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JOINT TORTFEASORS AND THE CONFLICT OF LAWS

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Much has been written regarding tort liability and the conflict of laws and there are numerous cases in the field.[1] But little attention has been paid to the conflicts aspects of the many legal problems which surround the concept of joint tortfeasors. This paper attempts to collect the relatively few decisions on the subject and to analyze the problems involved.

In the beginning it should be made clear that the term "joint tortfeasors" is used, unless otherwise indicated, in the broad, somewhat colloquial sense which most American courts use today. Thus used, it includes both joint tortfeasors in the narrow original common law meaning, and concurrent tortfeasors whose liability is several. Joint liability in the strict sense was imposed upon wrongdoers who were acting in concert, each being therefore responsible for the conduct of others; it may also exist in the case of principal and agent and other instances of vicarious liability and in the case of breach of a joint duty. Concurrent tortfeasors are those whose independent acts of negligence combined to produce a single, indivisible injury so that each is held liable for the full damage. A number of differences existed at one time between the legal attributes of these two concepts and some may exist today, at least in certain jurisdictions.[2] These differences and others which have developed suggest that when more than one state is involved the laws are likely to be in disagreement so that the decision on the question of conflict of laws may well determine the outcome of the litigation.

With this introduction, it may now be appropriate to consider some of the more important problems.

LIABILITY AND JOINDER

Liability for the entire amount of the damage suffered by the plaintiff is normally imposed upon each tortfeasor when there is no logical way of apportioning the damages among them. This includes joint tortfeasors (strict sense) and concurrent tortfeasors producing an indivisible result. Courts do not always agree, of course, as to when a

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1. For general discussion and collection of authorities, see Leflar, *Choice of Law: Torts: Current Trends, supra* p. 447.

2. See, in general, PROSSER, TORTS § 109 (1941); WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE §§ 3-5 (1951); Jackson, *Joint Torts and Several Liability,* 17 TEXAS L. REV. 399 (1939); Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413 (1937).

result is indivisible. At early common law joinder was permissible only of joint tortfeasors in the strict sense; today most jurisdictions permit it in the case of all joint tortfeasors in the broad sense of the term.

It is generally agreed that the American rule is that tort liability is governed by the law of the place where the injury occurs. Perhaps even greater agreement is to be found in the rule that questions of parties to an action are governed by the law of the forum. The distinction is the familiar one between substance and procedure — a dichotomy so well established in the conflict of laws as to suggest that the two should not even be discussed in the same sub-topic. But joinder and liability have become so mixed and confused in the opinions discussing joint tortfeasors that the distinction is often very difficult to draw for purposes of internal law and a corresponding difficulty may arise in the conflict of laws.

The leading case on the subject, *Mosby v. Manhattan Oil Co.*,[3] indicates the difficulties involved and suggests the appropriate analysis. Three oil companies, acting independently, allowed salt water and oil to run into a stream, rendering it unsuitable for drinking by cattle as it passed through plaintiff's ranch below. All of this occurred in Kansas and decisions of the Kansas court permitted an action for damages against the three oil companies joined as defendants, each being liable for the full amount. But the action was brought in a federal district court in Missouri, and the Missouri precedents, following the majority rule, were to the effect that the damages could be apportioned and that the defendants could not be joined in a single action. The district judge, in an oral opinion, held that the Missouri law governed a "matter concerning the remedy and not the right," so that there was a misjoinder of parties. The court of appeals reversed, saying: "We think the difference is more than a procedural one; it goes to the extent or scope of the cause of action. The measure of the damages which plaintiff has sustained may be the same in Missouri as in Kansas; but the extent of the liability is quite different in the two states. We think the difference is one of substantive right."[4]

Which court is correct? Is the problem one of substance or procedure? The answer is that both are involved and that the elements must be distinguished. The appellate court is correct in stating that the problem whether each defendant is liable for the full damages (as one indivisible whole) or only for his divisible part, is one of liability or substance, and Kansas law should control. The district court is correct in stating that joinder of parties is a matter of procedure and Missouri law should apply. Applying this analysis it would appear that the final

3. 52 F.2d 364, 77 A.L.R. 1099 (8th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931), 80 U. OF PA. L. REV. 449 (1932).
4. 52 F.2d at 367.

holding before the appellate court is correct. Kansas law determines that each of the three defendants is liable for the full amount of the plaintiff's damage. If Missouri procedural law had been to the effect that joinder of defendants could be had only of joint tortfeasors in the strict sense where there is concerted action, no joinder might have been had here. But, though the opinion does not disclose it, the Missouri courts had indicated that joinder is appropriate for concurrent tortfeasors, when each is liable for the full amount.[5] Joinder in this case is therefore suitable, and the final decision is not to be construed, as some authorities have asserted,[6] that the question of joinder of parties is a matter of substance governed by the *lex loci delicti*.[7]

This construction of the case means that it is perfectly consistent with *General Steam Nav. Co. v. Guillou*[8] and *Fryklund v. Great Northern Ry.*,[9] two cases which have held that the problem of joinder is a procedural one to be determined by the *lex fori*. These are the only three cases in point which have been found — with the possible exception of the cases involving the question whether a defendant's liability insurer may be joined as a party defendant to the tort action. Since this problem is much broader than the scope of this article, individual attention is not given to these cases.[10]

JUDGMENTS

The American view regarding joint tortfeasors is that they are liable jointly or severally. The plaintiff may therefore sue all of them or any one or more of them. If he obtains a judgment against any one, he may, so long as it is not satisfied, sue another and obtain judgment. The

5. See, *e.g.*, Payne v. Bertman, 274 Mo. App. 690, 27 S.W.2d 28 (1930); Reynolds v. Metropolitan St. Ry., 180 Mo. App. 138, 168 S.W. 221 (1914); *cf.* Shafir v. Sieben, 233 S.W. 419, 17 A.L.R. 637 (Mo. 1921).

6. See HANCOCK, TORTS IN THE CONFLICT OF LAWS 132-33 (1942); 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 263 (1947). *But cf.* WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 52 (1951).

7. *Cf.* STUMBERG, CONFLICT OF LAWS 245 n.74 (2d ed. 1951); 80 U. OF PA. L. REV. 449 (1932); and see Jones v. Otis Elevator Co., 231 N.C. 285, 56 S.E.2d 684 (1949). For a contracts case in which a similar analysis is applied, see Bank of Topeka v. Eaton, 95 Fed. 355 (D. Mass. 1899).

8. 11 M. & W. 877, 152 Eng. Rep. 1061 (Ex. 1843).

9. 101 Minn. 37, 111 N.W. 727 (1907). This action (against a railroad for personal injury) may have been in contract rather than tort, but the court clearly holds that the *lex fori* governs as to "parties to suit" and therefore might permit an action against one defendant severally.

10. When a statute permits a joinder of the tortfeasor's insurer as a party defendant, the first question normally considered is whether the statute is to be characterized as involving substance or procedure. The courts have differed in their answers. Cases are collected in Notes, 120 A.L.R. 855 (1939), 54 A.L.R. 515 (1928); see also *infra* p. 775. Clearly procedure is involved; joinder of parties is traditionally regarded as procedural. But the nature of the insurer's liability is affected, too. It would seem that a proper analysis of the classification of a "direct-action statute" will show that it is both substantive and procedural in nature. The further question of whether the substantive aspect is to be characterized as partaking of the nature of tort or contract need not concern us here.

English view, until recently changed by statute, was different. In the case of joint tortfeasors in the strict sense, a judgment against one discharged the others, the obligation being treated like a single one which was merged into the judgment.[11] Suppose a judgment is obtained against one joint tortfeasor in State X, which follows the English rule, and the plaintiff subsequently sues the second joint tortfeasor in State Y, which follows the American rule. Can the first judgment be pleaded as a bar? Is it entitled to full faith and credit? There seem to be no cases in point, but some assistance may be had by considering the case where the first judgment was in favor of the defendant.

In *Bigelow v. Old Dominion Copper Mining & Smelting Co.*,[12] plaintiff corporation charged Bigelow and Lewisohn, promoters of the corporation, with fraudulently obtaining secret profits. A tort action was brought against Lewisohn in the federal court in New York; Bigelow, a domiciliary of Massachusetts, was not served and was not a party to the action. Defendant's demurrer to the bill was sustained and the complaint was dismissed. This action was then brought in Massachusetts against Bigelow on the same claim. The Massachusetts courts declined to regard the New York judgment as res judicata or as controlling in any fashion, and held him liable. This was affirmed by the Supreme Court of the United States.

Both the Massachusetts courts and the Supreme Court proceeded under the assumption that "under the law of New York this judgment [in favor of Lewisohn] would have been a bar to another suit upon the same facts against Bigelow, in the courts of New York." This was a minority rule, not approved by either court;[13] but the question was whether the full faith and credit clause required Massachusetts to give to the New York judgment "the effect of estoppel which attached to it in the courts of New York." The answer was that "The general effect of a judgment in a court of one State when relied upon as an estoppel in the courts of another State is that which it has, by law or usage, in the courts of the State from which it comes. But the faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind the persons against whom the judgment is sought to be enforced."[14] Since the New York court had no personal jurisdiction over Bigelow and the estoppel was based only on the relationship between joint tortfeasors the Mas-

11. See WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 10 (1951). Some American cases at an earlier date followed the English rule, but they have been largely overruled and the rule "has been generally repudiated in the United States." PROSSER, TORTS 1106 (1941). See also 2 FREEMAN, JUDGMENTS §§ 573-75 (5th ed., Tuttle, 1925); RESTATEMENT, JUDGMENTS § 94 (1942). On the British dominions, see WILLIAMS, *op. cit. supra*, at 36-37.

12. 225 U.S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009 (1912).

13. See RESTATEMENT, JUDGMENTS § 94, comment b (1942); cf. Note, *Res Judicata: The Requirement of Identity of Parties*, 91 U. OF PA. L. REV. 467 (1943).

14. 225 U.S. at 135.

sachusetts court could decide for itself whether this relationship was sufficient to treat Bigelow as a party by privity or representation.[15]

Where *A*'s liability in tort depends solely on the conduct of *B* (*e.g.*, master-servant relationship), and the plaintiff's action against *B* results in a judgment for *B*, the majority rule is that the judgment constitutes a bar to a later action on the same facts against *A*.[16] Indeed, the Supreme Court in the *Bigelow* case distinguishes this situation from the usual joint-tortfeasor situation actually involved in the case.[17] In the unlikely event that a state disagreed with this rule, could it decline to treat a judgment in favor of *B* in another state as a bar to an action against *A*, if there had been no personal jurisdiction over *A*?[18] It would appear that the *Bigelow* doctrine, as expressed in the latter part of the opinion, is still applicable and that full faith and credit is not required.[19] As the *Restatement* declares, "The law of the state where a valid judgment is rendered determines who are in privity with the parties to the judgment. If by the law of a state, privity is imposed upon persons over whom the state has no jurisdiction, the judgment is to that extent invalid."[20] True, *Bigelow* was decided some forty years ago and there have been a number of developments regarding the scope of the full faith and credit clause since that time.[21] But its effect does not seem to have been seriously questioned.

Return may now be made to the problems with which the topic of

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15. *Id.* at 139.

16. RESTATEMENT, JUDGMENTS §§ 96, 99 (1942); and see Note, 133 A.L.R. 181 (1941).

17. 225 U.S. at 127-28.

18. Personal jurisdiction over a joint tortfeasor is acquired in the same way as over any other person. In D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648 (U.S. 1850), a New York statute providing that service on one joint debtor would permit judgment against all the joint debtors was held incapable of giving the court jurisdiction over a nonresident debtor so as to authorize a judgment against him enforceable in another state.

19. In Krolik v. Curry, 148 Mich. 214, 111 N.W. 761 (1907), an action brought in Canada in the alternative for rescission of a contract for fraud or for damages, resulted in a judgment for the defendant. The present action was brought in Michigan in fraud against the agent. It was held that the Canadian judgment was res judicata against the plaintiff's claim, but no attention was given to the conflicts problem.

20. RESTATEMENT, CONFLICT OF LAWS § 450, comment *d* (1934). *Cf.* Behrens v. Skelly, 173 F.2d 715, 719 (3d Cir. 1949): "The rule of that case might be applicable if, although New York regarded these defendants as in privity with Feuerring and Schwabacher, Pennsylvania did not. In that situation a Pennsylvania court would not be required to give faith and credit to the New York judgment with respect to these Pennsylvania defendants if they were not within the jurisdiction of New York. But here, as we have seen, the Pennsylvania law is in agreement with New York in regarding the defendants as in privity. . . ."

21. Perhaps the one most closely in point is Sovereign Camp, W.O.W. v. Bolin, 305 U.S. 66, 59 Sup. Ct. 35, 83 L. Ed. 45 (1938), suggesting that a judgment in a class action is subject to full faith and credit in other states and binding even on persons in the class who were not personally within the jurisdiction of the court. On the effect on established privity doctrines of recent Supreme Court cases involving the full faith and credit required for divorce decrees, see Overton, *Sister State Divorces*, 22 TENN. L. REV. 891, 905-10 (1953).

judgment was introduced. What is the effect in a second state of a judgment against a joint tortfeasor (strict sense) in a state which followed the English view that the obligation against the tortfeasors as a whole has merged into the judgment. The *Bigelow* case would suggest by analogy that the second state is not required to treat the judgment as discharging another joint tortfeasor who was not before the court or within its jurisdiction. Can that case be distinguished by arguing that the judgment under the English view merged the complete obligation into the judgment so that the obligation as a whole has been extinguished and no longer exists?[22] The argument may possibly have effect; and there may eventually be a Supreme Court case on the general subject, particularly in connection with joint promises, where the rule regarding a discharge of the joint duty has more modern application.[23]

Brief reference may here be made to the problem of election of remedies. Suppose that *A* steals the plaintiff's chattel and sells it to *B*. Plaintiff sues *A* in State *X* in quasi-contract and obtains judgment; he subsequently sues *B* in trover in State *Y*. Under the law of *X*, by bringing the action in quasi-contract or obtaining the judgment, the plaintiff "waives the tort" so that no action can be brought in tort against *B*. By the law of *Y*, so long as there has been no satisfaction, the second action may be brought. Which law governs? No authority in point has been found.[24] The problem will probably be treated as one of procedure so that the law of the forum will apply; but it may be characterized as substance, in which case it will be governed by the law of the place where the conduct constituting the election took place.[25]

Releases

Courts are in agreement that full compensation for an injury extinguishes a claim, so that a complete satisfaction by one joint tortfeasor discharges the others. Far less agreement exists regarding the effect of a release given to one joint tortfeasor on the obligation of the others. The great majority of the American states hold that such a release discharges the other joint and concurrent tortfeasors; but the British jurisdictions apply this rule only to joint tortfeasors in the strict sense and not to concurrent tortfeasors. The rule has been

22. As to the law governing the extinguishment of a tort claim, see the section on Releases, *infra*.

23. See Restatement, Judgments § 101 (1942).

24. Beale declares that "If an election of remedies is made in another state, no action will be allowed in this state on the other remedy." 2 Beale, Conflict of Laws § 450.19 (1935). This, of course, does not indicate what law determines whether there has been an election of remedies. Two cases are cited, but neither is in point.

25. As to possible application of the law of the place of the tort, see *infra* pp. 471-72.

sharply criticized and various devices have developed to avoid its application. It is generally held that a covenant not to sue one joint tortfeasor, since it does not extinguish the claim, does not have the effect of discharging another joint tortfeasor. Some courts are very strict in regard to the language which they will construe as constituting a covenant not to sue; others are willing to construe a document phrased in terms of a release as a covenant not to sue. Some courts hold that the injured party, in giving a release to one tortfeasor, may expressly reserve his rights against others; some even hold that an oral agreement to this effect may be shown; many hold that such reservation is ineffective. Statutes have made changes in some states, and judicial changes seem not uncommon.[26] All of these differing rules[27] indicate the potential presence of important problems of conflict of laws. What law governs the effect on one joint tortfeasor of a release given to another?

Only one case has been discovered in which the court recognized the problem and dealt with it. In *Goldstein v. Gilbert*,[28] plaintiff was injured in Virginia in a collision of two cars. One driver paid her $4,500, and she executed a " 'covenant not to sue,' expressly reserving" rights against the other driver. This apparently was also in Virginia. This action was commenced against the second driver in West Virginia, where a plaintiff's rights against the present defendant would not have been discharged by the instrument. By Virginia law the plaintiff would be barred. The court posed the question thus: "If the covenant not to sue is held to affect the remedy alone, then the law of the forum, or West Virginia, controls. If it operates upon the right of action, then the law of the state under which it arose, or Virginia, controls."[29] It declared that the birth and continued existence of the right of action depend upon the law of the place where the accident took place and added that "the legal effect of any conduct which might or might not terminate that existence would necessarily be weighed in accordance with the same law."[30]

The court is obviously correct in holding that the effect of a release is a question of substance, not procedure.[31] But assuming that the ques-

26. See, in general, PROSSER, TORTS 1107-11 (1941); WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE §§ 9, 11, 12 (1951); Notes, 13 CORNELL L.Q. 473 (1928), 22 MINN. L. REV. 692 (1938), 19 VA. L. REV. 881 (1933).

27. Another possibility of variance lies in the effect of a seal. The original common law release was an instrument under seal, not requiring a consideration; what today we call a release is actually an accord and satisfaction.

28. 125 W. Va. 250, 23 S.E.2d 606 (1942).

29. 23 S.E.2d at 608.

30. *Ibid.*

31. The only possible argument that it is procedural is by analogy to the rule on statutes of limitation, to the effect that the release or "covenant not to sue," does not bar the right but merely prevents the bringing of an action. But this does not seem to have been the effect in Virginia, and the analogy would still be ineffective.

tion is one of substance, there still remains an important question of conflict of laws. If the release had been given in a third state (say Maryland), should the law of Virginia or Maryland have controlled? *Goldstein v. Gilbert* seems to be an authority for the position that the law of Virginia still controls — in view of the language used and the fact that the court made no reference to the place where the release was executed. In point of fact, however, this place must have been Virginia and the court made no conscious choice between the two laws. The authority of the case is therefore rather weak and further consideration of the problem is warranted.

Perhaps it may be profitable to consider first the question of what law governs the effect of a release in the case of a single tortfeasor, the law of the place of injury or the law of the place of executing the release. Discharge of a cause of action for tort is normally said to be controlled by the law governing the tort, the law of the place of injury.[32] Thus the effect of death of one of the parties is governed by that law rather than the law of the place where the party died.[33] The effect of subsequent marriage of the parties is held to be governed by the same law.[34] And limitation of actions, when it is regarded as a matter of substance rather than procedure, is treated in the same way.[35]

These situations, however, all seem distinguishable. A strong argument can be made to the effect that a release is a contract between the parties and that its effect is to be governed by the law controlling the contract. So long as the cause of action for tort is not local and is subject to being discharged, it seems arguable that the parties should be able to contract for its extinguishment according to the law of the place where they contract.[36] No tort cases in point have been found.[37] There are several cases involving release of contract claims, but they

32. See 2 BEALE, CONFLICT OF LAWS § 389.1 (1935); STUMBERG, CONFLICT OF LAWS 189-91 (2d ed. 1951).

33. See, *e.g.*, Ormsby v. Chase, 290 U.S. 387, 54 Sup. Ct. 211, 78 L. Ed. 378 (1933); Chubbuck v. Holloway, 182 Minn. 225, 234 N.W. 314 (1931); *cf.* Orr v. Ahern, 107 Conn. 174, 139 Atl. 691 (1928); Goodrich, *Law Governing Claim Against Deceased Tortfeasor*, 19 PA. B.A.Q. 220 (1934).

34. Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931). This case is relied upon by the court in the *Goldstein* case.

35. See GOODRICH, CONFLICT OF LAWS § 86 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 149-52 (2d ed. 1951). In Phillips v. Eyre, L.R. 6 Q.B. 1 (1870), the Island of Jamaica, having created a cause of action in tort, abolished it by statute, and the effect of the statute was recognized in England.

36. An analogy may be drawn to the extinguishment of a claim by judgment. The law of the state where the judgment is rendered governs, not the law creating the claim.

37. *Cf.* Ciletti v. Union Pacific R.R., 196 F.2d 50 (2d Cir. 1952); and Frazier v. Sims Motor Transport Lines, Inc., 196 F.2d 914 (7th Cir. 1952), where the release was given in the state of the accident and the question of its validity arose in another state. Cases of so-called "releases" given in advance of an injury actually involve contractual assumption of risk and do not seem to be in point. This distinguishes Lindsay v. Chicago, B. & Q.R.R., 226 Fed. 23 (7th Cir. 1915), which purports to hold that a release is governed by the law of the place of injury.

are somewhat inconclusive.[38] The problem may therefore be said to remain open.[39]

Even assuming, however, that the law of the place of the release should be held to govern as to its effect in the case of a single tortfeasor, this does not mean that the same law governs as to the effect on a joint tortfeasor who did not participate in the contract of release and may never have been within the jurisdiction. In *Greenwald & Co. v. Kaster*,[40] a contract case, it was held that the law of the original contract, rather than the law of the release, controlled its effect upon the joint debtor who did not participate.[41] Though there may be distinguishable features to the case, it seems likely that a similar result would be reached in the case of joint tortfeasors. The argument about the freedom of the parties to contract regarding tort claims has less relevance, and this situation seems more appropriately to come within the generally expressed rule that the law of the tort governs its discharge.[42]

CONTRIBUTION AND INDEMNITY

The common law rule is that there can be no contribution between joint tortfeasors. In a few states, this rule has been limited to intentional wrongdoers, while a goodly number of states and England have

38. Woodbury v. United States Cas. Co., 284 Ill. 227, 120 N.E. 8 (1918), perhaps the strongest of the cases, suggests that the law of the release governs. The case involves the validity of a release of insurance policies, whether it was under seal, and whether fraud or duress might be shown. Similar conclusions may be drawn from York Metals & Alloys Co. v. Cyclops Steel Co., 280 Pa. 585, 124 Atl. 752 (1924), where there seems to be little conscious consideration of the problem; and Phelps v. Boland, 103 N.Y. 406, 9 N.E. 307 (1886), involving discharge in bankruptcy with the creditor voluntarily submitting to the jurisdiction. On the question of what law determines whether a negotiable note discharges an antecedent debt, contrast Tarbox v. Childs, 165 Mass. 408, 43 N.E. 124 (1896), with Gilman v. Stevens, 63 N.H. 342, 1 Atl. 202 (1885). Waters v. Manufacturers Trust Co., 143 F.2d 383 (6th Cir. 1944), is of little assistance.

39. Compare the cases involving an employee injured by the negligence of a third party. If he accepts workmen's compensation under the law of the state of employment, it has been held that that statute may terminate his tort action against the tortfeasor if it so provides. Cf. Biddy v. Blue Bird Air Service, 374 Ill. 506, 30 N.E.2d 14 (1940); Saloshin v. Houle, 85 N.H. 126, 155 Atl. 47, 49 (1931); see *infra* pp. 476-77.

40. 86 Pa. 45 (1878).

41. The significance of Firestone Tire & Rubber Co., Inc. v. Friedman, 64 N.Y.S.2d 402 (Sup. Ct. 1946), is hard to determine. Where the release is given in the jurisdiction governing the original contract, there is of course no real problem even though another state is the forum. Cf. Holdridge v. Farmers & Mechanics' Bank, 16 Mich. 68 (1867); Scandinavian Am. Nat. Bank v. Kneeland, 24 Manitoba L.R. 168, Ann. Cas. 1917B 1177 (1914); and see Sunflower State Bank v. Bowman, 243 S.W. 403 (Mo. App. 1922).

42. On the other hand, in support of the argument that the law of the release should apply, it may be suggested that neither the injured party nor the second joint tortfeasor is in a position to complain. The injured party has voluntarily contracted to give the release in the particular state. If the law of the release discharges the second tortfeasor, he is certainly in no position to complain; if it does not, he is no worse off than if the release had not been given and the law of the state in which the release was given has simply declined to affect his obligation.

passed statutes changing the common law rule in varying degrees. The right to indemnity has been generally recognized from the beginning but only in a restricted group of cases, and the states are not in complete agreement as to the requirement for permitting indemnity.[43] Thus, in the field of contribution and indemnity, too, the laws of the various states are quite likely to differ and the applicable rule of conflict of laws will frequently determine the rights of the parties.

The first conflicts problem involves the distinction between substance and procedure. Suppose that the tort takes place in State *X* and one of two joint tortfeasors is sued there and pays the judgment. He brings an action for contribution (or indemnity) in State *F*. Which law determines? In *Builders Supply Co. v. McCabe*,[44] a contribution case, the law of *X* did not permit contribution while the law of *F* did; it was held that the law of *X* prevailed and there could be no contribution. In *Hughes Provision Co. v. La Mear Poultry & Egg Co., Inc.*,[45] an indemnity case, the law of *X* permitted indemnity; the court held for the plaintiff without seeking to ascertain the law of *F*. Together, therefore, these cases clearly indicate that the question is one of substance rather than procedure. This seems correct on principle.[46]

An argument can be made for the other position, however. It would run like this: An action for contribution is not allowed because the parties are *in pari delicto;* the plaintiff's suit is dismissed because the court will not listen to a party unworthy to appear in court on account of his wrongdoing, and not because of lack of a valid claim.[47] Whether this "disability" in the plaintiff exists may be regarded as a procedural matter, to be determined by the forum. But it seems unlikely that the argument will be sustained. The maxim, *in pari delicto,* generally carries with it the implication that the claim itself is defective.[48]

43. On contribution and indemnity in general, see GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS cc. 2-5 (1936); PROSSER, TORTS 1111-17 (1941); WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE c. 4 (1951); RESTATEMENT, RESTITUTION §§ 86-102 (1937); Bohlen, *Contribution and Indemnity Between Tortfeasors,* 21 CORNELL L.Q. 552 (1936), 22 *id.* 469 (1937); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale,* 37 IOWA L. REV. 517 (1952); Gregory, *Contribution Among Tortfeasors: A Uniform Practice,* 1938 WIS. L. REV. 365; Hodges, *Contribution and Indemnity Among Tortfeasors,* 26 TEXAS L. REV. 150 (1947); Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. OF PA. L. REV. 130 (1932). For a treatment of the civil law, see Cohn, *Responsibility of Joint Wrongdoers in Continental Laws,* 51 L.Q. REV. 468 (1935).

44. 366 Pa. 322, 77 A.2d 368 (1951).

45. 242 S.W.2d 285 (Mo. App. 1951).

46. Other cases cited later carry the same indication. Compare the cases holding that a statute permitting contribution between tortfeasors will not have a retroactive effect. *E.g.,* Commercial Cas. Ins. Co. v. Leonard, 210 Ark. 575, 196 S.W.2d 919 (1946); Distefano v. Lamborn, 81 A.2d 675, 83 A.2d 300 (Del. Super. 1951).

47. For explanation of this position in connection with illegal contracts, see Wade, *Benefits Obtained Under Illegal Transactions — Reasons For and Against Allowing Restitution,* 25 TEXAS L. REV. 31, 37-42 (1946).

48. See *id.* at 42-48, and *passim.* (In its complete form the maxim reads, *In pari delicto potior est conditio defendentis.*) The case of American Surety Co.

In one respect the law of the forum may be held to be controlling. If it forbids the action it may be treated as establishing a public policy which prevents a foreign-created cause of action from being brought. This, of course, would be an undesirable result.

The more difficult conflicts problem arises when the tort occurs in State X and the payment by one tortfeasor occurs in State Y. Which law then determines the right to contribution? This right may be regarded as growing out of the tort and therefore properly to be controlled by the same law; or it may be regarded as an independent cause of action based on principles of restitution and therefore to be controlled by the law of the state where the unjust enrichment was obtained.

There appear to be no cases in which the issue is clearly and consciously decided. The two cases cited earlier as holding that the nature of the problem is substantive and not procedural are not particularly helpful. They both suggest that the right to contribution or indemnity is restitutionary in nature but seem to indicate that the law of the place of injury controls.[49]

Another pair of cases also indicates that it is the *lex loci delicti* which governs. In *Charnock v. Taylor*,[50] a collision occurred in Tennessee, injuring the plaintiff. Plaintiff sued defendant in North Carolina and defendant answered, claiming that if he was liable a transportation company was joint tortfeasor with him and asking for contribution in case recovery was had against him. The company, having been served in accordance with North Carolina practice, demurred to defendant's answer and it was held that the demurrer should be sustained on the ground that Tennessee law, which did not give a right to contribution,

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v. Wrightson, 103 L.T. 663 (1911), may possibly be regarded as holding that the problem of contribution is procedural. There one of two insurance companies paid a claim and sought contribution from the other, and the court applied English law as "the tribunal to which the party who is required to do equity is subject." This has also been construed to mean that the law of the domicil of the debtor is applicable. See WOLFF, PRIVATE INTERNATIONAL LAW 244 (2d ed. 1950); *cf.* GRAVESON, CONFLICT OF LAWS 320 (2d ed. 1952). The argument that the problem is procedural is also made in 6 MIAMI L.Q. 121, 123 (1951).

49. In Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 375 (1951), the court said: "Since the right of contribution is a quasi-contractual right arising by reason of an implied engagement of each to help bear the common burden, if such contractual obligation is not recognized as existing in the State where the accident occurred it cannot be enforced in any other jurisdiction." In Hughes Provision Co. v. La Mear Poultry & Egg Co., Inc., 242 S.W.2d 285, 289 (Mo. App. 1951), the court said: "The duty to indemnify in such cases arises by operation of law, independent of contract. It rests on the principle that the original act of delivering the article is wrongful and that such a tortfeasor is responsible for the natural consequences of his wrongful act," citing the *Restatement of Restitution* § 96. But all of the discussion of the conflicts problem is in terms of the proper law governing a tort and the determination of the place of injury. See the treatment of the problem in Dauber, *New Jersey Joint Tortfeasors Contribution Law*, 7 RUTGERS L. REV. 380, 393-94 (1953).

50. 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943).

controlled. Here, of course, there had been no judgment obtained against the party seeking contribution and no payment by him, hence no acquired unjust enrichment. Still the unjust enrichment was potentially present and the North Carolina law could have been applied to prevent its inception. Instead, the court talked solely in terms of the law governing the tort.[51]

Conversely, in *Bache v. Dixie-Ohio Express Co.*,[52] where an automobile accident happened in Kentucky and the action was brought in federal district court in Georgia, an unlimited right of contribution was allowed by Kentucky law but not by Georgia law.[53] The court allowed a third-party defendant to be impleaded so that a judgment for contribution might be rendered against it, saying: "The substantive law of the State of Kentucky governs the question of the liability of the third-party defendant to respond to the third party plaintiff."[54]

The cumulative effect of these cases, and of certain others whose significance is not as clear,[55] is to indicate that the strong current of the authorities is that the *lex loci delicti* governs the right to contribution or indemnity. Despite the force of these authorities a logical argument can be made for the other view. The claim for contribution is quasi-contractual or restitutionary in character — an obligation created by law for the purpose of preventing unjust enrichment. And, as the *Restatement* declares, "When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched."[56]

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51. "No case under similar conflict of laws has been brought to our attention involving a demand for contribution between joint tort-feasors, but the rule [that the *lex loci delicti* governs] is broad enough to cover that situation, since such demand would not arise except as it grew out of the tortious transaction and the relation thus brought about between the parties." 26 S.E.2d at 913.

52. 8 F.R.D. 159 (N.D. Ga. 1948).

53. Georgia law permitted contribution but only between parties against whom a joint judgment had been obtained. See Vaughn v. Guenther, 8 F.R.D. 157 (N.D. Ga. 1948), decided by the same court on the same day. In the principal case the original defendant had asked for indemnity but the court found that this was not available and treated the request for indemnity to include contribution.

54. 8 F.R.D. at 159.

55. Brady v. Black Diamond S.S. Co., 45 F. Supp. 338 (S.D.N.Y. 1941) seems to be similar to the two cases just discussed. See also Maryland Cas. Co. v. Paton, 194 F.2d 765 (9th Cir. 1952), a workmen's compensation case, to be discussed later. A number of cases simply refer to the law of the place of injury without discussing the conflicts problem in any way and without indicating where the payment was made. In some of them the facts are such as to make it not unlikely that payment was made in a different state. See, *e.g.*, Southwestern Greyhound Lines, Inc. v. Crown Coach Co., 178 F.2d 628 (8th Cir. 1949); Hodges v. United States F. & G. Co., 91 A.2d 473 (D.C. Mun. App. 1952). In some other cases the court discloses a recognition of the problem but does not need to decide it. See, *e.g.*, Barber S.S. Lines, Inc. v. Quinn Bros., Inc., 104 F. Supp. 78, 80 (S.D. Mass. 1952); Roth v. Great Atlantic & Pacific Tea Co., 12 F.R.D. 383, 386 (E.D.N.Y. 1952).

56. RESTATEMENT, CONFLICT OF LAWS § 453 (1934). *Cf. id.* § 452: "The law of a place where a benefit is conferred determines whether the conferring of the benefit creates a right against the recipient to have compensation." See, in

There is also case authority to support the principle.[57] Certain suretyship cases may well be regarded as applying it to the question of contribution.[58] In none of the tort decisions did the court appear to realize clearly the decision being made or that it was acting contrary to the rule expressed in the *Restatement*.[59]

Another group of cases in a related field may have particular significance here. They involve the situation where an injured employee has a claim under a workmen's compensation statute against his employer and a tort claim against the tortfeasor who injured him. Here the employer and the tortfeasor are not joint tortfeasors, but in a sense their liabilities cover the same injury. Assume that the employer (or his insurer) pays under the compensation statute of State *X* (the state of employment) and that this statute provides that the employer (or his insurer) is entitled to recover against the tortfeasor. The law of State *Y*, where the tort occurred, does not so provide. Can the employer prevail in an action against the tortfeasor? Several courts have said that to apply the statute of State *X* is to give it an improper extraterritorial effect and that the *lex loci delicti* must govern the tortfeasor's liability.[60] They have generally not even considered the possibility of holding that the statute is simply providing for a right

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accord, Gutteridge and Lipstein, *Conflicts of Law in Matters of Unjustifiable Enrichment*, 7 CAMB. L.J. 80 (1939).

57. See Wilson & Co., Inc. v. Douredoure, 154 F.2d 442 (3d Cir. 1946) (overpayment by mistake); *cf.* Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179 (1823) (services rendered).

58. In Aldrich v. Aldrich, 56 Vt. 324, 48 Am. Rep. 791 (1883), a note was given in Vermont with plaintiff and defendant as sureties. The Vermont statute of limitations had run. Plaintiff voluntarily but not with fraudulent intent, went to New Hampshire, where the statute had not run. There he was sued and judgment obtained. Having paid, he sued defendant for contribution in Vermont. In holding for the plaintiff, the court said: "The legal right of sureties as against each other is not governed by the *lex loci contractus;* neither is there any implied obligation that they shall reside or remain in any particular locality. The right to contribution among co-sureties is not founded on the contract of suretyship, but is based on an equity arising from the relation of the co-sureties. The right of action for contribution accrues when one has paid more than his proportion of their liability. It is an equity which arises when the relation of co-sureties is entered into, and upon which a cause of action accrues, when one has paid more than his proportion of the debt for which they were bound." 56 Vt. at 327. Cf. Frew v. Schoular, 101 Neb. 131, 162 N.W. 496, L.R.A. 1917F 1065, Ann. Cas. 1918E, 511 (1917).

59. Where is the "place of enrichment" or the "place where a benefit is conferred"? Normally this would be regarded as the place where payment is made. But the suggestion has been made that since the "enrichment" is the satisfaction of an obligation, the place of that enrichment may be the state where the tortious obligation arose — the *lex loci delicti*. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 39 (1951). Is it necessary that there be a payment or satisfaction in order for some law other than the *lex loci delicti* to apply? What about the cases involving third-party practice, where the defendant seeks to bring a third-party defendant in for the purpose of obtaining contribution?

60. See, *e.g.*, Hendricksen v. Crandic Stages, Inc., 216 Iowa 643, 246 N.W. 913 (1933); Anderson v. Miller Scrap Iron Co., 176 Wis. 521, 187 N.W. 746 (1922); *cf.* Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948).

of indemnity governed by the law of State *X*.[61]

But some workmen's compensation statutes provide that the employee's right of action is assigned to the employer. The assignment takes place in State *X* where the payment is made and there is no creation of a new cause of action.[62] The result is that the majority of the courts which have talked in terms of an assignment have had no difficulty in holding that the law of State *X* applies.[63] In other cases, either the statute or the opinion speaks in terms of subrogation (which, after all, is a form of equitable assignment), and thus in many instances the decision is that the employer can prevail.[64]

The relevance of these cases to the joint-tortfeasor situation should be apparent. It is true that where contribution is not permitted between joint tortfeasors an express assignment by the injured party to one tortfeasor is ineffective.[65] But this rule should have no application when both payment and express assignment are made in a state permitting contribution.[66] The express assignment may not be necessary

61. In Maryland Casualty Co. v. Paton, 194 F.2d 765 (9th Cir. 1952), where the statute of limitation had run on the original death action against the tortfeasor, the court held that the California workmen's compensation act could not "add to the consequences of the negligent operation of a truck on an Oregon highway." *Id.* at 768. The court subsequently discussed the "common law right of indemnity" and found there was none, but it failed to perceive the conflicts problem here.

62. In connection with the creation of a new cause of action, compare the cases holding that the employer's action against the third party tortfeasor is subject to the same statute of limitations as the employee's action. See discussion in 2 LARSON, WORKMEN'S COMPENSATION LAW § 75.30 (1952).

63. See particularly the discussions in Alexander v. Creel, 54 F. Supp. 652, 656-57 (E.D. Mich. 1944); and Saloshin v. Houle, 85 N.H. 126, 155 Atl. 47, 49 (1931), involving the provisions of the New York Workmen's Compensation Act. See also Betts v. Southern Ry. 71 F.2d 787 (4th Cir. 1934); *cf.* Biddy v. Blue Bird Air Service, 374 Ill. 506, 30 N.E. 2d 14 (1940); Scott v. Missouri Pacific R.R., 333 Mo. 374, 62 S.W.2d 834 (1933).

Difficulties may exist where the employee is killed and the beneficiaries under the wrongful death statute and the workmen's compensation statute are not the same. See, *e.g.*, Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Application of the real-party-in-interest statutes and questions of which party must bring suit and what parties must be joined are of course matters of procedure, to be determined by the *lex fori*. See, *e.g.*, Maryland to Use of Carson v. Acme Poultry Corp., 9 F.R.D. 687 (D. Del. 1949); Saloshin v. Houle, 85 N.H. 126, 155 Atl. 47 (1931).

64. See Dinardo v. Consumers Power Co., 181 F.2d 104 (6th Cir. 1950); Maryland to Use of Carson v. Acme Poultry Corp., 9 F.R.D. 687 (D. Del. 1949); American Mut. Liab. Ins. Co. v. United States Electrical Co., 55 Ohio App. 107, 9 N.E.2d 157 (1936); *cf.* Koepp v. Northwest Freight Lines, 10 F.R.D. 524 (D. Minn. 1950); General Acc. F. & L.A. Corp., Ltd. v. Zerbe Const. Co., Inc., 269 N.Y. 227, 199 N.E. 89 (1935). *But cf.* Personius v. Asbury Transp. Co., 152 Ore. 286, 53 P.2d 1065 (1936). See, in general, 2 LARSON, WORKMEN'S COMPENSATION LAW § 88.20 (1952); 3 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 840 (Perm. ed. 1943); WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS § 9 (1948).

65. See, *e.g.*, Slater v. Ianni Const. Co., 268 Mich. 492, 256 N.W. 495 (1934); Manowitz v. Kanov, 107 N.J.L. 423, 154 Atl. 326, 75 A.L.R. 1464 (1931); Esten v. Rosen, 63 Ont. L.R. 210, [1929] 1 D.L.R. 275 (App. Div. 1928).

66. *Cf.* Anstine v. Pennsylvania R.R., 352 Pa. 547, 43 A.2d 109, 160 A.L.R. 981 (1945). Contrast this case with Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127 (1889), decided when contribution between joint tortfeasors was not permitted in the state.

if the court implies it as a matter of law, and the equitable doctrine of subrogation seems very appropriate here and may well be applied by a sympathetic court.[67]

The conclusion to be drawn is that a joint tortfeasor seeking contribution should first seek a forum which will not be inclined to throw the case out because of a local public policy. If then contribution is permitted by the law either of the place of the tort or of the place of payment, he should have a good chance of succeeding, since he needs only to characterize the nature of his claim in such a fashion as to make the desired law apply.

67. Compare Southeastern Greyhound Lines v. Myers, 288 Ky. 337, 156 S.W.2d 161, 138 A.L.R. 1461 (1941), where the question was whether a non-resident motorist statute covering "any civil suit or proceeding . . . arising out of or by reason of any accident," should apply to a suit for contribution between joint tortfeasors. In holding that it did, the court said: "The primary liability of appellee, if he was negligent, was to the injured person, but, by payment of the claim, appellant became subrogated to the injured person's right to recover from appellee to the extent of one-half of any reasonable amount paid by appellant. . . . It is true the right in appellant to maintain the action arises from a contract implied from the provisions of section 484a [providing for contribution] but the subject matter of the proceeding arose out of and by reason of the accident." 156 S.W.2d at 163.

See also Retelle v. Sullivan, 191 Wis. 576, 211 N.W. 756, 50 A.L.R. 1106 (1927). On subrogation where indemnity between tortfeasors is possible, see 50 AM. JUR., *Subrogation* § 38 (1944). On subrogation between joint debtors, see SHELDON, SUBROGATION c. 4 (1882); 50 AM. JUR., *Subrogation* §§ 67-69 (1944); Note, 99 Am. St. Rep. 474, 531-33 (1904).