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JUDGMENTS — CONTRIBUTION — RES JUDICATA — Where an action is brought against two persons as joint tortfeasors, and one or both are held liable to the plaintiff, is the judgment res judicata in a subsequent action between the codefendants for contribution?

In *American Motorists Insurance Co. v. Vigen,* and *General Casualty Co. of Wisconsin v. Golob*,[1] two persons were sued together as joint tortfeasors in a personal injury action. Judgment was rendered in favor of one defendant and against the other defendant. The unsuccessful defendant paid the judgment and then brought an action against his successful codefendant for contribution, and sought to establish a common liability of the two original defendants to the original injured plaintiff as a basis for his claim. The defendant contended that the former adjudication, by which he was held not to be liable to the original plaintiff, was conclusive against the plaintiff in the subsequent action. It was held that the judgment in the original action was conclusive that there was no liability on the part of the successful defendant to the original plaintiff, and hence no common liability as to him upon which a suit for contribution could be based.

It is the general rule that parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action.[2] This is in accordance with the fundamental doctrine of res judicata that no one should be bound by

[1] (Minn. 1942) 5 N. W. (2d) 397.

[2] 1 FREEMAN, JUDGMENTS, 5th ed., § 422 (1925); 2 BLACK, JUDGMENTS, 2d ed., § 599 (1902); 1 VAN FLEET, FORMER ADJUDICATION, § 256 (1895).

a judgment except in so far as he had an adequate opportunity to litigate the matter against the party who seeks to use the judgment against him.[3]

Whether or not joint defendants are adversary parties as between themselves would seem to depend on whether the question of joint liability was actually raised and litigated between the codefendants in the prior suit.

Statutes sometimes provide that this question may be directly raised between the codefendants on the face of the pleadings in the original suit by cross complaint. If this were done pursuant to such a statute, codefendants would clearly become adversary parties, and the judgment would be res judicata, as to their common liability, in a subsequent action between them for contribution. It was so held by the Supreme Court of Wisconsin in *Hemenway v. Beecher*.[4]

It has also been held, by the same court, that the same result is produced by a statute which authorizes a third party to be brought in as a codefendant where the original defendant shows by affidavit that if he were held liable in the action he would have an action over against such third party. Since the statute provides this procedure expressly "in order that the rights of all parties may be finally settled in one action," it was considered that the mere use of the procedure was a statutory presentation of the issue as to the contingent right of contribution, without resort to a formal cross complaint.[5]

A number of states have statutes providing that judgment may be given for or against any one or more of several plaintiffs or defendants, and may determine the rights of the parties on each side as between themselves. Under such a statute in Missouri it was held by the United States Circuit Court of Appeals in *A.B.C. Fireproof Warehouse Co. v. Atchison, Topeka & S. F. Ry.*,[6] that

> ". . . a judgment is res adjudicata between codefendants of any controlling fact upon which it is based, in rights and relation-

[3] 1 FREEMAN, JUDGMENTS, 5th ed., § 422 (1925).

[4] 139 Wis. 399, 121 N. W. 150 (1909). Where a statute provides that if it is sought to have a judgment determine the ultimate rights of the codefendants as between themselves, such determination must be demanded in the answer, a judgment against one or more codefendants should not be held to be conclusive in a subsequent suit for contribution where no such demand was made. Petition of L. Boyer's Sons Co., (D. C. N. Y. 1927) 23 F. (2d) 201. In Kemerer v. State Farm Mut. Auto Ins. Co., 210 Minn. 239, 276 N. W. 228 (1937), the court discussed the advisability of the Wisconsin practice of framing issues between codefendants, and suggested that it might be more convenient to try such issues in a separate suit between the codefendants.

[5] Wait v. Pierce, 191 Wis. 202 at 227, 209 N. W. 475, 210 N. W. 822 (1926); Wis. Laws (1915), c. 219, § 6, Stat. (1927), § 260.19 (since amended by Laws of 1935, c. 541, § 10).

[6] (C. C. A. 8th, 1941) 122 F. (2d) 657 at 659.

ships between such coparties arising out of or connected with the matter in litigation, where they have actually assumed the position of adversaries with respect to such fact throughout the proceeding, by expressly placing it in issue in their pleadings, whether answer or cross petition, and contesting it on the trial; where they have had the opportunity for a full and fair trial and submission on the merits; where the result of the determination of the litigation by the court or jury is to establish in the trial the legal existence of the fact, as contended for by the one and as denied by the other; and where no new legal situation is presented in the subsequent litigation attempted between them."

The court did not hold in the foregoing case that the statute, by its own force, made codefendants adversaries. Such an effect was expressly denied by the Supreme Court of Missouri in *Missouri District Telegraph Co. v. Southwestern Bell Telephone Co.*[7] The sole function of the statute seemed to be to authorize defendants, if they so desired, to raise and litigate issues against their codefendants.

In the absence of any statute making codefendants adversary parties or authorizing them to litigate issues between themselves, it would nevertheless be possible for them, by consent, to assume the position of adversaries and litigate their mutual rights and liabilities.[8] In view of this principle can it properly be concluded that there has been such adversary litigation between joint tortfeasors from the mere fact that each sought to avoid liability by throwing the blame upon the other?

This question was answered in the negative in *Erie Railroad v. Buffalo & Lackawanna Traction Co.*,[9] where a street car passenger, who was injured by a collision between the street car and a railroad locomotive, sued the traction company and the railroad company as joint tortfeasors. Judgment was rendered in favor of the traction company and against the railroad company, whereupon, after paying the judgment, the unsuccessful defendant sued its successful codefendant for contribution. The latter relied on the former judgment as conclusively showing that the injury was due to the sole negligence of the railroad company. The court held that the question of the traction company's negligence was an issue solely between the injured passenger and that company, that if the passenger were unable, or did not desire, to prove concurring negligence on the part of the traction company there was nothing that the railroad company could do about it, and that since the railroad company had had no opportunity to show the traction company was concurrently negligent, it was not bound by the judgment in favor of the traction company.

[7] 336 Mo. 453, 79 S. W. (2d) 257 (1934).
[8] Hogg v. Caudill, 228 Ky. 396, 15 S. W. (2d) 239 (1929).
[9] 220 App. Div. 520, 221 N. Y. S. 680 (1927).

So, in *Fidelity & Casualty Co. v. Federal Express*,[10] the court said, quoting a prior case,[11] that where codefendants, sued as joint tortfeasors, filed separate defenses, "Neither defendant had any control over the pleading or defense made by the other, and neither could take up for review an adverse judgment against the other. To all intents and purposes, the conditions were the same as if independent suits had been brought against each of the defendants."

The same view was adhered to in the well considered case of *Merrill v. St. Paul City Ry.*,[12] where the plaintiff, while sitting in a parked automobile, was injured by a collision between a passing street car operated by one defendant and a passing automobile operated by the other defendant. In a suit against both defendants as joint tortfeasors, each denied negligence and claimed that the other's negligence was the sole cause of the plaintiff's injuries. Judgment was rendered for the railway company and against the personal defendant. The latter claimed contribution against the railway company. It was held that the codefendants did not become adverse parties merely because each attempted to fasten the blame upon the other, since each was thereby meeting an issue raised solely between himself and the plaintiff and not between himself and his codefendant. Therefore the judgment in favor of the railroad company was not res judicata as to the right of the other defendant to contribution. This was followed in the later case of *Hardware Mutual Casualty Co. v. Anderson*.[13] But in the two recent cases discussed at the beginning of this comment that doctrine was abandoned, and it was held that where a defendant, for his own defense, raises an issue with the injured plaintiff as to the wrongful conduct of his codefendant, the defendant and codefendant become adversary parties regarding that issue as between themselves.[14]

Minnesota has long had a statute[15] providing that the judgment may determine the rights of the several defendants as among themselves, but this statute has not been referred to in any of the Minnesota cases as having any bearing upon the effect of a prior judgment in a subsequent action for contribution.

E. R. S.

[10] (C. C. A. 6th, 1938) 99 F. (2d) 681.

[11] City of Owensboro v. Westinghouse, Church, Kerr & Co., (C. C. A. 6th, 1908) 165 F 385 at 388.

[12] 170 Minn. 332, 212 N. W. 533 (1927).

[13] 191 Minn. 158, 253 N. W. 374 (1934).

[14] The court cited in support of its decision the case of Hobbs v. Hurley, 117 Me. 449, 104 A. 815 (1918).

[15] Minn. Stat. (Mason, 1927), § 9393.