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CASE NOTES

CIVIL PROCEDURE—THIRD PARTY PRACTICE—ANTICIPATED RECOURSE FOR THE PASSIVELY NEGLIGENT

Linda Sargent, a minor, was injured by a motor vehicle while she was crossing a street. The vehicle was owned by the Sun Ray Fluorescent Company and was driven by its employee, David Herskovitz. In Count I of her complaint she charged these defendants with seven acts of negligence in the operation of their vehicle. Count II of the complaint was directed against the owner and driver of another vehicle: Interstate Bakeries, Inc. and Steve Diklich. She charged these defendants with negligence in parking their vehicle at the crosswalk of the intersection and alleged that this also caused her to be injured. Interstate Bakeries and Diklich filed a third party complaint for indemnity against the Sun Ray Company and Herskovitz contending that their own negligence was passive while that of Herskovitz was active and was the proximate cause of the plaintiff's injuries. The Circuit Court of Cook County dismissed the complaint, but the Appellate Court of Illinois reversed holding that Interstate's third party complaint stated a cause of action for indemnity and entitled Interstate to a trial on the merits. *Sargent v. Interstate Bakeries, Inc.*, 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).

This same theory was also upheld in *Trzos v. Berman Leasing Company*¹ wherein the initial or primary defendants alleged their negligence, if any, to be only passive and that of another, not a party to the original suit, to be active, therefore affording to the primary defendants a right to indemnity as in *Sargent*.

Sargent and *Trzos* are examples of third party actions under Section 25 of the Illinois Civil Practice Act² as amended in 1955. A third party action is a relatively recent feature of civil procedure whereby a defendant alleged to be liable for a specific injury can bring into the controversy a new party, a person not originally joined by the plaintiff, for the purpose of showing that the party impleaded is liable to the defendant for all or part of the plaintiff's claim. Prior to 1955 this could not be accomplished in Illinois, as Section 25 then consisted only of the following:

If a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in. If a person, not a

¹ 86 Ill. App. 2d 176, 229 N.E.2d 787 (1967).

² ILL. REV. STAT. ch. 110, § 25 (1967).

party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party.³

This only gave a counterclaimant the right to bring in third parties as additional counterdefendants.⁴ Thus, if a defendant had no basis upon which to file a counterclaim, he consequently had no right to implead a new party, since this section only applied when the defendant filed a counterclaim which required the presence of other parties necessary to a full determination of his counterclaim. Only in this situation could another party be impleaded by a defendant. Hence, prior to 1955, but for a lone municipal court rule,⁵ there was no complete third party practice per se, which could be used universally in all situations, in Illinois.

On July 19, 1955 the following paragraph was added to Section 25 to be effective January 1, 1956:⁶

Within the time for filing his answer or thereafter by leave of court, a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Subsequent pleadings shall be filed as in the case of a complaint and with like designation and effect. The third-party defendant may assert any defenses which he has to the third-party complaint or which the third-party plaintiff has to the plaintiff's claim and shall have the same right to file a counterclaim or third-party complaint as any other defendant. If the plaintiff desires to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant, he shall do so by an appropriate pleading. When a counterclaim is filed against a party, he may in like manner proceed against third-parties. Nothing herein applies to liability insurers or creates any substantive right to contribution among tortfeasors or against insurer or other person which has not heretofore existed.⁷

This provided Illinois with a true third party practice, comparable to that of federal courts⁸ and of nine other states.⁹ By this provision, any defendant,

³ ILL. REV. STAT. ch. 110, § 25(1) (1967).

⁴ See *Johnson v. Moon*, 3 Ill. 2d 561, 121 N.E.2d 774, 46 A.L.R.2d 1246 (1954).

⁵ CAPLAN, *THE MUNICIPAL COURT MANUAL OF THE MUNICIPAL COURT OF CHICAGO* 29 (1950): "Third-party procedure. (1) By Defendants. A defendant, upon giving notice to the plaintiff, may move for leave to serve a third-party-claim upon a person not a party to the action who is or may be liable to the defendant or to the plaintiff for all or part of the plaintiff's claim against the defendant. . . . (2) By Plaintiffs. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so."

⁶ *Brunsmann, Parties—Joinder And Third Party Practice*, 44 ILL. B. J. 371 (1956).

⁷ ILL. REV. STAT. ch. 110, § 25(2) (1967).

⁸ FED. R. CIV. P. 14: "A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

⁹ ARIZ. REV. STAT. ANN. §§ 21-446, 21-447 (Supp. 1967); COLO. R. CIV. P. 14; IOWA

whether or not he files a counterclaim, may implead a third party. The new party need not have an interest or title which will be affected by a judgment, nor must his presence hinge upon a complete determination of the controversy being rendered. In order for a third-party defendant to be impleaded, the primary defendant must only show that the third party is or may be liable to him for a portion of the plaintiff's claim.

This note will analyze third party actions both from a procedural and substantive view. Procedurally, a third party may be impleaded as long as certain standards are met; what these standards are and how they are to be applied will be discussed. Substantively, this note will show how third party practice has and will continue to affect both indemnity and contribution.

Procedurally, third party actions have many advantages. Of utmost importance to the defendant is the fact that he is no longer obliged to wait until his liability has been determined or until he has paid the plaintiff's damages in order to bring an action against another for contribution or indemnity.¹⁰ The defendant need no longer be "out of pocket"; he can now implead another party in conjunction with the plaintiff's action and force him to pay all or part of the plaintiff's claim. For example, in a suit against an employer arising out of the conduct of his employee, the latter may be impleaded for the purpose of idemnification. The complete burden of loss will thus fall on the employee and the defendant will not be required to pay any portion of the plaintiff's damages. On the other hand, absent a third party practice, the employer would be forced to pay the plaintiff's total damages and then institute his own action against the employee for recovery.

Another advantage of a third party action is its allowance for a full and final determination of a controversy by providing a means to hear issues arising between the plaintiff, defendant and a third party concurrently.¹¹ A multiplicity of actions is thereby diminished as are both the necessity of a second trial, and, in many instances, the relitigation of identical issues. Also the parties can be assured that all common questions involved will be afforded identical treatment and that the possibility of different constructions by separate juries of the same evidence will be eliminated.¹² Hence, expediency without a sacrifice of a fair administration of justice is the greatest asset of third party practice, one which is especially desirable in this day of crowded court calendars and dockets.

R. CIV. P. 33(b); MO. ANN. STAT. § 507.080 (1952); N.M. STAT. ANN. § 21-1-1(14) (Supp. 1967); N.Y. STAT. ANN. § 1007 (1962); PA. R. CIV. P. 2252-2256; TEX. R. CIV. P. 38; WIS. STAT. ANN. §§ 260.19, 260.20 (Supp. 1969).

¹⁰ Embree v. Gormley, 49 Ill. App. 2d 85, 199 N.E.2d 250 (1964).

¹¹ Grewenig v. American Baking Co., 293 Ill. App. 604, 609, 13 N.E.2d 183, 185 (1938); Blaszak v. Union Tank Car Co., 37 Ill. App. 2d 12, 20, 184 N.E.2d 808, 812 (1962); Miller v. DeWitt, 37 Ill. 2d 273, 287, 226 N.E.2d 630, 639 (1967).

¹² *Supra* note 6, at 377.

Necessary to the successful maintenance of a third party action is the requirement that the primary defendant have at least a possibility of recovery from the third party defendant for all or part of the plaintiff's claim.¹³ Thus the primary defendant must be a conduit through which liability may be imposed upon a third party.¹⁴ There must be a circuit of liability flowing from the third party to the primary defendant and in turn from the primary defendant to the plaintiff. A primary defendant may not, therefore, validly implead a third party who is or may be liable to the plaintiff alone.¹⁵ If the primary defendant merely alleges that the third party is liable to the plaintiff and not to him, the circuit is broken. In effect, the primary defendant is thereby attempting to eliminate himself and substitute the new party as defendant.¹⁶ Such attempt must fail, as only the plaintiff has the right to choose the party or parties against whom he wishes to institute his action.¹⁷

A valid third party action not only requires this possibility of recovery by the primary defendant against the third party, but also a potential liability of the primary defendant to the original plaintiff. That is, recovery by the plaintiff against the primary defendant must be feasible before a third party action can be initiated.¹⁸ This comprises the second facet of the circuit; if there is no possibility of liability of the primary defendant to the plaintiff the circuit is also broken and any third party action must consequently fail.

While it is true that procedural rules do not create for a third party plaintiff any greater rights than those conferred by substantive law,¹⁹ third party practice has and will have a noteworthy impression on the application and

¹³ See *Blaszak v. Union Tank Car Co.*, *supra* note 11; *Yankey v. Oscar Bohlin & Son, Inc.*, 37 Ill. App. 2d 457, 186 N.E.2d 57 (1962).

¹⁴ See *Embree v. Gormley*, *supra* note 10.

¹⁵ This is illustrated by the case of *D'Amico v. Moriarty Meat Co.*, 47 Ill. App. 2d 63, 197 N.E.2d 445 (1964), which involved a suit by a business invitee against the owner and occupier of land for failing to keep his premises in a reasonably safe condition. The defendant then filed a third party complaint alleging that he had a possible right to indemnity since another had created the dangerous condition which caused the harm. This was held to be a valid third party complaint, as the defendant alleged that the third party was liable to "him" and not to the plaintiff for the injury. See *Scott v. Curtis*, 195 N.Y. 424, 88 N.E. 794 (1909); *Home Telephone Co. v. Louisville & N. Ry. Co.*, 214 Ky. 822, 284 S.W. 104 (1926); *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949); *Davis, Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 522 (1952).

¹⁶ A case illustrating this point is *Halligan v. Shulman*, 31 Ill. App. 2d 168, 175 N.E.2d 590 (1961), in which the third party complaint showed no possibility of recovery by the defendant from the third party, but only that the third party was liable to the plaintiff.

¹⁷ *Fort v. Bash*, 10 F.R.D. 626, 627 (E.D. Pa. 1950).

¹⁸ See *Muhlbauer v. Kruzal*, 39 Ill. 2d 226, 234 N.E.2d 790 (1968).

¹⁹ *Miller v. DeWitt*, 59 Ill. App. 2d 38, 141, 208 N.E.2d 249, 298 (1965).

utilization of substantive law.²⁰ The greatest development, as exemplified by *Sargent and Trzos*, will continue to be seen in the areas of indemnity and contribution between joint tortfeasors.²¹

Prosser defines indemnity as the shifting of "the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead."²² It will not be allowed in all cases²³ but only in limited situations, as for example where the indemnitor owes a duty of his own to the indemnitee.²⁴ Hence, if a person is held liable but is without fault, he can recover indemnity from the actual wrongdoer.²⁵ This is illustrated by the doctrine of respondeat superior²⁶ by which a master is liable for the unauthorized acts of his servant done within the general scope of employment.²⁷ Where the master has been held liable for his employee's torts, he can, through a third party action, hold the servant liable and he has a right of indemnification against his servant for any damages he has to pay because of the servant's wrongful acts.²⁸

²⁰ See Brunsman, *supra* note 6.

²¹ See Brunsman, *supra* note 6.

²² PROSSER, TORTS § 48 (3d ed. 1964). See also *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319 (1951); *Lunderberg v. Bierman*, 241 Minn. 349, 63 N.W.2d 355, 43 A.L.R.2d 865 (1954); *Aetna Casualty & Surety Co. v. National Bank of Tacoma*, 59 F.2d 493 (9th Cir. 1932).

²³ Davis, *supra* note 15, at 531-36: "Indemnity will not be allowed if (a) both parties are equally negligent (b) both parties are the proximate cause of the injury (c) both parties are primarily responsible for the injury."

²⁴ *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949). See, e.g., *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449, 140 A.L.R. 1301 (1941); *George A. Fuller Co. v. Otis Elevator Co.*, 245 U.S. 489 (1918).

²⁵ Skelton, *Contribution And Indemnity Among Joint Tortfeasors*, 33 TENN. L. REV. 184, 186 (1966). See, e.g., *Canadian Indem. Co. v. U. S. F. & G. Co.*, 213 F.2d 658 (9th Cir. 1954); *Thomas v. Malco Refineries*, 214 F.2d 884 (10th Cir. 1954); *American Southern Ins. Co. v. Dime Taxi Service*, 275 Ala. 51, 151 So.2d 783 (1963); *Continental Casualty Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 296 P.2d 801, 57 A.L.R.2d 914 (1956).

²⁶ See *Herr v. Simplex Paper Box Corp.*, 330 Pa. 129, 198 A. 309 (1938); *Jack Cole Co. v. Hoff*, 274 S.W.2d 658 (Ky. App. 1954); *McDermott v. W. T. Grant Co.*, 313 Mass. 736, 49 N.E.2d 115 (1943); *Schisano v. Brickseal Refractory Co.*, 62 N.J. Super. 269, 162 A.2d 904 (1960); *Stawasz v. Aetna Ins. Co.*, 99 Ill. App. 2d 131, 240 N.E.2d 702 (1968).

²⁷ See *Potter v. Golden Rule Grocery Co.*, 169 Tenn. 240, 84 S.W.2d 364 (1935); *Gillis v. Great Atl. & Pac. Tea Co.*, 223 N.C. 470, 27 S.E.2d 283, 150 A.L.R. 1330 (1943); *Novick v. Gouldsberry*, 173 F.2d 496 (9th Cir. 1949). Compare *Mayhew v. DeCoursey*, 135 Kan. 184, 10 P.2d 10 (1932); *Idom v. Weeks*, 135 Miss. 65, 99 So. 761, 40 A.L.R. 668 (1924).

²⁸ *Stawasz v. Aetna Ins. Co.*, *supra* note 26. See also *Popejoy v. Hannon*, 37 Cal. 2d 159, 231 P.2d 484 (1951); *Holcomb v. Flavin*, 37 Ill. App. 2d 359, 185 N.E.2d 716 (1962); *Blaszak v. Union Tank Car Co.*, *supra* note 11.

A right to indemnity also accrues where there is a disproportion or difference in the character of the duties owed to the plaintiff.²⁹ For example, a landowner has a non-delegable duty to maintain his premises in a safe condition to all invitees. If another created a dangerous condition that caused harm to an invitee, the landowner may be indemnified³⁰ unless he, the landowner, knew of the condition.³¹ Illinois reaches this result by allowing indemnity where the parties are not *in pari delicto*³² or where one is legally liable for injuries to a third person caused by the negligence of another in which he does not himself participate.³³

The third broad area in which indemnity will be granted entails a great or substantial disparity in the gravity of the fault of each of the two tortfeasors.³⁴ This is denominated the "active-passive" theory of negligence—indemnity will be granted against an active wrongdoer in favor of one who bears a passive relationship to the cause of the injury.³⁵

Many courts have been reluctant to delineate and define active and passive negligence. However, in *Southwestern Greyhound Lines v. Crown Coach Co.*³⁶ the court stated, "Passive negligence exists where one person negligently brings about a condition or an occasion and active negligence exists where another party negligently acts upon that condition and perpetrates a wrong."³⁷ A similar explanation was given in *King v. Timber Structures, Inc. of California*³⁸ where it was held that, "one is passively negligent if he merely

²⁹ Davis, *supra* note 15 at 546. See, e.g., *Doyle v. Union Ry. Co.*, 276 N.Y. 453, 12 N.E.2d 541, reversing 251 App. Div. 564, 296 N.Y.S. 877 (1937); *Farrelly v. City of Pittsburgh*, 340 Pa. 516, 17 A.2d 191 (1941).

³⁰ See Davis, *supra* note 15, at 549. See, e.g., *Am. Dist. Telegraph Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950); *U. S. v. Chicago, R. I. & Pac. Ry.*, 171 F.2d 377 (10th Cir. 1949).

³¹ *Morgan Warehouse & Commercial Co. v. Gilbert Mfg. Co.*, 60 S.W.2d 1053 (Tex. Civ. App. 1933). See, e.g., *Jones v. Beck*, 109 S.W.2d 787 (Tex. Civ. App. 1937); *Hartford v. Coolidge-Locher Co.*, 314 S.W.2d 445 (Tex. Civ. App. 1958).

³² *Holcomb v. Flavin*, *supra* note 28; *Spivack v. Hara*, 69 Ill. App. 2d 22, 216 N.E.2d 173 (1966); *Skala v. Lehon*, 343 Ill. 602, 175 N.E. 832 (1931).

³³ *John Griffiths & Son Co. v. Nat'l Fireproofing Co.*, 310 Ill. 331, 141 N.E. 739 (1923); *Sleck v. Butler Bros.*, 53 Ill. App. 2d 7, 202 N.E.2d 64 (1964).

³⁴ See *Slattery v. Marra Bros.*, 186 F.2d 134 (2d Cir. 1951). See generally *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316 (1896); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319 (1951); *Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co.*, 157 Ohio St. 385, 105 N.E.2d 568, 31 A.L.R.2d 1317 (1952).

³⁵ *Miller v. DeWitt*, *supra* note 11; *Embree v. Gormley*, *supra* note 10; *Dobbins v. Beachler*, 47 Ill. App. 2d 30, 197 N.E.2d 518 (1964); *Rovekamp v. Central Const. Co.*, 45 Ill. App. 2d 441, 195 N.E.2d 756 (1964); *Hyten v. Kleffman*, 31 Ill. App. 2d 273, 175 N.E.2d 632 (1961).

³⁶ 178 F.2d 628 (8th Cir. 1949).

³⁷ *Id.* at 632.

³⁸ 240 Cal. App. 2d 178, 49 Cal. Rptr. 414 (1966).

fails to act in fulfillment of a duty of care which the law imposes on him One is actively negligent if he participates in some manner in the conduct or omission which caused the injury."³⁹

Prior to *Sargent* and *Trzos*, the vast majority of cases in Illinois⁴⁰ only applied this active-passive theory where there existed a prior relationship between the parties⁴¹ as for example lessor-lessee,⁴² master-servant,⁴³ vendor-vendee,⁴⁴ or employer-employee.⁴⁵ Relief was predicated on the existence of a community of interest or derivative liability between the defendants in their relationship to the plaintiff. Hence, indemnity was granted only where there was some relationship between the defendant and the third party, exclusive of the fortuitous fact that they both might be liable to an injured party for their actions.⁴⁶ But in *Sargent* and *Trzos* there was no such relationship or derivative liability. Before the injury to the plaintiff, the primary defendant and the third party he sought to implead had never consorted with each other. There was no prior connection; they were in fact "complete strangers." Yet, in both cases the court saw the possibility of a difference in the degree of negligence of the tortfeasors and allowed the third party action to stand, on the ground that the third party may be liable to the initial defendant for indemnity via the active-passive theory. This is the most important aspect of *Sargent* and *Trzos*. Together they develop a trend in Illinois toward allowing indemnity under the active-passive theory even where there was no prior relationship or derivative liability. The rationale underlying the evolution of this trend is expressed by the court in *Sargent*: "Nor does absence of a specific relationship necessarily prove that the codefendants were in 'pari delicto' and thereby preclude indemnity."⁴⁷

³⁹ *Id.* at 182, 49 Cal. Rptr. at 417.

⁴⁰ *Reynolds v. Illinois Bell Telephone Co.*, 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964), which involved a similar factual situation to *Sargent*, was the only case in Illinois prior to *Sargent* and *Trzos* which applied the active-passive theory of indemnity where there was no prior relationship between the parties.

⁴¹ See Pritchett, *Comparative Negligence, Contribution, Collateral Source, an Illinois Appraisal*, 56 Ill. B.J. 468, 475 (1968).

⁴² *Dart Transit Co. v. Wiggins*, 1 Ill. App. 2d 126, 117 N.E.2d 314 (1953); *Blaszak v. Union Tank Car Co.*, *supra* note 11.

⁴³ *Supra* note 27.

⁴⁴ See, e.g., *Wanamaker v. Otis Elevator Co.*, 228 N.Y. 192, 126 N.E. 718 (1920); *Boston Woven-Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N.E. 657 (1901).

⁴⁵ *Sack v. Arcole Midwest Corp.*, 33 Ill. App. 2d 344, 179 N.E.2d 441 (1961).

⁴⁶ In *Spivack v. Hara*, *supra* note 32, at 24, 216 N.E.2d at 174, the appellate court held: "The usual case in which this exception [*viz.*, the active-passive theory of indemnity] is applied involves a specific relationship where the defendant incurring derivative liability has neither participated in the wrongful act nor known of the condition which caused the injury."

⁴⁷ *Sargent v. Interstate Bakeries, Inc.*, 86 Ill. App. 2d 187, 191, 229 N.E.2d 769, 771 (1967).

Hence, third party practice, while not directly changing substantive law, has exerted a decided influence by affording a means through which the concept of indemnity may best be used to facilitate a full determination of a controversy in one action.⁴⁸ It also has expanded the scope of the active-passive theory, extending its application to a situation wherein no prior relationship is necessary.

Contribution, unlike indemnity, does not constitute the shifting of the entire loss from one tortfeasor to another but involves a distribution of the burden.⁴⁹ It amounts to a proportionate sharing of the loss among tortfeasors pursuant to the degree of their fault. These two concepts are often confused as evidenced by the fact that many courts have allowed indemnity under the name of contribution.⁵⁰ At common law, contribution was not allowed between joint tortfeasors,⁵¹ on the theory that no relief by way of distribution of the loss should be allowed a person whose wrongful conduct lent to the injury.⁵² It was felt that if contribution were granted, it would favor a wealthy defendant at the expense of a relatively poor defendant and provide for a situation inconsistent with the desires and good of society.⁵³ However, this rule has been interpreted by many to apply only in cases of wilful and intentional wrongdoers.⁵⁴ Accordingly, some states have allowed contribution in cases wherein the claimant committed an unintentional breach of the law,⁵⁵ and others have passed statutes modifying the common law rule.⁵⁶

⁴⁸ If a defendant can show that he has a possible right to indemnity from another not a party to the plaintiff's action, he may bring a third party action, since he would have fulfilled the "is or may be liable to the defendant" requirement of § 25(2).

⁴⁹ PROSSER, *supra* note 22, at 47. See also *Canosia Twp. v. Grand Lake Twp.*, 80 Minn. 357, 83 N.W. 346 (1900); *Ratte v. Ratte*, 260 Mass. 165, 156 N.E. 870 (1927).

⁵⁰ *Supra* note 35.

⁵¹ *Merryweather v. Nixan*, 8 Term Rep. 186 (1799).

⁵² *Mannino, Civil Procedure—Contribution Among Joint Tortfeasors—Rights of Insurers*, 44 N. C. L. REV. 142, 144 (1965).

⁵³ *James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1165 (1941).

⁵⁴ See *Bohlen, Contribution And Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 22 CORNELL L.Q. 469 (1936-37); *Leflar, Contribution And Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947); *Gregory, Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365.

⁵⁵ The following five states have allowed contribution between joint tortfeasors without legislation: Iowa—*Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1963); Maine—*Bedell v. Reagen*, 159 Me. 292, 192 A.2d 24 (1963); Minnesota—*Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960); Tennessee—*Huggins v. Grayes*, 210 F. Supp. 98 (E.D. Tenn. 1962); Wisconsin—*Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

⁵⁶ Arkansas—ARK. STAT. ANN. §§ 34-1001 to -1009 (1967); California—CAL. CIV. PRO. CODE §§ 875-880 (1968); Delaware—DEL. CODE ANN. tit. 10, §§ 6301-08 (1966); Georgia

Since 1856⁵⁷ Illinois has adhered strictly to the common law rule and has not allowed contribution.⁵⁸ While there have been attempts to formulate exceptions to the rule, these have materialized in the area of indemnity under the guise of contribution.⁵⁹ No Illinois court has allowed contribution even for mere negligence between joint tortfeasors.⁶⁰ The Illinois legislature has not passed any statute in this regard,⁶¹ nor have they adopted the Uniform Contribution Among Tortfeasors Act.⁶² Hence, at present there is no right to contribution in Illinois. This even extends into the federal system,⁶³ since before a third party action can be initiated at the federal level, the substantive law of the particular states involved must be examined to see whether contribution is allowed.⁶⁴ If no right to contribution exists, a defendant can-

—GA. CODE ANN. §§ 105-2011 to -2012 (1968); Hawaii—HAWAII REV. LAWS §§ 246-10 to -16 (1965); Kentucky—KY. REV. STAT. § 412.030 (1966); Louisiana—LA. REV. STAT. ANN. §§ 2103-05 (1967); Maryland—MD. ANN. CODE art. 50, §§ 16-24 (1968); Massachusetts—MASS. GEN. LAWS ANN. ch. 231b, §§ 1-4 (1968); Michigan—MICH. STAT. ANN. § 27a.2925 (1968); Mississippi—MISS. CODE ANN. § 335.5 (1962); Missouri—MO. ANN. STAT. § 537.060 (1968); New Jersey—N.J. REV. STAT. §§ 2a:53a-1 to -5 (1968); New Mexico—N.M. STAT. ANN. §§ 24-1-11 to -18 (1968); New York—N.Y. CIV. PRAC. § 1401 (1968); North Carolina—N.C. GEN. STAT. ANN. § 1-240 (1967); North Dakota—N.D. CENT. CODE §§ 32-38-01 to -04 (1967); Pennsylvania—PA. STAT. ANN. tit. 12, §§ 2082-89 (1968); Rhode Island—R.I. GEN. LAWS ANN. §§ 10-6-1 to -11 (1968); South Dakota—S.D. CODE §§ 33.04A01-33.04A10 (1968); Texas—TEX. REV. CIV. STAT. ANN. art. 2212 (1968); Virginia—VA. CODE ANN. § 8-627 (1968); West Virginia—W. VA. CODE ANN. §§ 55-7-13 (1968).

⁵⁷ Nelson v. Cook, 17 Ill. 443 (1856).

⁵⁸ Pritchett, *supra* note 41, at 474.

⁵⁹ See *supra* note 35.

⁶⁰ Comment, *Contribution & Indemnity In Illinois Negligence Cases*, 19 U. CHI. L. REV. 388, 393 (1952).

⁶¹ Proehl, *Contribution Between Joint Tortfeasors*, 49 ILL. B.J. 880, 883 (1961).

⁶² 9 U.L.A. § 4 (1955). See also *Augustin v. General Accident, Fire & Life Assur. Corp.*, 283 F.2d 82 (7th Cir. 1960). The following states have adopted this act: Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota. See 18 AM. JUR. 2d *Contribution* § 41 (1968); Annot., 34 A.L.R.2d 1107 (1954).

⁶³ In *D'Onofrio Const. Co. v. Recon Co.*, 225 F.2d 904 (1st Cir. 1958), it was held that the federal rule regarding impleader could not be used to affect the substantive results, so that if by the law of the state a joint tortfeasor is not liable to his co-tortfeasors for contribution, no such liability can be imposed upon him by the federal court on a third-party complaint. For example, in the case of *Holstlaw v. Southern Ry. Co.*, 9 F.R.D. 276 (D. Mo. 1949), the court held that since under the law of Illinois (the state in which the defendant's train collided with the automobile in which the plaintiff was riding) a defendant would not be entitled to contribution from an automobile driver whose negligence allegedly caused or contributed to the plaintiff's injuries, the defendant was not entitled to make the driver a third party under federal rules.

⁶⁴ Keeffe and Cotter, *Service Of Process In Suits Against Directors: A Barrier to Justice*, 27 CORNELL L.Q. 74, 83 (1941). See also *Thompson v. Cranston*, 2 F.R.D. 270 (W.D. N.Y. 1942), *aff'd* 132 F.2d 631, 148 A.L.R. 1178, *cert. denied* 319 U.S. 741 (1942); *Bache v. Dixie-Ohio Exp. Co.*, 8 F.R.D. 159 (N.D. Ga. 1948).

not implead a joint tortfeasor⁶⁵ under federal third party practice.⁶⁶

But Section 25(2) is broad enough to include the possibility that contribution may be allowed in Illinois in the future as is indicated by the language, "who is or may be liable to him for all or part of the plaintiff's claim against him," the word "part" denoting a sharing of the plaintiff's claim between the defendant and the third party. Today the section can be utilized for indemnity purposes under the active-passive theory, where the parties are not *in pari delicto* or where one incurs a legal liability. Tomorrow the section may be available to afford a defendant the right of contribution against a third party.

This may not lie in the too distant future, as there is dictum in *Sargent* which indicates a discernible trend toward some form of contribution in Illinois. The court notes that the Illinois Judicial Conference in 1964 unanimously adopted a resolution favoring contribution among joint tortfeasors,⁶⁷ noting that, "[t]he possibility of inequity is unavoidable until the rule against contribution yields to a more rational approach which will place upon each tortfeasor liability in proportion to his own culpability."⁶⁸

Many writers have concurred with the *Sargent* court's suggestion that contribution should be allowed if there is a disproportion of fault among wrongdoers.⁶⁹ But if this trend is to materialize it will more than likely have to originate in the Illinois legislature. This is in view of a recent Illinois Supreme Court decision which refused to substitute judicially the doctrine of comparative negligence for contributory negligence. The court held:

After full consideration we think, however, that such a far-reaching change, if desirable, should be made by the legislature rather than by the Court. The General Assembly is the department of government to which the Constitution has entrusted the power of changing the laws.⁷⁰

Therefore, the 1969 session of the Illinois General Assembly will certainly

⁶⁵ Oliver, *Federal Practice: Third-party Practice in the District Courts: Impleader of a Joint Tortfeasor under Federal Rule of Civil Procedure 14(a): Erie v. Tompkins*, 28 CORNELL L.Q. 89, 93 (1942). See also *Mitchell v. Duquesne Brewing Co.*, 34 F.R.D. 145 (W.D. Pa. 1963).

⁶⁶ FED. R. CIV. P. 14.

⁶⁷ *Sargent v. Interstate Bakeries, Inc.*, *supra* note 47, at 197, 229 N.E.2d at 774.

⁶⁸ *Sargent v. Interstate Bakeries, Inc.*, *supra* note 47, at 202, 229 N.E.2d at 776.

⁶⁹ See Pritchett, *supra* note 41; *supra* note 60; Proehl, *supra* note 61; Hennessey, *Torts: Indemnity and Contribution*, 47 MASS. L.Q. 421 (1962); Mannino, *supra* note 52; Davis, *Contribution Between Tortfeasors*, 25 MODERN L. REV. 357 (1962); McIntire, *Contribution Among Joint Tortfeasors: Louisiana's Past, Present, And Future*, 37 TUL. L. REV. 525 (1963).

⁷⁰ *Maki v. Frelk*, 40 Ill. 2d. 193, 196, 239 N.E.2d 445, 447 (1968). See generally Comment, *Comparative Negligence—The Developing Doctrine and the Death of Maki*, 18 DEPAUL L. REV. 203 (1968).

bear watching to see if a realistic system of loss distribution will be formulated through the adoption of both contribution and comparative negligence. If contribution is adopted, third party practice in Illinois will be ready.

William Tymn

CONSTITUTIONAL LAW—AID TO PAROCHIAL SCHOOLS AND
THE ESTABLISHMENT CLAUSE—*EVERSON TO ALLEN*:
FROM BUSES TO BOOKS AND BEYOND

Section 701 of the Education Law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through twelve upon the individual request of any student in a public or private school.¹ Only textbooks which are required for one semester or more in a particular class and those textbooks which are either designated for use in a public school in the state or approved by a board of education may be lent.² Plaintiffs, members of local school boards, sought a declaratory judgment that the statutory requirement was invalid as violative of the state³ and federal constitutions.⁴ It was their contention that the lending of textbooks by the State of New York free of charge to students attending parochial schools amounted to an establishment of religion and that the requirement of paying taxes to provide textbooks for such students inhibited plaintiffs' free exercise of religion. In a 4-3 decision the New York Court of Appeals held that the statute violated neither the state nor the federal constitution.⁵ The United States Supreme Court, concerned only with the federal constitutional question, affirmed the decision of the Court of Appeals. *Board of Education v. Allen*, 392 U.S. 236 (1968).

The "primary purpose and effect" test first adopted by the United States Supreme Court in *Abington Township v. Schempp*⁶ formed the basis of the majority opinion. The Court considered section 701 of New York's education law to have a secular legislative purpose and primary effect which neither advanced nor inhibited religion.⁷ In 1965 the New York legislature in amending section 701 stated the purpose for the adoption of the legisla-

¹ N. Y. EDUC. LAW § 701(3) (McKinney 1968).

² N. Y. EDUC. LAW § 701(3) (McKinney 1968).

³ N. Y. CONST. art. 11, § 4 (1894).

⁴ U. S. CONST. amend. I.

⁵ *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791 (1967).

⁶ 374 U.S. 203 (1963).

⁷ *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968).