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District Court Digests

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sociology, to law reviews and bar journals. In 1954-55 he was a Fulbright Lecturer and gave a series of lectures in the United Kingdom. The Department of State assigned him to duties in the Far East and specifically to the Korean Legal Institute. He has emphasized and stimulated the study of legal philosophy and jurisprudence in the United States. For several years he served as Chairman of the Editorial Committee of the Twentieth Century Legal Philosophy Series. This series includes seven volumes of translated material and articles written by the leading jurists of the world. Mr. Hall has an international reputation as a scholar. He has professional respect and love for this University. For his scholarly attainment, his sterling character and his penetrating grasp of the infinite complexities of our legal institutions, I deem it a privilege to recommend on behalf of the University Council, that the degree of Doctor of Laws, *honoris causa,* be conferred upon our former colleague, Jerome Hall.

O. H. THORMODSGARD, *Dean*

DISTRICT COURT DIGESTS

CIVIL PROCEDURE—THIRD-PARTY COMPLAINT FOR CONTRIBUTION NOT IMPOSABLE BY EMPLOYER IN ACTION BY EMPLOYEE UNDER TERMS OF WORKMEN'S COMPENSATION ACT.—*Schindler v. Clark Transport Co.,* District Court of the Second Judicial District, Rolette County, North Dakota, Albert Lundberg, District Judge.

On February 20, 1957, a collision occurred between a truck owned by defendant Clark Transport Co. (hereinafter "Clark") and an automobile driven by Fagerlund. The plaintiff Schindler was a passenger in the Fagerlund automobile. Schindler was empolyed by Fagerlund in employment covered by the North Dakota Workmen's Compensation Act, and at the time of the accident was concededly in the course of his employment. Injured in the accident, Schindler brought an action for damages against Clark and against one Wilken, the driver of the Clark truck. Clark and Wilken in turn impleaded Fagerlund as a third-party defendant, their third-party complaint alleging that the accident resulted solely from the negligence of Fagerlund. Fagerlund filed a third-party answer denying this allegation. Thereafter the plaintiff Schindler and the third-party defendant Fagerlund joined in a motion to dismiss the third-party proceeding on the ground it was not permissible under N.D.R.Civ.P. 14. In support of this motion they

argued that the accident occurred prior to the effective date of the Uniform Contribution Among Joint Tortfeasors Act in North Dakota and hence that Fagerlund was not liable to make contribution to the defendants; and further, that Fagerlund could not conceivably be liable to Schindler for any injuries, since as an employee injured in the course of his employment Schindler had no right of action against his employer for negligence and was restricted to recovery under the terms of the Workmen's Compensation Act. Since Schindler had no claim against Fagerlund, it was asserted, the defendants could not recover from Fagerlund on the theory they were subrogated to Schindler's claim; nor could they assert a right to indemnification from Fagerlund. In opposition to the motion it was argued (1) that the motion asserted affirmative defenses to the third-party proceeding which had not been pleaded in the third-party answer, and hence violated N.D.R.Civ.P. 8(c); (2) that the motion came too late to be timely under the provisions of N.D.R.Civ.P. 12(b); and (3) that if the defendants could show that Fagerlund had the last clear chance to avoid the accident, then Fagerlund would be solely liable and if defendants were obliged to pay damages to Schindler they should be permitted to reimburse or indemnify themselves from Fagerlund "under some principle of law or equity not coming within our recently enacted statute allowing contribution."

On the issues of raising affirmative defenses not pleaded in the third--party answer and timeliness, the district court ruled in favor of the motion. It was pointed out that an application of the Rules of Civil Procedure in the fashion contended for by the third-party plaintiffs would merely result in forcing the third-party defendant to amend his answer to tender to the court the precise issues already raised by the motion. The court thought this would be merely a formality. "To rule out some important facts admitted to exist, because of the failure of a party to plead them in another part of the proceedings, would, it seems to us, tend to defeat the purpose and spirit of the Rules."

On the issue of the third-party plaintiffs' right to reimbursement or indemnity from the third-party defendant, the court found "a more complex and technical situation." Proof that Fagerlund's alleged negligence had been the sole proximate cause of the accident would be a defense to Schindler's action against Clark and Wilken. But in *Bolton v. Donovan,* 9 N.D. 575, 84 N.W. 357 (1900), it was held that "the remedy for a defendant who felt that a third

party was really to blame for the injuries for which he, the defendant, was being sued, was not to drag in said third party but to show in his own trial as a defense that such third party was to blame."

The court could find no authority for the contention that the "last clear chance" doctrine was available to anyone save a plaintiff accused of contributory negligence. Nor did a right of contribution exist as between the third-party plaintiffs and the third-party defendant, because the accident occurred prior to the enactment of the statute allowing contribution among joint tortfeasors. "Nor can we find anything under the headings of indemnity or subrogation to support counsel's argument."

The motion was accordingly granted.

CIVIL PROCEDURE — IMPLEADER OF THIRD PARTY DEFENDANT UNDER CONTRIBUTION AMONG TORTFEASORS ACT. — *Colter v. Lisakowski* (John Colter, Third-Party Defendant), District Court of the First Judicial District, Grand Forks County, North Dakota, O. B. Burtness, District Judge.

On February 25, 1958, the plaintiff was riding as a guest in a motor vehicle driven by John Colter which collided with another vehicle driven by the defendant. Plaintiff brought an action against the defendant who, in turn, impleaded John Colter as a third-party defendant, alleging as a defense that Colter's negligence was the sole proximate cause of the accident or alternatively that he was entitled to contribution from Colter on the ground he was a joint tortfeasor.

The plaintiff in the main action and the third-party defendant moved for a dismissal or severance of the third-party complaint on the ground that the right to impose a third-party complaint was procedural only, but to permit it would disturb substantive rights. The court then had this question to decide: May a defendant in an action for personal injury implead a joint tortfeasor for the purpose of asserting a right of contribution?

Judge Burtness in granting the motion to dismiss stated that our statute conferring the right of contribution among joint tortfeasors (N.D.Rev.Code Chapter 32-38, 1957 Supplement) is substantive law in its entirety. Unless, therefore, the statute permits such impleaders of third-party defendants no such right can exist as N.D.R.Civ.P. 14 could not change or alter substantive rights.

Rule 14 (a) permits the impleading of a third-party "who is or *may be* liable to such third-party plaintiff for all or part of the

plaintiff's claim against him." (Emphasis added.) In view of this Judge Burtness stated, "A defendant may under such language be brought in even though at the time it has not been judicially determined that such third party is liable either to the plaintiff or is liable to the defendant for contribution. However under the rule the Court has discretion to grant any party's Motion for 'severance, separate trial, or dismissal of the third-party claim'."

"The jury trial would be greatly lengthened if the third-party proceedings were included. It is difficult for juries to distinguish between ordinary actionable negligence and gross negligence and it is not easy to prepare instructions to make them understand the differences. While that can be overcome in cases where the plaintiff sues both operators who are parties to a car collision . . . it becomes a different proposition where there is no actual trial between the plaintiff and the third-party defendant and the jury has to pass on the confusing issue of right of contribution. The possibility of mistrial, of hung juries and of further proceedings . . . are increased and those may in turn increase rather than decrease the costs to the county, may increase the time devoted to the entire proceedings by the court and may even result in the delay of justice."

The court went on, "However, as I am holding that the rule permits third-party proceedings in a case of this sort, I am in effect holding that there is no distinction under our contribution statute between joint tortfeasors and concurrent tortfeasors in spite of the use of the words 'common liability'. In my opinion the liability is 'common' even though in a given case one party is liable for ordinary actionable negligence and the other only for gross negligence. Of course, both parties must be legally liable to respond in damages in the same amount arising out of the same facts but necessarily on identical degrees of negligence."

DIGEST OF ATTORNEY GENERAL OPINIONS

HEALTH AND SAFETY—DEFINITION OF RESTAURANT

September 30, 1958

Section 23-0901 of the North Dakota Revised Code of 1943 defines the word "restaurant" as "every building or other structure, or any part thereof . . . kept, used, maintained, advertised, or held out to the public as a place where meals or lunches are served. . ." Section 23-0917 provides that restaurants shall pay a license fee of two dollars and fifty cents.