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FEDERAL PROCEDURE--THIRD-PARTY PRACTICE--CONTBIBUTION AMONG JOINT OR CONCURRENT TORT-FEASORS

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FEDERAL PROCEDURE—THIRD-PARTY PRACTICE—CONTRIBUTION AMONG JOINT OR CONCURRENT TORT-FEASORS—*A* sued *B* for injuries arising out of a collision between *B*'s taxicab and an automobile driven by *C*, in which *A* was riding as a guest passenger. *B* filed a third-party complaint against *C*, who denied *B*'s allegation of negligence and counterclaimed against *B* for personal injuries. *A* did not amend his complaint to assert a claim against *C*. The jury found that *A*'s injury was caused by the concurrent negligence of *B* and *C*. Judgment for $11,500 was given to *A* against *B*, and *B* was awarded a judgment against *C* for one-half of that amount. *Held,* affirmed. The judgment in favor of *B* against *C* was proper under Rule 14 of the Federal Rules of Civil Procedure. *Knell v. Feltman,* (App. D.C. 1949) 174 F. (2d) 662.

Rule 14(a) of the Federal Rules makes provision for the impleader of third-party defendants.[1] The application of this rule, in regard to contribution among

[1] 28 U.S.C.A. (1949) following §723c: "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

joint or concurrent tort-feasors, has raised many troublesome problems.[2] The Federal Rules do not change the substantive rights of parties, but were designed to unite and simplify the procedural rules of law and equity.[3] The right of contribution is clearly substantive, so a federal court may allow contribution only when the jurisdiction in which it sits allows it.[4] The majority of the states, in the absence of statute, do not allow contribution among joint or concurrent tort-feasors;[5] in these states Rule 14(a) could not be used by a defendant tort-feasor to bring in another.[6] The common law rule in respect to contribution has been changed in many states by statute.[7] Statutes generally provide either for an action against joint or concurrent tort-feasors by a defendant who has paid a judgment in a suit brought against him alone, or for allowing contribution among the tort-feasors whom the plaintiff has joined as defendants. The wording of such statutes prevents the utilization of Rule 14(a) by the defendant, because both types require a prior judgment against one or all of the defendants as a prerequisite to the right of contribution.[8] The principal case represents the minority of jurisdictions which have allowed contribution among non-intentional joint or concurrent tort-feasors in the absence of statute,[9] and requires neither a prior judgment nor

[2] See Holtzoff, "Some Problems under Federal Third-Party Practice," 3 LA. L. REV. 408 (1941); Willis, "Five Years of Federal Third-Party Practice," 29 VA. L. REV. 981 (1943).

[3] The enabling act reads, in part, "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants." 48 Stat. L. 1064, §1 (1934), 28 U.S.C.A. (1949) §723b. Kittleson v. American District Telegraph Co. (Armour and Co., third-party defendant), (D.C. Iowa 1948) 81 F. Supp. 25 at 29, states, "This Rule [14(a)] is a procedural rule, however, and does not give the telegraph company any greater rights against Armour & Co. than it would otherwise under rules of substantive law."

[4] Erie Ry. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1937).

[5] An exhaustive survey of the problems of contribution has been made by R. A. Leflar, "Contribution and Indemnity between Tortfeasors," 81 UNIV. PA. L. REV. 130 (1932). See also, Merryweather v. Nixan, 8 T.R. 186 (K.B. 1799); PROSSER, TORTS §109 (1941); RESTITUTION RESTATEMENT §102 (1937).

[6] Hills v. Price, (D.C. S.C. 1948) 79 F. Supp. 494; Combs v. Continental Casualty Co., (D.C. Ala. 1944) 54 F. Supp. 507. Cf. Satink v. Holland Township, (D.C. N.J. 1939) 28 F. Supp. 67.

[7] An extensive treatment of statutory developments may be found in 45 HARV. L. REV. 369 (1932); N.Y. LAW REVISION COMM. REP. 722 (1936). A discussion of the 1946 amended New York practice may be found in 14 BROOKLYN L. REV. 157 (1947).

[8] Vaughn v. Guenther (Carroll, third-party defendant), (D.C. Ga. 1948) 8 F.R.D. 157; Baltimore & Ohio Ry. Co. v. Saunders, (C.C.A. 4th, 1947) 159 F. (2d) 481; Brown v. Cranston, (C.C.A. 2d, 1942) 132 F. (2d) 631, cert. den. 319 U.S. 741, 63 S.Ct. 1028 (1943). When state substantive law provides for contribution, but the state procedural law requires payment of judgment before obtaining contribution, it has been held that there may be impleader under the Federal Rules in the original action. Pucheu v. National Surety Corp., (D.C. La. 1949) 87 F. Supp. 558.

[9] The court in the principal case adopted contribution without reservation or exception: ". . . 'when the parties are not intentional and wilful wrongdoers, but are made so by legal inference or intendment.'" Principal case at 666. See also, PROSSER, TORTS 1113 (1941); Reporters notes of the RESTITUTION RESTATEMENT §102 (1937). There have been a few cases that have come to a conclusion that is consistent with the principal case. Anderson v. Kenosha Auto Transp., Inc., (D.C. Minn. 1946) 6 F.R.D. 265; Sussan v. Strasser, (D.C. Pa. 1941) 36 F. Supp. 266, 168 A.L.R. 610 (1947); Keller v. Kornegay, (D.C. N.C. 1949) 9 F.R.D. 103. An interesting case under the New York statute which requires a joint judgment in order to have contribution among tort-feasors, holds that the federal third-party practice may be used when there is an indemnity agreement. Pyzynski v. New York Central Ry.

a joinder of defendants by the plaintiff. The result reached is meritorious because it does not depend on the whim or caprice of the plaintiff in joining tort-feasors and, in addition, allows adjudication of all the issues arising out of the same transaction in one proceeding.[10] This procedural advantage is a strong argument for changing the statutes in those states which have allowed contributions among tort-feasors, but have so worded their statute that Rule 14 is not available to a defendant in a federal court in that state.

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Co. (Eastern States Cooperative Milling Corp., third-party defendant), (D.C. N.Y. 1946) 7 F.R.D. 302.

[10] See 1 MOORE, FEDERAL PRACTICE 740 §1401 (1938) where it is stated, "The general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant."