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Joint Tortfeasors in Tennessee and the New Third-Party Statute

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COMMENTS

JOINT TORTFEASORS IN TENNESSEE AND THE NEW THIRD-PARTY STATUTE

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Chapter 145 of the 1955 Public Acts[1] enacted by the Tennessee Legislature, purporting in some degree to permit a third-party action, has evoked considerable interest among members of the Tennessee Bar and liability insurance carriers.

The act provides that when a defendant deems some other party primarily liable to the plaintiff, then the defendant may file a cross action against the third party. It will be recalled that when the Federal Rules of Civil Procedure were first promulgated, Rule 14 provided that a defendant, deeming a third party liable to himself or to the plaintiff, could make such third party a defendant to the cause.[2] The effect of this rule was that the plaintiff could have judgment against either the original defendant or the third-party defendant even though the plaintiff had never himself sued the third-party defendant. Because of the novelty of this procedure and the fact that it was not the intent of the federal rules to change substantive law, Rule 14 was soon amended so as to delete the portion that permitted such a cross action when the defendant deemed the third party liable to the plaintiff, so that such cross actions are now only permitted on an allegation that the third party is liable to the original defendant.[3]

It appears, therefore, that the Tennessee statute is unlike the original federal rule in that Chapter 145 does not contemplate plaintiff having judgment against the third-party defendant, and is unlike the present federal rule in that the allegation required is not that the third party is liable to the defendant but rather that he is "primarily liable to the plaintiff."

One cannot prophesy with certainty the construction that will be placed on this statute by the courts. It would appear that it is merely

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1. "[W]henever any person sued in a Court of law on any cause of action cognizable therein shall deem that some other person, not a party to such suit, is primarily liable to the plaintiff, such person so made a defendant may file a cross-action against such other party, in which case the procedure shall be the same as though such cross-action had been filed against the original plaintiff; provided, however, that the filing of such cross-action shall not operate to delay the right of the original plaintiff to proceed against the original defendant when the cause shall be at issue as to such original defendant.

"As used herein the word 'person' shall include all entities capable of suing or being sued." Tenn. Pub. Acts 1955, c. 145.

2. FED. R. CIV. P. 14.

3. When a third party is made such a cross defendant, the rule permits the original plaintiff thereafter to assert a claim against him. See note 2 *supra*.

a procedural statute and does not create any new cause of action. If such an interpretation be valid, several areas of inquiry are immediately suggested. One is what sort of situations will meet the test of "primary liability to the plaintiff." Another is what impact will be had on the Tennessee rules on recovery by one tortfeasor against another. A search into this field leaves one somewhat less than certain. A further consideration is of the effect of the third-party, or the prospective third-party, defendant's having for consideration obtained from the original plaintiff a covenant not to sue: whether one who has expended a sum of money for the covenant can expect to get any credit therefor if ultimately held liable to the defendant is a problem of extreme practical importance.

If the supposition that this statute is only procedural be correct, of course none of these questions has been materially affected by the statute. However, it does seem that the statute will have a significant practical effect in that it immediately suggests to defendants a consideration of their possible rights against another wrongdoer; and it is certainly possible that some defendants, having little in the way of a meritorious defense, will undertake to use the statute, even with little hope of ultimate success thereunder, with the idea that it may confuse the plaintiff's lawsuit.

JOINDER OF TORTFEASORS

Of course, before there can be recovery by one tortfeasor against another for contribution or indemnity, there must be joint liability on the part of the defendants. If two defendants are merely severally liable for separate damages, then they may not be sued together, and each would be liable to the plaintiff only for the damage which he had caused. Joint liability is imposed in cases where the defendants have acted in concert or in the furtherance of a common purpose to produce the plaintiff's damages; in cases where there is vicarious liability, as the liability of a master for the tort of a servant; and in cases where there is no practical manner of apportioning the damages between the defendants, as where a single indivisible result, such as death or personal injury, has been inflicted by their acts.[4] If there is any feasible way of apportioning damages between the defendants who have acted separately, then the defendants will be held liable only severally and not jointly. Thus frequently where damages are sought in nuisance cases, as where fumes from two independent factories mingle and damage plaintiff's land, or waste from several plants combine to pollute a stream, apportionment is required although proof is difficult, and the defendants quite often are held not to be jointly liable.[5]

4. PROSSER, TORTS § 45 (2d ed. 1955).
5. Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S.W. 93 (1903).

INDEMNITY AND CONTRIBUTION

In cases of joint liability, consideration must be given to the Tennessee cases dealing with recovery by one tortfeasor against another. Can one party who is liable to the plaintiff, or who deems himself liable to the plaintiff, recover from another party who is also liable to the plaintiff for the same harm? There are two legal remedies appropriate to the problem. One is a right of indemnity, which contemplates one party bearing the full amount of the damage; the other is contribution, which contemplates a pro rata distribution of damage. The distinction between the two, certainly as far as terminology is concerned, has not always been kept clear in the Tennessee cases and is not yet clear. The leading Tennessee case in this field is *Cohen v. Noel*.[6] In this case the allegations claimed passive negligence on the part of Cohen in driving a vehicle into a parking garage and failing to see a painter on a ladder in the driveway of the garage, and active negligence on the part of Noel in placing the painter on the ladder in the dimly lit driveway of the garage. The suit sought to impose upon Noel the full amount of the judgment that the painter had obtained against Cohen. It was a suit for indemnity, not for contribution, and the Tennessee Supreme Court held that a cause of action for indemnity was stated.[7]

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6. 165 Tenn. 600, 56 S.W.2d 744 (1933) (opinion by Green, J.). There had been earlier cases pertinent to the problem. Rhea v. White, 40 Tenn. 121 (1859), and Anderson v. Saylors, 40 Tenn. 551 (1859), had announced that contribution was not available to a tortfeasor who had been held liable with others in actions of trover. In the former case the court limited its holding as follows: "recovery against a party in trover, for a joint wrong, *prima facie*, at least, if not conclusively, so places him in *pari delicto*, as that he can have no contribution unless he aver and prove his innocence of the wrong; and that is not done in this case." 40 Tenn. at 125. In Maxwell, S. & Co. v. Louisville & N.R.R., 1 Tenn. Ch. 8 (Cooper 1872), there was presented a situation where the complainant had contracted to do work on a bridge for the railroad and by the contract made itself primarily liable for damages of the type that had occurred. The injured party had obtained judgment against the contractor and the railroad; the railroad had purchased the judgment and had execution issue thereon against the contractor. The present case was by the contractor seeking to enjoin execution of the judgment. Chancellor Cooper declined the injunction holding that equity would not lend its aid to prevent the execution of a legal arrangement which secures "equity of contribution." The result of the holding was that the railroad, being secondarily liable under its contract with the complainant, achieved indemnity. In Central Bank & Trust Co. v. Cohn, 150 Tenn. 375, 264 S.W. 641 (1924), a joint judgment had been rendered against a trustee who had breached his trust and other parties who had become technically liable by acquiring the trust property from the trustee, thereby participating in the breach of trust. The trustee was a reputable attorney, and the court deemed the other parties free of moral guilt. The main point in the case had to do with the attempted purchase of the judgment by one of the judgment debtors, but the court, through Special Justice Thomas H. Malone, adjudicated contribution among the solvent judgment debtors. The trustee, an actual wrongdoer, was insolvent. Of course, liability in this case was predicated on tort, and this decision is probably as significant as *Cohen v. Noel*.

7. This ruling was on a demurrer. When the case was tried on its merits, the negligence of both parties was found to have been active. Cohen v. Noel, 21 Tenn. App. 51, 104 S.W.2d 1001 (M.S. 1937).

There followed *Graham v. Miller*,[8] a suit by the administrator of a minor son against the employer of his driver-father. The driver-father was operating a truck belonging to the defendant and was having trouble with the clutch. The clutch stuck at the floorboard; and, leaving the motor running and the truck in gear, the driver-father and his minor son got out of the truck. As the boy walked in front of the truck the clutch pedal became dislodged, causing the truck to run over him. The administrator was aware that he could not sue the father[9] and, accordingly, brought suit against the employer-owner. Liability was alleged not only on the doctrine of respondeat superior, but also upon the basis that the truck was defective. The supreme court stated that upon the facts a situation like that in *Cohen v. Noel* was evident and that the active negligence was on the part of the father-driver. It followed that if judgment were rendered against the truck owner, he would have a cause of action against the actively negligent father with the result that the minor's administrator would be recovering from the father, a recovery not permitted by Tennessee law. Hence, the suit was dismissed. Quite apparently, the court had in mind indemnity.[10]

The next decision was that of *Carter v. Eastern Tennessee & Western North Carolina Transportation Co.*[11] by the Eastern Section of the Court of Appeals. In this case the company, a common carrier of freight, being short of equipment, contracted with Carter to haul a shipment for it. Under the law the company could not exonerate itself of liability to third persons but in the contract with Carter it exacted an agreement from Carter that he would be liable for damages caused by him and would insure such liability. Carter injured third persons and suits were brought against Carter and the company. The latter called upon Carter to settle the suits but on his refusal to do so, the company settled them for $17,000 and thereupon filed suit in the chancery court against Carter for indemnity. In the chancery suit the company being mindful of the risk of being deemed a volunteer, or of the possibility that settlement, although made in a good faith belief of liability on its part, would be held insufficient, and being mindful of the possibility of a defense upon the ground that the amount paid in settlement was unreasonable, demanded a jury and submitted to it issues as to whether or not the company was liable to the injured parties and whether or not $17,000 was a reasonable settlement of

8. 182 Tenn. 434, 187 S.W.2d 622, 162 A.L.R. 571 (1945).
9. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
10. For other cases denying recovery against an employer or third person upon the basis of family immunity between plaintiff and the tortfeasor, see Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952), 22 TENN. L. REV. 1050 (1953); Fagg v. Benton Motor Co., 193 Tenn. 562, 246 S.W.2d 978 (1952); *cf.* Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Mahaffey v. Mahaffey, 15 Tenn. App. 570 (W.S. 1932).
11. 35 Tenn. App. 196, 243 S.W.2d 505 (E.S. 1949).

the claim. Answers favorable to the company on these issues were made by the jury. The court of appeals held that the company and Carter had by contract made Carter primarily liable and that, accordingly, the company, having been judicially determined liable to the injured parties and having paid a reasonable amount in settlement, was entitled to full indemnity from Carter.

At this point the only cases had been ones seeking indemnity, and the courts had held that indemnity could be had (1) by a passive tortfeasor from an active tortfeasor, and (2) by one who by contract was secondarily liable from one who by the contract was primarily liable. *Graham v. Miller* involved two predicates of indemnity, one arising out of the master-servant relationship and the other out of a factual situation like that in *Cohen v. Noel.* The court appeared to put more weight on the factual situation than on the master-servant relationship.

Subsequently, there came before the supreme court *Davis v. Broad Street Garage.*[12] Following *Cohen v. Noel* and *Graham v. Miller,* the complainant alleged that her own negligence was passive and that of the defendant active and flagrant, but the factual situation alleged was somewhat short of the ones in those two cases. In an intersection accident complainant alleged that when she approached an intersecting street she looked both ways and could see about 180 feet to her right and that when she was about halfway across the intersection, the defendant who was driving fast, not looking or applying her brakes, ran into the right rear of plaintiff's car. Complainant characterized her own negligence as passive in failing to again look as she entered the intersection and that of the defendant as active. In a circuit court suit between the two drivers, both suits had been dismissed, implying negligence on the part of both. The car which was being driven by the so-called active tortfeasor was owned by the Broad Street Garage. It had sued both drivers and had obtained judgment against them. The bill alleged that the garage had then released the active tortfeasor. Notwithstanding the allegation of passive and active negligence, which entitled the passive tortfeasor to indemnity, the bill sought from the defendant only one-half of the judgment, or contribution. The majority of the court held that a cause of action was stated. It is difficult to be sure how far-reaching this decision is. The pleader characterized his suit as presenting a "*Cohen v. Noel* situation," yet the facts alleged possibly show more nearly a comparative negligence situation. The bill sought not indemnity but contribution, which, where permitted, neither requires nor contemplates proof of an active-passive negligence situation. The dissent in this case notes that the facts do not show a case like that in *Cohen*

12. 191 Tenn. 320, 232 S.W.2d 355 (1950), 4 VAND. L. REV. 907 (1951).

v. Noel, and the allegation that it is such is simply the conclusion of the pleader—not admitted by the demurrer. The dissent interpreted the majority opinion as going far beyond *Cohen v. Noel* and judicially legislating for Tennessee the doctrine of contribution among joint tortfeasors. A reading of the opinion, the dissent, and the opinion on the petition to rehear leaves little doubt that the court recognized that the blanket prohibition against contribution among tortfeasors was an archaic doctrine, with little, if any, support in reason and concluded that equity and justice demanded that Tennessee align itself with modern authority and permit contribution among tortfeasors, except in the case of a willful tort, immoral action or conscious violation of law.[13]

This interpretation of the decision was confirmed in the case of *American Casualty Co. v. Billingsley,*[14] decided in 1953. Here, too, the complainant sought contribution rather than indemnity. The facts alleged were that Billingsley drove his automobile over onto the wrong side of the highway and forced Henry to leave the road whereupon Henry struck and damaged a building owned by Hensley. Henry had sued Billingsley for his property damage and obtained a judgment. Hensley, the building owner, had sued both Henry and Billingsley but the case was dismissed as to Billingsley and judgment rendered against Henry. In the present action by Henry against Billingsley, the court stated that a case for contribution had been alleged. "There was no question of willfulness in the case" (the contribution concept) and "under the allegations of the declaration and the stipulations, it appears that insofar as Billingsley was concerned Henry was guilty only of passive negligence" (the indemnity concept of *Cohen v. Noel*).[15] The court pointed out that Henry must have been guilty of some negligence because the building owner had recovered a judgment against him but that Henry had obtained a judgment against Billingsley and "this settled the liability as between the two." However it cannot be concluded from the opinion that these prior judicial determinations were critical to the court's decision in this case. It is to be noted that this suit was brought by Henry's insurer.

Some five months later, there was presented to the court the case of *Vaughn v. Gill,*[16] likewise a suit for contribution. This suit was brought not by the insurer who had paid the loss, but rather in the name of the insured, and the court held that, it appearing that the complainant had been paid by his insurer and the insurer had been

13. It was in cases of intentional torts that contribution was first denied. An erroneous extension of these holdings is thought to be the origin of the broad general rule denying contribution. PROSSER, TORTS 246-49 (2d ed. 1955). See also 4 VAND. L. REV. 907 (1951).

14. 195 Tenn. 448, 260 S.W.2d 173 (1953).

15. *Id.* at 450, 260 S.W.2d at 173.

16. 264 S.W.2d 805 (Tenn. 1953).

subrogated to his rights, he had alleged no loss and no cause of action was stated.

The court went further, however, and stated that contribution was not available in this case because it was not shown that the defendant and complainant were under a common burden or liability until a judgment had been obtained by the injured party against both of them,[17] and, further, that the statute of limitations had run against the injured party in favor of one of the defendants, further demonstrating that they were no longer under a common burden. This portion of the opinion is quite puzzling.[18] In *American Casualty Co. v. Billingsley*,[19] decided five months earlier, there had not been judgments against both defendants and in *Davis v. Broad Street Garage*[20] there is no indication that this requirement was deemed significant. The general law elsewhere is that it is not required that the defendants be under a common burden at the time of the suit, it being sufficient if they were initially under a common burden.[21] Moreover, if a complainant has a cause of action for contribution, it matures when he makes payment;[22] it is not predicated upon his being subrogated to any rights of the original plaintiff and should be unaffected by the running of a one-year personal injury statute of limitations on the original plaintiff's claim against a defendant.[23] If this dictum is fol-

17. Possibly this case should be compared with the *Eastern Tennessee* case, note 11 *supra*. In the subject case, the court states that there can be no contribution because the plaintiff had had judgment against only the party seeking contribution. In *Eastern Tenn. & W.N.C. Transp. Co. v. Carter*, at the time of the suit for contribution, plaintiff had not had judgment against either party. In the chancery suit for contribution it was litigated and determined that both the company and Carter were liable to the injured parties. Obviously, one seeking contribution must judicially establish such liability before he can obtain contribution from another claimed wrongdoer. In the *Eastern Tennessee* case the court of appeals deemed it sufficient that these issues be proved in the suit for contribution. In the subject case liability of the defendant seeking contribution had already been established and liability to plaintiff of the defendant in the contribution suit was alleged in the suit for contribution, but the court in its dictum apparently deemed this insufficient. The *Eastern Tennessee* case was not mentioned. Unless these issues can be determined in the suit for contribution, it would seem that the matter is completely controllable by the injured parties.

18. For other comment on this case, see Wade, *Restitution—1954 Tennessee Survey*, 7 VAND. L. REV. 941, 948-50 (1954).

19. Note 14 *supra*.

20. Note 12 *supra*.

21. 13 AM. JUR., *Contribution* § 15 (1938).

22. *Id.* § 10.

23. Wade, *supra* note 18, at 950. A portion of the dictum in *Vaughn v. Gill* would indicate that if the statue of limitations has run on the plaintiff's claim against the third party, then a suit for contribution against such third party would not lie. This dictum gives a contribution suit somewhat the aspects of a subrogation action. However, the two are separate and distinct concepts and the right of contribution may exist where subrogation could not. 13 AM. JUR., *Contribution* § 2 (1938). If the above dictum were followed, it might result that if the one seeking indemnity or contribution from another tortfeasor has himself previously been paid by such third party or his insuror for his own injury and has given a broad release therefor releasing all causes of action in law or in equity, he would be held to have released his or his insuror's right to indemnity or contribution against such third party.

lowed, it would appear that the right of contribution apparently adopted in *Davis v. Broad Street Garage* and *American Casualty Co. v. Billingsley* has been severely limited and that its availability to a defendant will be almost accidental, or certainly controllable by the plaintiff. On the other hand, if this portion of the opinion is rejected as dictum unnecessary to the decision, the case adds nothing to the doctrine of contribution other than to point up the necessity that the suit be brought either by the defendant, if he has actually paid the loss, or by the insurer of the defendant, or for its use and benefit, in the event that the insurer has paid the loss.

There have been no subsequent reported cases. If the foregoing interpretation of *Davis v. Broad Street Garage* and *American Casualty Co. v. Billingsley* is correct, it appears that, in addition to the right of indemnity, there also exists in Tennessee a right of contribution among joint tortfeasors, except where the conduct of the parties is such as to deny them the use of the courts.[24] This statement possibly should be hedged by pointing out that in all of the Tennessee cases adjudicating a right of contribution, the complainant has alleged that the negligence of the complainant was passive and that of the other defendant active although the facts alleged have not always seemed necessarily to justify such a conclusion. The only case seeking contribution where active-passive negligence was not alleged was *Vaughn v. Gill,* where contribution was denied on other grounds. Of possible significance is the fact that the court in this case did not mention the absence of this allegation. The extent to which the right of contribution may have been limited by *Vaughn v. Gill* has already been noted.

RELEASES AND COVENANTS NOT TO SUE

When there are two or more joint tortfeasors, it is well settled in Tennessee, as in most other states, that a release of one of the tortfeasors by the plaintiff has the effect of releasing or discharging all of the others.[25] On the other hand, a mere covenant not to sue one of the tortfeasors by the plaintiff does not release the remaining wrongdoers.[26] In most jurisdictions the amount paid to the plaintiff under the covenant may be proved by the remaining defendants, and this amount may be taken into account to mitigate the damages and to reduce the recovery. This is not the rule in Tennessee, however, and peculiar and difficult problems may arise as a result.

As cross actions under the recent statute, or independent suits, are brought for indemnity or contribution, there will soon be presented a situation where the third-party defendant has paid to the original

24. See note 13 *supra.*
25. Snyder v. Witt, 99 Tenn. 618, 42 S.W. 441 (1897); Brown v. Kencheloe, 43 Tenn. 192 (1866).
26. See notes 32 and 33 *infra.*

plaintiff money for a covenant not to sue. It is difficult to see how this covenant would be a defense to the indemnity or contribution action, and the authorities that have had the question presented have generally so held,[27] although certain of the dicta in *Vaughn v. Gill* if logically extended might point to a contrary result.[28] Nor would it appear that the covenantee would get any credit for his payment whether the judgment be one of indemnity or contribution. The theory of indemnity is that, between the parties, the indemnitor should bear the full loss of the exoneration of the indemnitee; it would seem unimportant that the indemnitor had already paid some money to the injured party. Moreover, whether it be indemnity or contribution, it appears that in Tennessee the amount received by the covenanting injured party does not operate to reduce the recovery against the remaining defendant. This state appears to stand almost alone in excluding evidence of what a plaintiff has received in consideration of his covenant not to sue another party.[29] The latest of the Tennessee cases is *Mink v. Majors*.[30] In this suit, which was one for property damage against a subcontractor, the jury fixed the plaintiff's damages at $2,000. The trial judge credited this judgment with $1,500, which was the amount plaintiff had received for the same loss under a covenant not to sue the primary contractor. The court of appeals held that in so doing the trial judge was in error, apparently conceding that the law permitted a plaintiff to be almost twice compensated. While not cited, there was ample Tennessee authority for the court's holding in this regard. As early as 1916 in *Nashville Interurban Ry. v. Gregory*,[31] Judge Green had stated:

> "Inasmuch as such a covenant can only be pleaded by the covenantee by way of set-off or recoupment and is not a satisfaction of the claim for damages, it is difficult to understand how it could be available at all

27. 13 AM. JUR., *Contribution* § 104 (1938); Annot., 85 A.L.R. 1091, 1095 (1933), 8 A.L.R.2d 196 (1949). See note 31 *infra*.

28. See note 23 *supra*. As hereinabove indicated, *Vaughn v. Gill* states that there can be no contribution unless the wrongdoers are under a common burden at the time of the suit for contribution. The opinion was expressed that since the statute of limitations had run on the original plaintiff's suit against the one from whom contribution was sought, the latter was no longer under any burden. Under this reasoning, is one who had obtained a covenant not to be sued under a burden? Neither the running of the statute of limitations nor the attaining of a covenant has destroyed the cause of action.

29. PROSSER, TORTS 246 (2d ed. 1955). Referring to amounts received by a plaintiff, this author states: "All courts are agreed, however, that it must be credited pro tanto to diminish the amount of damages recoverable against him, irrespective of an agreement that it shall not, and regardless of whether it is received under a release or a covenant not to sue. The prevailing view, with some authority to the contrary, is that it must be so credited even where the person released was not in fact a joint tortfeasor, or was not liable to the plaintiff at all." See also RESTATEMENT, TORTS § 885(3) (1939).

30. 279 S.W.2d 714 (Tenn. App. W.S. 1953).

31. 137 Tenn. 422, 193 S.W. 1053 (1916).

> to another tort-feasor, either to bar the suit against him or *to reduce the recovery* had against him. He has no semblance of right to a cross-action."[32]

In several cases since that time the court of appeals has ruled such evidence incompetent.[33] It is interesting to note that in *Oliver v. Williams*[34] in 1935 the present chief justice, then a circuit judge, had permitted a defendant to prove what a plaintiff had received on a covenant and had held that it was the duty of the jury to allow such as a credit on the plaintiff's damages, but his holding in this regard was deemed erroneous by the court of appeals.

Logically, it would seem to follow that in cases where the amount received on a covenant could be shown, the amount so paid should be considered as having operated to reduce the plaintiff's recovery and accordingly to inure to the benefit of all defendants. Accordingly, it should be taken into account in arriving at the proportionate share of the contributing tortfeasor, and this appears to be generally the law.[35] However, in Tennessee where the amount so paid does not operate as a credit, and in fact cannot even be shown in evidence, it would seem to follow that the payment has not inured to the benefit of all initially under the common burden and accordingly will not be taken into account in arriving at a pro rata share of the contributing tortfeasor.

The foregoing suggests that covenants not to sue are considerably less attractive than they sometimes have appeared. It would appear that where the fact situation is such that a jury issue might be made on active and passive negligence, a law or jury issue on primary and secondary liability by reason of contract, and possibly primary and secondary liability under the servant-master relationship, then a defendant so exposed, who pays a sum of money for a covenant not to sue, remains exposed to payment of the full judgment that might be obtained against another defendant, without credit for the amount expended for the covenant. While somewhat less clear, it further appears that if Tennessee has adopted the rule of contribution among tortfeasors, a defendant in the ordinary negligence case (where the

32. *Id.* at 436, 193 S.W. 1056 (Emphasis added.).

33. Horner v. Cookeville, 36 Tenn. App. 535, 259 S.W.2d 561 (M.S. 1952); Levitan v. Banniza, 34 Tenn. App. 176, 236 S.W.2d 90 (M.S. 1950); Nashville v. Brown, 25 Tenn. App. 340, 157 S.W.2d 612 (M.S. 1941); Oliver v. Williams, 19 Tenn. App. 54, 83 S.W.2d 271 (M.S. 1935); Cecil v. Jernigan, 4 Tenn. App. 80 (M.S. 1927). The United States District Court for the Eastern District of Tennessee has refused to apply the state rules to actions arising under the Federal Employers Liability Act, 35 STAT. 65 (1908), as amended, 45 U.S.C.A. § 51 (1954), however, and has held that the other tortfeasors are entitled to credit for the amount paid under the covenant in such cases. The action being based upon a federal statute, the court felt free to follow the general law, rather than local law, and accordingly adopted the general rule which allows such credit. Cowan v. Nashville, C. & St. Ry., Civil No. 1797, E.D. Tenn.

34. 19 Tenn. App. 54, 83 S.W.2d 271 (M.S. 1935).

35. 13 AM. JUR., *Contribution* § 32 (1938).

special relationships above stated do not obtain) is likewise exposed ultimately to contributing a proportionate share of the judgment obtained against another or other defendants, and likewise may not obtain credit for the amount he has expended of his covenant.

As a result of this situation, it is possible that serious efforts may be made to have covenants not to sue construed as releases. Whether a particular instrument is a release or a covenant not to sue, of course, depends upon its wording and the intention of the parties who entered into it. Since certain forms have been approved by the appellate courts for covenants not to sue, however,[36] it would seem that the careful draftsman, by employing language previously judicially construed as constituting a covenant, should be able to avoid the possibility of misconstruction of the document.

It is possible that the covenant not to sue might be so drawn as to protect the covenantee against the risk of liability for indemnity or contribution without receiving credit for the amount paid under the covenant. For example, it might be so drawn as to provide expressly that the amount paid thereunder to the plaintiff should reduce the common burden of all of the joint tortfeasors and inure to the benefit of all. Or it might be drawn in such manner as to obligate the plaintiff to indemnify the covenantee or reimburse him if he were later held liable to a co-defendant or joint tortfeasor for contribution or indemnity. Of course, whether the plaintiff would agree to the inclusion of such provisions in the covenant is problematical, as a practical matter, and these suggestions probably do not afford real solutions to the problem.

The Third Party Statute

Having considered the situation apparently entitling one tort-defendant to recover from another, we should return to an examination of Chapter 145 of the Acts of 1955. As noted at the outset, the language of the statute permits the third party action when the defendant deems the third party primarily liable to the plaintiff. It does not say that the defendant deems that between himself and the third party that the third party is primarily liable, although it appears quite likely that this is what the legislature had in mind; otherwise there would have been no occasion to use the word "primarily." As far as a plaintiff is concerned, it would seem that all of the concurring wrongdoers, whether actively or passively negligent, are primarily liable to him. Certainly, there is no requirement that he sue one before being entitled to sue the other. Likewise a master liable under the doctrine of respondeat superior may be sued without the servant's being sued and

36. See, *e.g.*, Horner v. Cookeville, 36 Tenn. App. 535, 255 S.W.2d 561 (M.S. 1952); Oliver v. Williams, 19 Tenn. App. 54, 83 S.W.2d 271 (M.S. 1935).

in this sense is primarily liable to the plaintiff. Also where defendants have contracted among themselves as to primary and secondary liability, the plaintiff need not concern himself with their contract. Accordingly, if the statute is given this interpretation, it would permit any defendant deeming that he had a right either of indemnity or of contribution to sue for either in the original suit.

On the other hand, if the court interprets the statute as contemplating only situations where as between the defendants there is primary and secondary liability, it would appear that it would only permit indemnity cases and would not permit actions for contribution.[37] As mentioned above, it would appear that in neither event does the statute contemplate or permit the original plaintiff having judgment against the third-party defendant, although it must be admitted that such a construction is within the realm of possibility. The provision of the statute that the filing of the cross action shall not operate to delay the plaintiff's suit against the original defendant is inconsistent with the thought that the statute contemplates plaintiff having judgment against the third party. Moreover, if the statute does have this meaning it has worked a radical change in substantive law, something not ordinarily accomplished by implication from language of uncertain meaning. If the statute were intended to accomplish this result, it has certainly left many questions unanswered. The defendant, by suing the third party, cannot delay plaintiff's suit against him. Can he force the plaintiff to proceed in breach of a covenant not to sue which plaintiff has given (or may give after the cross action is brought) to the third party, or can he prevent the plaintiff from nonsuiting as to the third party? For the above reasons, it seems unlikely that the statute will be construed as permitting the plaintiff to have judgment against the third party.

Certainly, however, the statute contemplated somebody having judgment thereunder against somebody else; it is novel indeed if it were otherwise. If it has any discernable meaning, it would seem that the most likely construction will be that it simply permits an indemnity suit to be brought in the plaintiff's action and, if it does not operate to delay plaintiff's trial, to be tried at the same time.

The benefits to flow from this construction are not apparent. Confusion by the jury will necessarily and understandably result. It would probably not be deemed an abuse of discretion for a trial judge to order separate trials of the issues. It would also appear that possibly a defendant's right of indemnity might be more limited if brought under this statute than if brought independently. As herein appears, it seems that a covenant not to sue would not defeat a complainant's

37. It has even been held by a trial court that this statute is inapplicable to tort actions entirely upon the theory that "primary liability" is terminology appropriate only to contract actions.

right of indemnity in an equity action brought therefor; nor on principle should the running of the statute of limitations on the plaintiff's action against the third party defeat the right of indemnity. However, under this statute in neither situation would the third party be "primarily liable" to the plaintiff, except in a theoretical sense.

CONCLUSION

We can expect significant and interesting decisions during the next few years and it is apparent that the job of the courts is going to be difficult.[38] The recent third-party statute is not clear in meaning. Only a short distance down the road of contribution among tortfeasors has been traveled and many questions in connection therewith remain unanswered. Immediately suggested are questions such as the necessity of a judgment, the right to litigate the issue of negligence and causation in the suit for contribution, the right arising in favor of one having made a settlement in good faith, and the statute of limitations properly applicable to suits for indemnity or contribution. Possibly there will also have to be determined whether the contribution must be made on an equal numerical pro rata basis among the solvent defendants, or whether the jury or court may distribute the load according to their ideas of degrees of fault. The effect of covenants not to sue must be considered, and achieving an equitable distribution of the burden in the face of decisions which make inadmissible evidence of what a plaintiff has received for a covenant presents quite a problem. It may well be that the bar and legislature should consider legislative treatment along the lines of the Uniform Contribution Among Tortfeasors Act.

38. While not involving the recent statute, of considerable interest is the case of Commerce Title Guaranty Co. v. Shepard Elevator Co., Civil No. 2523, W.D. Tenn. Shepard Elevator Company had installed an elevator in an office building in Memphis owned and operated by Commerce Title Guaranty Company. The elevator fell and McIntyre, who was injured, brought suit in the Shelby County Circuit Court against both the building owners and the elevator company. Prior to the trial, the elevator company paid McIntyre $7,500 for a covenant, and the case was dismissed as to it. A jury verdict in the amount of $22,500 was returned against the building owner. The building owner thereupon brought the present action in the district court seeking indemnity from the elevator company upon allegations that its negligence was passive and that of the elevator company, active. Thereupon, the elevator company filed a cross action for the recovery of the sum it had expended for the covenant upon two theories: (1) that its negligence was passive and that of the building owner was active; and (2) that contractual undertakings at the time of installation rendered the building owner primarily liable. On a preliminary hearing the first theory had been rejected by Judge John D. Martin of the United States Court of Appeals for the Sixth Circuit, acting as district judge. The case was tried to a jury with Judge William E. Miller of the middle district of Tennessee sitting by assignment. Specific interrogatories were submitted to the jury and they found that the negligence of the building owner was passive and that of the elevator company was active and found adversely to the contentions of the elevator company as to its claimed rights under the contract. The result was that the building owner had judgment against the elevator company for full indemnity, leaving the elevator company in the unenviable position of being liable for the full judgment in addition to the $7,500 which it had expended for the covenant.