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Contribution—Where One Joint Principal Pays Tort Judgement Against Agent

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ferring this priority unconstitutional as impairing contractual obligations.¹³ There is an increasing sentiment against this preference because of its obvious unfairness.¹⁴

—KINGSLEY R. SMITH.

CONTRIBUTION — WHERE ONE JOINT PRINCIPAL PAYS TORT JUDGMENT AGAINST AGENT. — A tract of land was owned jointly by A and B, as executors and trustees of the estate of X, by C, and by D. An agent, Drebert, had charge of the land for all the owners when a tenant, Massey, was killed by electrically charged wire. In an early action a judgment was recovered by the personal representative of the deceased against A and B, as executors and trustees. This was reversed,¹ as a trust estate is not liable for the torts of the trustees who are free from the control of the beneficiaries. Thereafter, another suit was instituted against A and B, and the agent, Drebert. A and B being dismissed from this suit upon a plea in abatement for defective service of process, judgment was taken against Drebert, which with costs was paid by A and B, as executors and trustees. In the principal case A and B and C sued the administrator of D, since deceased, for contribution. *Held*: Rulings of the trial court that contribution between joint tort-feasors is not permitted and that the payment was voluntarily made were error. *Payne v. Charleston National Bank*.²

At common law there was no contribution between joint tort-feasors,³ and because of the unjust effect of the application of the rule in certain cases exceptions have developed,⁴ and the test most

¹³ *Harris v. Walker*, 199 Ala. 51, 74 So. 40 (1917) (right of depositors of an insolvent bank held to have arisen out of a contract with the bank as controlled by a constitutional guaranty then in force. This was held an "obligation of a contract" which could not be impaired by either the constitution or a statute); *Atchafalaya R. & Banking Co. v. Bean*, 3 Rob. 414 (La. 1843) (legislature cannot constitutionally change relative rank of creditors *inter se* by an act subsequent to the creation of the debt.

¹⁴ See the comment on *Central Trust Co. v. Bank of Mullens*, 107 W. Va. 679, 150 S. E. 221 (1929) in (1930) 36 W. VA. L. Q. 278.

¹ *Massey v. Payne*, 109 W. Va. 529, 155 S. E. 658 (1930).

² *Payne v. Massey*, 164 S. E. 252 (W. Va., 1932).

³ *Merryweather v. Nixan*, 8 T. R. 186, 101 Eng. Reprint 1337 (1799); THROCKMORTON'S COOLEY ON TORTS (Student ed., 1930) § 81.

⁴ Where the party was only technically liable, *Chicago Rys. v. R. F. Conway Co.*, 219 Ill. App. 220 (1920); where the ground of liability is negligence in carrying on a lawful business, *Harriban v. City of Des Moines*, 198

often applied seems to be whether the parties must be presumed to have known that they were committing an illegal or wrongful act.⁵

Some states now allow contribution between joint tort-feasors by statute.⁶ The West Virginia statute, first adopted in 1872 and since subjected only to slight modifications in wording by amendments, permits contribution only where there has been a joint judgment rendered against the tort-feasors.⁷ The principal case, then, was not governed by the statute.

In West Virginia the question has usually arisen where two or more tort-feasors have asked to be dismissed from an action because they are in law severally liable.⁸ The unusual situation in the principal case, however, is probably without parallel in the reports. The cases most nearly in point⁹ may be distinguished because the judgment in the principal case was against the agent. The judgment below declared that the agent, "was guilty of misfeasance in his duty to said decedent." This fact, that the agent's liability in relation to the principals was never fixed, and the further fact that the trust estate of X was exonerated from all liability (yet A and B paid their part of the judgment against the agent out of the trust estate), supports the argument that the payment was voluntarily made. The courts and text writers speak

Id. 549, 194 N. W. 988 (1925); where the tort does not involve moral turpitude, it is the same as the right in a contract, *Ellis v. Chicago & N. W. R. R.*, 167 Wis. 392, 167 N. W. 1048 (1918); where the tort was that of a servant or agent, *Armstrong Co. v. Clarion Co.*, 66 Pa. 218 (1870); and where the act was not *malum in se*, *Hutcherson v. Slate*, 105 W. Va. 184, 192 S. E. 444 (1929); *Buskirk v. Sanders*, 70 W. Va. 363, 73 S. E. 937 (1912).

⁵ 1 COOLEY ON TORTS (3rd ed., 1906) 258.

⁶ KY. STAT. (Carroll, 1930) § 484a; N. C. CODE ANN. (Michie 1930) § 618; VA. CODE ANN. (Michie, 1930) § 5779; MO. REV. STAT. (1919) § 4223; and W. VA. REV. CODE (1931) c. 55, art. 7, § 13.

⁷ *Ohio Valley Bank v. Greenbaum Sons & Trust Co.*, 11 Fed. (2d) 91 (C. C. A. 4th, 1926).

⁸ *Martin v. Appalachian Power Co.*, 109 W. Va. 129, 153 S. E. 245 (1930); *Massey v. Payne*, *supra* n. 1; *Starcher v. Penn Oil Co.*, 81 W. Va. 587, 95 S. E. 28 (1918); *Blevins v. Bailey*, 102 W. Va. 415, 135 S. E. 395 (1926); *Pence v. Bryant*, 73 W. Va. 126, 80 S. E. 923 (1912); and *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744 (1897).

⁹ Where the tortfeasors were two counties both liable for the maintenance of a bridge and a judgment was rendered against one, *Armstrong Co. v. Clarion Co.*, *supra* n. 2; where the negligence was the constructing of a party wall and a judgment was entered against both tortfeasors, *Ankey v. Moffett*, 37 Minn. 109, 33 N. W. 320 (1887); and where the agent of two principals injured a third person with an automobile and the judgment was against both principals, *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918).

¹⁰ *Cooley on Torts* (4th ed., 1931) 297, § 89; *Acheson v. Miller*, 2 Ohio St. 203 (1853); *Price v. Ryan & Dickinson*, 255 N. Y. 16, 173 N. E. 107 (1930).

of compelling to pay,¹⁰ which is based on a money judgment against one or all the tort-feasors. In Kentucky¹¹ the court has said, "There must have been a satisfaction of the judgment before the suit can be entertained, as the right to contribution rests on an implied contract and is enforced accordingly."

As an agent is liable for his torts, independently of his principal, and as an agent can be sued jointly with the principal when it is shown that both were at fault,¹² and since only the agent may be liable in a given case, the contention that the payment was voluntarily made seems sufficient to defeat the right to contribution.

—CHARLES W. CALDWELL.

COURTS — EQUITABLE ENFORCEMENT OF FOREIGN ALIMONY DECREE. — Complainant had been granted a divorce and alimony in a Florida Court, which retained jurisdiction. She went into equity in Georgia and obtained a writ of *ne exeat*, a decree for accrued alimony and counsel fees, and an injunction to prevent defendant from removing any of his property from the county. The court declared in general terms that the foreign decree must be given full faith and credit in Georgia. *Roberts v. Roberts*.¹

Courts have allowed as a matter of course the bringing of a suit on a foreign decree for accrued alimony.² Future alimony is not the basis for such a decree unless it be shown that the original decree is not subject to modification by the foreign court.³ A contrary result was reached in a recent California case where future installments of alimony were covered by the decree though the foreign court retained jurisdiction, it being stipulated that in case of modification the California decree should operate subject thereto.⁴ These foreign decrees, whether sued upon in law or equity, are entitled to full faith and credit under the Federal Constitution.⁵ Though equity may grant relief on a decree

¹ *Consolidated Coach Co. v. Wright*, 231 Ky. 713, 22 S. W. (2d) 108 (1929).

² *Lee v. Standard Oil Co.*, 105 W. Va. 579, 44 S. E. 292 (1928).

¹ 163 S. E. 735 (Ga. 1932).

² *Sistare v. Sistare*, 218 U. S. 1, 30 S. Ct. 682 (1909); *Barber v. Barber*, 21 How. 582, 16 L. ed. 226 (1858).

³ *Lynde v. Lynde*, 181 U. S. 183, 21 S. Ct. 555 (1900).

⁴ *Cummings v. Cummings*, 97 Cal. App. 144, 275 Pac. 245 (1929).

⁵ *Sistare v. Sistare*, *supra* n. 2.