "delict" and "quasi delict."

on the judgment. *Held,* where the actual fault which is the proximate cause of an injury is attributable to one of two joint tortfeasors, and the other is only technically or constructively at fault, indemnity may be obtained against the one primarily responsible for the act which caused the damage.[2] *American Employers' Insurance Company v. Gulf States Utilities Company,* 4 So. (2d) 628 (La. App. 1941).

Indemnity is based on the legal notion of subrogation and the relief it affords extends to the full liability of the innocent party. Contribution, on the other hand, is founded on an equitable principle of equalization of what should be a common burden, permitting each tortfeasor to recover the amount paid in excess of his proportionate share.[3] Where a right to contribution between joint tortfeasors is recognized, an insurer of one who satisfies a joint judgment has been held to be subrogated to his rights against the co-tortfeasors.[4] However, the general common law rule, independent of statutory alteration, permits neither indemnity nor contribution between joint tortfeasors.[5]

Various explanations for the strict common law rule have been suggested: it has been said that a court should not lend its aid to one who comes before it with unclean hands,[6] that no man

2. The case reaffirms the position taken in Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917) (where the adjudication was made in the original suit by the injured party). See Appalachian Corp., Inc. v. Brooklyn Cooperage Co., Inc., 151 La. 41, 46, 91 So. 539, 541 (1922).

3. Prosser, Handbook of the Law of Torts (1941) 1117, § 109; Note (1921) 5 Minn. L. Rev. 370. Contribution between joint tortfeasors should be compared with and distinguished from the civilian doctrine of comparative negligence which is applied in admiralty law and by statute in some jurisdictions. The comparative negligence doctrine applies to a situation where the court or jury apportions the loss between the two wrongdoers according to their relative fault. The doctrine of contribution among joint tortfeasors, on the other hand, applies to a situation where one wrongdoer seeks contribution from the other after he has paid an in solido judgment to a third party. See The Steamer Max Morris v. Curry, 137 U.S. 1, 11 S. Ct. 29, 34 L.Ed. 586 (1890). Harper, A Treatise on the Law of Torts (1933) 303, § 137. For an excellent discussion of the comparative negligence doctrine see Comment (1936) 11 Tulane L. Rev. 112.

4. Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Frankfort General Ins. Co. v. Milwaukee Electric Ry. & Light Co., 169 Wis. 533, 173 N.W. 307 (1919).

5. Royal Indemnity Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194 (1930), noted in (1930) 75 A.L.R. 1486. See also Prosser, op. cit. supra note 3, at 1111, § 109. Note (1932) 78 A.L.R. 580. The doctrine first appeared in Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Reprint 1337 (1779).

6. Vandiver v. Pollak, 107 Ala. 547, 553, 19 So. 180, 182, 54 Am. St. Rep. 118, 123 (1895); Owensboro City R.R. v. Louisville, H. & St. L. Ry., 165 Ky. 683, 689, 178 S.W. 1043, 1046 (1915); Manowitz v. Kanov, 107 N. J. Law 523, 525, 154 Atl. 326, 327 (1931). Prosser, Joint Torts and Several Liability (1937) 25 Calif. L. Rev. 413, 425.

can make his own misconduct the basis of an action in his favor,[7] that potential wrongdoers should be deterred by the warning that they enter the wrongful transaction with the risk of bearing all the consequences,[8] that the court will not waste time with law breakers at the expense of delay to honest litigants.[9] The rule, however, is subject to so many exceptions that it can scarcely be considered embracive,[10] and its harsh effect has often led to statutory alteration.[11] As well established as the rule itself is the exception that one who is only technically a joint wrongdoer and has not in any way participated in the wrong may exact full indemnity from the actual wrongdoer if compelled to pay damages for the injury.[12]

The question of contribution between joint tortfeasors was first presented in Louisiana in *Sincer v. Bell.*[13] This case has been argued as authority for the proposition that contribution could not be compelled in Louisiana, but later jurisprudence has refused to interpret the case as sanctioning such a doctrine.[14] The basis for permitting contribution between joint tortfeasors is found in an interpretation of the articles of the Louisiana Civil Code. Article 2324 makes joint tortfeasors liable in solido.[15] Ar-

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7. See Brown, Contribution Between Joint Wrongdoers (1917) 85 Cent. L. J. 244. Quatray v. Wicker, 178 La. 289, 297, 151 So. 208, 211 (1933).

8. See Peck v. Ellis, 2 Johns Ch. 313, 135 (N.Y. 1816); Thweatt's Adm'r v. Jones, 1 Rand. 328, 333, 10 Am. Dec. 538, 540 (Va. 1823).

9. See Avery v. Central Bank of Kansas City, 221 Mo. 71, 88, 119 S.W. 1106, 1111 (1909).

10. For example, where parties intentionally do an act which in good faith they think lawful, but which in fact is tortious, contribution is allowed. Brown, supra note 7, at 245. See also Notes (1932) 11 Tex. L. Rev. 367, (1935) 35 Col. L. Rev. 1310. See also note 11, infra.

11. See, for example, suggestions in Gregory, Legislative Loss Distribution in Negligence Actions (1936); Law Revision Commission for the State of New York, Report of the Law Revision Commission for 1937 (1937) 67-81.

12. Prosser, op. cit. supra note 3, at 1114, § 109. This is the view adopted by the American Law Institute. See A.L.I., Restatement of the Law of Restitution (1937) § 76. See also §§ 80, 86.

13. 47 La. Ann. 1548, 18 So. 755 (1895).

14. See Quatray v. Wicker, 178 La. 290, 296, 151 So. 208, 210 (1933): "Sincer v. Bell. . . is authority for the proposition that one of two joint tortfeasors who has been judicially compelled to pay damages committed by them jointly has not a right of action against the other of the two joint tortfeasors who has not been judicially condemned to pay the damages."

15. The French text of the article was originally translated so as to make co-trespassers, or joint tortfeasors, liable jointly but not in solido. By Act 20 of 1844 the article was "so amended as to make the English of said article correspond with the French so as to make co-trespassers liable in solido."

Two or more defendants residing in different parishes who are answerable jointly or in solido may be sued at the domicile of any one of them. Art. 165(6), La. Code of Practice of 1870. Gardner v. Erskine, 170 La. 212, 127 So. 604 (1930).

ticle 2103 permits contribution between individuals bound in solido and has been interpreted to apply to obligations *ex delicto* as well as those arising *ex contractu*.[16] However, this view is limited by the rule that contribution may be compelled only where the parties have been judicially declared liable in solido.[17] This position works injustice where the plaintiff chooses not to sue one of the parties actually liable in solido.[18]

Greater relief may be obtained in the federal courts. A joint tortfeasor may be brought in as a party by the defendant, thus assuring the defendant's right to contribution or indemnity, regardless of the party chosen for liability by the plaintiff.[19] A recent English statute,[20] enacting in effect a rule of comparative negligence as between joint tortfeasors, has met the problem by allowing contribution without requiring any prior adjudication of the liability of the party from whom contribution is sought. In France the liability of joint tortfeasors is held solidary by the jurisprudence independent of any code provision on the subject. The commentators agree that the right to contribution is a necessary consequence of this doctrine[21] and should be allowed even

16. Quatray v. Wicker, 178 La. 290, 151 So. 208 (1933). See Loussade v. Hartman, 16 La. 117 (1840). The release of one of several debtors bound in solido *ex delicto* extinguishes the debt as to the remaining co-debtors unless the creditor has expressly reserved his rights against them. Irwin v. Scribner, 15 La. Ann. 583 (1860); Orr & Lindsley v. Hamilton, 36 La. Ann. 583 (1884); Recile v. Southern United Ice Co., 17 La. App. 611, 136 So. 179 (1931); Crowell & Spencer Lbr. Co., Ltd. v. La Caze, 188 So. 446 (La. App. 1939). See Art. 2203, La. Civil Code of 1870; Hall v. Allen Mfg. Co., 133 La. 1079, 63 So. 591 (1913). No particular form is required for such a reservation if the intention to reserve the right is clearly shown. Cusimano v. Ferrara, 170 La. 1044, 129 So. 630 (1930); Landry v. New Orleans Pub. Service, Inc., 177 La. 105, 147 So. 698 (1933). But if a written release is given without a reservation therein, parol evidence is inadmissible to show such a reservation. Reid v. Lowden, 192 La. 811, 189 So. 286 (1939).

Other rules governing solidary liability are applicable to that arising *ex delicto*.

17. Sincer v. Bell, 47 La. Ann. 1548, 18 So. 755 (1895). See Quatray v. Wicker, 178 La. 289, 296, 151 So. 208, 210 (1933), noted in (1934) 9 Tulane L. Rev. 125; Aetna Life Ins. Co. v. Dejean, 185 La. 1074, 171 So. 450 (1936), noted in (1938) 1 LOUISIANA LAW REVIEW 235, (1937) 11 Tulane L. Rev. 494; Chaney v. Hutches, 192 So. 556 (La. App. 1939); Gray v. Hartford Accident & Indemnity Co., 31 F. Supp. 299 (W.D. La. 1940). But see Appalachian Corp., Inc. v. Brooklyn Cooperage Co., Inc., 151 La. 41, 91 So. 539 (1922).

18. Such was the situation in Chaney v. Hutches, 192 So. 556 (La. App. 1939). See also Note (1938) 1 LOUISIANA LAW REVIEW 235, 239.

19. Federal Rules of Civil Procedure, Rule 14, 28 U.S.C.A. foll. § 723(c) (1941), applied in Gray v. Hartford Accident and Indemnity Co., 31 F. Supp. 299, 304 (W.D. La. 1940). See Note (1932) 78 A.L.R. 580.

20. The Law Reform (married women and tortfeasors) Act, 1935, 25 & 26 Geo. V, c. 30, §§ 6, 7, 8.

21. 13 Baudry-Lacantinerie, Traité Théorique & Pratique de Droit Civil (3 ed. 1907) Des Obligations 414-421, nos 1303-1305; 3 Larombière, Theorie des

where there has been no previous adjudication of solidary liability.[22] Under the doctrine of comparative negligence, this reparation may extend to full indemnity.[23]

The conclusion reached by the instant case properly throws the burden of making reparation for misconduct on the party actually guilty, without danger of loss to the injured plaintiff. The case may be held out as an example of the equitable conclusions that can be reached by means of careful interpretation of the articles of the Civil Code without the necessity of special legislation.

G.R.J.

VENUE OF DIRECT ACTION AGAINST TORTFEASOR'S INSURER—LOUISIANA ACT 55 OF 1930—Under the provisions of Louisiana Act 55 of 1930,[1] which gives a right of direct action against a tortfeasor's insurer, three injured parties sued a truck-owner's insurer for damages growing out of the negligent operation of the truck. Suit was filed at the domicile of the insurer. Exceptions to the jurisdiction ratione personae and ratione materiae were sustained.[2] *Held,* this statute gives a "right"[3] of action which can be asserted only "in the parish where the accident or injury occur-

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Obligations (1885) 416, Art. 1202, nº 22; 2 Planiol, Traité Élémentaire de Droit Civil (10 ed. 1926) 315-316, §§ 900-903; 2 Sourdat, La Responsabilité ou l'Action en Dommages-Intérêts (6 ed. 1911) 472, nºs 1393-1394.

22. 13 Baudry-Lacantinerie, op. cit. supra note 21, at 419, nº 1304; 2 Sourdat, op. cit. supra note 21, at 472, nº 1395.

23. 13 Baudry-Lacantinerie, loc. cit. supra note 21; 2 Sourdat, op. cit. supra note 21, at 472-475, nºs 1395-1396.

1. La. Act 55 of 1930 [Dart's Stats. (1939) § 4248] adds the following provision to La. Act 253 of 1918 [Dart's Stats. (1939) §§ 4248-4249] (which gives the injured person a direct action against the insurer when the assured is bankrupt or insolvent): "the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where assured has his domicil, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido."

2. In the lower court plaintiffs argued that filing the exceptions to the jurisdiction ratione personae and ratione materiae at the same time, defendants waived the former. The supreme court did not touch this point in its opinions, but, by maintaining defendant's exceptions, it indicated *sub silentio* that the exception to the personal jurisdiction was not waived. See Morales v. Falcon, 167 So. 109 (La. App. 1936); Brown v. Gajan, 173 So. 485 (La. App. 1937).

3. "Right of action pertains to the remedy and relief through judicial procedure. Cause of action is based on the substantive law of legal liability." Elliott v. Chicago, M. & St. P. Ry., 35 S.D. 57, 63, 150 N.W. 777, 779 (1915).