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Pleading and Practice Appeal and Error--Civil Practice Act Section 211-a Gives No Right of Appeal as Aggrieved Party to Defendant Upon Reversal of Judgment Against Co-Defendant (Ward v. Iriquois Gas Corp., 258 N.Y. 124 (1932))

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the owner of a cause of action on contract against the assignor. Such a result is too harsh; it would impress too great a clog upon the free alienation of land. * * *" [10]

C. V.

PLEADING AND PRACTICE APPEAL AND ERROR—CIVIL PRACTICE ACT SECTION 211-A GIVES NO RIGHT OF APPEAL AS AGGRIEVED PARTY TO DEFENDANT UPON REVERSAL OF JUDGMENT AGAINST CO-DEFENDANT.—An iron cover hurled into the air by an explosion in a manhole struck plaintiff. A gas corporation and street railway company were sued jointly to recover for the injuries sustained. Plaintiff recovered against both defendants on the trial. The Appellate Division [1] reversed the judgment as to the street railway company. Gas corporation appealed from this reversal on the ground that it deprived appellant of its right to contribution from its co-defendant. *Held,* appeal dismissed and judgment affirmed.[2] *Ward* v. *Iriquois Gas Corp.,* 258 N. Y. 124, 179 N. E. 317 (1932).

The Court of Appeals has indicated again [3] that the significance attached to the comparatively new [4] addition to the Civil Practice Act, Section 211-a,[5] was greatly over-estimated and the confusion

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[10] Instant case at 5, 179 N. E. at 33.

[1] 233 App. Div. 127, 251 N. Y. Supp. 300 (4th Dept. 1931). Crouch, *J.,* dissented from the holding of the Appellate Division on the ground that the evidence did not warrant a dismissal of the judgment agains tthe street railway company. The question of the construction of §211-a and the right of the gas corporation to have its co-defendant remain in the action was not before that court.

[2] Gas corporation, as a second point, appealed from the decision of the Appellate Division affirming the judgment as to it. Lehman, *J.,* dissented from so much of the ruling of the Court of Appeals as affirmed the judgment against the gas corporation.

[3] Price v. Ryan, 255 N. Y. 16, 173 N. E. 907 (1930) held that a defendant cannot complain because a jury failed to find co-defendant negligent; Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305, 178 N. E. 289 (1931) decided that a co-tort-feasor cannot be brought in under §193, subd. 2, in order to give effect to §211-a of the CIVIL PRACTICE ACT.

[4] N. Y. L. 1928 c. 714.

[5] "Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own *pro rata* share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the *pro rata* share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his *pro rata* share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice."

unwarranted. Unsuccessful litigants have urged it as new grounds for appeal and defendants have invoked it to bring in new parties to share their burden of liability.[6] It has been sought to extend the application of the law to add defendants and now to prevent their release although there is no evidence to warrant a judgment against them. The error lay in attempting to create a situation to fit the law instead of applying it only when all the conditions are present. It is essential that "a judgment recovered jointly against two or more defendants * * * has been paid by one or more defendants." The plaintiff's case must be closed and his judgment collected. Contribution between joint tort-feasors is a gift of the legislature by statute and this statute derogatory of the common law[7] must be strictly construed and strictly complied with before the right comes into existence. This decision properly construes the statute by giving it a limited application, and again states the opinion of the court that it does not affect any other section relating to the parties to actions.

J. M. C.

PLEADING AND PRACTICE—LIMITATIONS OF ACTIONS—THE STATUTE OF LIMITATIONS AS AFFECTS AMENDED PLEADINGS.—Plaintiff sued defendants for the purchase price of a motorboat on defendants' misrepresentation as to its speed. On the trial plaintiff learned of its error in not suing defendants as agents for breach of authority of warranty and asked leave to amend its complaint to include this cause of action. Both alleged causes of action arose in 1919 and the trial was held in 1930. *Held,* The trial court had discretion in permitting the plaintiff to amend his complaint, but the amendment, constituting a new cause of action, was subject to the bar of the statutory period and defendants had the right to interpose that defense. *Harriss* v. *Tams,* 258 N. Y. 229, 179 N. E. 476 (1932).

An action lies against an agent for misrepresentation of authority to warrant concerning his principal's goods.[1] If the agency is

[6] For an exhaustive study of this section and the cases relating to it see Rothschild, *Contribution Between Tort-Feasors* (1931) 6 ST. JOHN'S L. REV. 1.

[7] 1 WILLISTON, CONTRACTS (1924) §345.

[1] Moore v. Maddock, 251 N. Y. 420, 167 N. E. 572 (1929); 1 WILLISTON, CONTRACTS (1920) §282: "* * * if on a fair construction of the contract it appears that the intent was to bind the principal only, according to the better view the agent is liable, not on the contract, but on an implied warranty of his authority based on his representation of authority"; TIFFANY, AGENCY (2d ed. 1924) §130. As to liability on a negotiable instrument when unauthorized see New Georgia National Bank v. Lippman, 249 N. Y. 307, 164 N. E. 108 (1928) interpreting §39 of the N. Y. NEGOTIABLE INSTRUMENTS LAW to mean that the agent is liable as a principal on the note.