REVISIONAL CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

PARBHU DAYAL (PLAINTIFF) *v.* DWARKA PRASAD AND ANOTHER (DEFENDANTS).* 1931 *November*, 13.

Tort—Joint tort-feasors—Contribution inter se—Injured party obtaining decree for damages against them all—Decree satisfied by one of them—Suit for contribution not maintainable.

Where a decree for damages is obtained by the injured party against joint tort-feasors who had committed the wrong consciously without the least semblance of a right, and the decree is executed against and satisfied by one of them alone, he has no right of contribution as against the others. No distinction in principle can be drawn between a case where a joint liability has been liquidated without a suit and where a joint liability has been established by a suit and the judgment has been liquidated by one of the parties.

There is undoubtedly a distinction between cases where the tort-feasors were aware of the fact that they were acting purely in tort and without any semblance of right in themselves, and cases where an act of trespass or other action in tort is committed more or less innocently and in good faith with a semblance of right, although that right may not actually exist.

Mr. *Ambika Prasad*, for the applicant.

Messrs. *Gopi Nath Kunzru*, *R. K. Malaviya*, *Panna Lal Khatri* and *Lalta Prasad Gupta*, for the opposite parties.

MUKERJI and BENNET, JJ.:—This is a revision against a decree of a small cause court at the instance of the plaintiff, who has lost his suit.

The facts that have been found by the court below are these. The plaintiff and the defendants, who are two in number, without the least semblance of right, removed the materials of a building in a certain village. The building belonged, in part, to one Basityar Khan.

*Civil Revision No. 436 of 1930.

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Basityar Khan brought a suit against the present parties to recover his own share of the value of the materials. That suit was decreed. The decree was executed against the plaintiff to the present litigation, namely Parbhu Dayal, and Parbhu Dayal satisfied that decree. Thereupon, Parbhu Dayal brought the suit, out of which this revision has arisen, to recover a certain sum of money said to be due to him from the defendants by way of contribution.

The learned Judge of the small cause court dismissed the suit. He held: "The plaintiff had no interest or share in the beams which he had removed and that he was conscious of his wrongful act, and that as such this suit for contribution does not lie." It has been argued before us that although the parties to the present suit were joint tort-feasors in the true sense of the expression, yet the plaintiff was entitled to succeed simply because there was a decree made in favour of Basityar Khan jointly against the parties to the present litigation. Reliance has been placed on a dictum of Lord WATSON in *Palmer* v. *Wick* (1). His Lordship is reported to have said, at page 332: "But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case—which is the present case—the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro rata*, or, in other words, for an equal share with the rest." Lord HALSBURY thought that if the case had to be decided under the law of England, he could not depart from the principle laid down in *Merryweather* v. *Nixan* (2). It seems to us that the case of *Palmer* v. *Wick* was decided on the basis of Scotch law which we are not bound to administer in India.

(1) [1894] A.C., 318. (2) (1799) 8 T.R., 186; 16 R.R., 810.

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Speaking for ourselves, we do not see any distinction that can properly be drawn, in principle, between a case where a joint liability has been liquidated without a suit and where a joint liability has been established by a suit and the judgment has been liquidated by one of the parties. There is undoubtedly a distinction between cases where the tort-feasors were aware of the fact that they were acting purely in tort and without any semblance of right in themselves, and cases where an act of trespass or other action in tort is committed more or less innocently and in good faith with a semblance of one's rights, although those rights may not actually exist.

No case has been cited to us where it may have been held distinctly that, as between persons who are conscious tort-feasors, in the sense that when they committed the act of tort they knew that what they were doing was nothing but a clear case of tort, a right of contribution existed. In our opinion, the authority of *Merryweather* v. *Nixan* still holds good so far as this country is concerned.

The learned counsel for the applicant has relied on the case of *Ram Prasad* v. *Arja Nand* (1). It was a decision by a learned single Judge of this Court, MAHMOOD, J. The decision was based on the ground that a decree had been passed against all the parties to the suit and that was enough ground for the plaintiff, a joint tort-feasor, succeeding in a suit for contribution against his co-tort-feasor. We are not prepared to accept the correctness of this decision.

In *Fakire* v. *Tasadduq Husain* (2) a decree for costs had been made against two defendants, who opposed unnecessarily the claim of a rightful plaintiff to a certain property. The decree for costs was a joint one against the defendants. The plaintiff paid off those costs and sued to recover from his co-defendants a share of it. Sir JOHN EDGE, C. J., and BLAIR, J.,

(1) Weekly Notes, 1890, p. 161. (2) (1897) I.L.R., 19 All., 462.

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remarked as follows: "Apparently the plaintiff and defendants here were wrong-doers. They were holding on to property to which the plaintiff in the former suit was entitled, and to which they (or either or any of them) were not entitled. Each was acting independently and for his own benefit, and setting up a title against the plaintiff to the former suit which was independent of, and separate from, and inconsistent with, the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other; and there was no equity between these persons, whose cases were antagonistic to each other." It will be noticed that the mere fact that a decree had been made jointly for costs against two persons was not held to be a sufficient ground for decreeing the plaintiff's case. Although the facts of the case of *Fakire* v. *Tasadduq Husain* are different from the facts of the case before us, the former does lay down the true principle on which contribution may be claimed. There must be either a contract, express or implied, by which it may be said that the defendant agreed to compensate the plaintiff in certain events, or that there should be an equity between the parties which would induce the courts to grant the plaintiff a relief from the burden he has undergone by discharging the decree or a debt payable by the parties. The mere fact that three persons agreed to commit an act of tort cannot be regarded as a valid agreement, much less as a valid contract on which a suit can be based by a joint tort-feasor against his co-tort-feasor. We may take it that the plaintiff and the defendants had agreed to deprive Basityar Khan of the materials of the house and that they agreed to indemnify one another from the consequence of the act. But if there was an implied agreement to that effect, it was an agreement which was immoral and cannot be countenanced in a court of law.

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Several other cases were cited before us, but we do not think that there is any case which bears directly on the point before us. Some of the cases have drawn the distinction to which we have already alluded and which undoubtedly exists between the cases of torts of different kinds.

In this particular case there is nothing in favour of the plaintiff which could induce us to grant him any relief. In the result, we dismiss the application with costs.

Before Mr. Justice Kendall.

JAGMOHAN MISIR (PLAINTIFF) *v.* MENDHAI DUBE AND ANOTHER (DEFENDANTS).*

1931 *November,* 17.

Promissory note—Consideration—Burden of proof—Negotiable Instruments Act (XXVI of 1881), section 118—Provincial Small Cause Courts Act (IX of 1887), section 25—Revision—Misdirection and misplacing of burden of proof.

The defendants to a suit on a promissory note in a court of small causes admitted their signatures but alleged that they had signed a blank paper, without any consideration in cash, in order to induce the plaintiff to give evidence for them in a certain case. Thereupon an issue was framed in such a form as in fact to throw the burden of proof regarding consideration on the plaintiff. Evidence was led on both sides and in the result the suit was dismissed on the ground that consideration was not proved. It was *held*, in revision, that the Judge had lost sight of section 118 of the Negotiable Instruments Act, under which every negotiable instrument must be presumed to be for consideration, and so the issue was wrongly struck so as to throw the burden on the plaintiff; that the Judge had misdirected himself, with the result that even without any discussion of the defence evidence or even a definite statement that this evidence had been considered on its merits he had come to the conclusion that the defence had been made good; and that the case was one fit for interference under section 25 of the Provincial Small Cause Courts Act.

Mr. *Kedar Nath Sinha*, for the applicant.

*Civil Revision No. 186 of 1931.