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CIVIL PROCEDURE-RIGHT OF IMPLEADER UNDER MICHIGAN CONTRIBUTION STATUTE

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CIVIL PROCEDURE—RIGHT OF IMPLEADER UNDER MICHIGAN CONTRIBUTION STATUTE—Plaintiff, a resident of of Michigan, brought a negligence action against defendant, an Illinois corporation, for personal injury in the Federal District Court for the Eastern District of Michigan. The defendant moved to implead a citizen of Michigan and a Michigan corporation as third party defendants on the theory that under the Michigan Contribution Statute[1] as concurrent tortfeasors they would be liable to him for part of the judgment in the event that plaintiff recovered in the suit. The court granted the motion and the defendant filed its third party complaint. Plaintiff then moved to dismiss the

[1] 22 Mich. Stat. Ann. (1935) §27.1683. "Section 1. Whenever a money judgment has been recovered jointly against 2 or more defendants in an action for bodily injury or death resulting therefrom, or property damage, and such judgment has been paid in part or in full by 1 or more of such defendants, each defendant who has paid more than his pro rata share shall be entitled to contribution with respect to the excess so paid over and above the pro rata share of the defendants making such payments. . . ."

third party complaint. *Held*: motion granted. The court reasoned that since the Michigan Contribution Statute was almost identical with that of New York and since the Michigan Supreme Court has never passed upon the right of impleader under it, the New York court's interpretation[2] of their statute denying impleader should govern. *Buckner v. Foster (McLouth Steel Corp., Third-Party Defendants)*, (D.C. Mich. 1952) 105 F. Supp. 279.

At common law there was no right of contribution among tortfeasors. Many states have, however, passed a variety of statutes which authorize contribution in cases of negligence actions for personal injury or property damage. Some of these statutes have been expressly worded or so interpreted as to abrogate completely the common law prohibition in this type of case and permit contribution whenever prayed for.[3] But the decisions of each court must rest necessarily upon the particular statute in its jurisdiction. The New York statute in both form and content is practically identical with that of Michigan.[4] The New York court[5] adopted the view that the substantive right of contribution arises only after a joint judgment has been recovered and therefore a defendant can have no right to implead a third party on the basis that he is or may be liable[6] to defendant because, according to the express words of the statute, he can not be liable unless a joint judgment is recovered. Until that time defendant has no substantive right of contribution. The logic of the court's argument is irrefutable. Of the many critics of the New York position, only one has questioned the court's interpretation,[7] the rest simply urging that this unfortunate law be changed.[8] Only in one jurisdiction, Texas, with a contribu-

[2] See Brown v. Cranston, (2d Cir. 1942) 132 F. (2d) 631, affd. 2 F.R.D. 270 (1942), cert. den. 319 U.S. 741, 63 S.Ct. 1028 (1942) upon which the court in the principal case relied and wherein are collected the leading New York decisions in the field.

[3] 1 N.C. Gen. Laws (Michie, 1943) §1-240; 12 Pa. Ann. Stat. (Purdon, 1951) §2081; Howey v. Yellow Cab Co., (3d Cir. 1950) 181 F. (2d) 967, affd. 340 U.S. 543, 71 S.Ct. 399 (1951); Wis. Stat. Ann. (1951) §260.19(3); Bakula v. Schwab, 167 Wis. 546, 168 N.W. 378 (1918).

[4] N.Y. Civil Practice Act (1946) §211-a. ". . . Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in full by one or more of such defendants, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants. . . ."

[5] Fox v. Western New York Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931).

[6] Id. at 308. The court concluded that the New York Impleader Statute which authorizes impleader of a third party who is or may be liable to defendant was of no help to defendant in that case because liability could be predicated only on a joint judgment.

[7] Bennett, "Bringing in Third Parties by Defendant," 19 MINN. L. REV. 163 at 180, 181 (1935). Professor Bennett admitted that the decision was technically unimpeachable at page 182.

[8] 1 MOORE, FEDERAL PRACTICE 773 (1938); Gregory, "Tort Contribution Practice in New York," 20 CORN. L.Q. 269 (1935); GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936). In this book Mr. Gregory says of Professor Bennett: "How Professor Bennett can believe that the Court of Appeals' interpretation is unfortunate is hard to understand. Why the court should have pulled the legislature's half baked chestnut out of the fire is difficult to see." At page 29, n. 29.

tion statute[9] which authorizes recovery after joint judgment has the court concluded that this gives the defendant a right to implead a third party. The Texas court in *Lottman v. Cuilla*[10] concluded that the spirit of their law is to abrogate completely the common law prohibition. They admitted that literally the statute applies only to judgments rendered against two or more defendants but considered that complete abrogation must have been the intent of the legislature. Since this first Texas decision, no further question seems to have been raised in regard to the validity of its interpretation. In the absence of the Texas decision it would be easy to conclude that the Michigan Supreme Court will reach the same decision as did the federal district court in the principal case. Its presence, however, casts the shadow of a doubt. The writer is inclined to believe, in spite of this, that the Michigan Supreme Court will conclude that the contribution statute does not give defendant a right to implead, because the correctness of this decision is urged by most of the authorities in the field,[11] and because of the policy of the Michigan courts as well as those of most states to interpret statutes in derogation of the common law strictly.[12] The Texas courts apparently do not follow this rule and in fact in this situation have allowed their ideas of justice and fair play rather than the express language of the statute to influence their judgment as to the intention of the legislature.

If the view is accepted that the Michigan Contribution Statute does not give a right of impleader to a defendant, should the matter be allowed to rest there?[13] It is submitted that the conclusion reached by the Texas court is more desirable as a matter of justice and that the statute should be changed. A suggested amendment would be to change the present section 2 to section 3 and insert the following as section 2: "Section 2. The Defendant may, however, implead a third party who may be liable to him if a joint judgment is recovered against them in order that such joint judgment may be recovered." An amendment in this form will avoid the possibility of subsequent litigation to establish the liability of a third party to defendant since the right to contribution will still rest upon the recovery of a joint judgment.

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[9] 7 Tex. Stat. Ann. (Vernon, Civil Statutes, 1950) art. 2212. "Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort . . . shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants. . . ."

[10] (Tex. Comm. App. 1926) 288 S.W. 123.

[11] Supra note 8.

[12] Principal case at 281.

[13] As to the relative merits of allowing plaintiff or defendant to decide who shall be party defendant to a suit, compare James and Gregory, "Contribution Among Tortfeasors," 54 HARV. L. REV. 1156 at 1178, 1184 (1941).