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CONTRIBUTION AND INDEMNITY BETWEEN TORTFEASORS¹

FRANCIS H. BOHLEN†

I. CONTRIBUTION

The rule which, except as modified by statute,^{1a} is accepted law in every common-law jurisdiction other than Minnesota,² Pennsylvania,³ Wisconsin,⁴ and, probably, Oregon⁵ is that there can be no contribution between joint tortfeasors, irrespective of whether the claimant is in moral or social fault, as where he is conscious of the wrongfulness of his conduct, or is merely a tortfeasor in the sense that for one reason or another he is liable in an action in form of tort.⁶ Whatever may

†The writer thanks the editorial board of the Cornell Law Quarterly for the opportunity to express even though in an inadequate way his personal affection and professional admiration for Chief Judge Cuthbert Pound.

¹The term "tortfeasor" is used to describe one who for any reason is subject to liability in an action in form that of tort. It is unfortunate that no other word can be found to describe him. The word "tort", from its derivation and usage, carries with it the suggestion of wrongdoing. There are many cases in which tort liability is imposed where the person subject to it is not only innocent of moral or social fault, but also where the actual conduct which subjects him to liability is not his own or done at his direction. It is obvious that the word "wrongdoer" should be restricted to those guilty of moral or social fault. The words "tortious conduct" should also be restricted to describe those acts or omissions which are the basis of the tort liability to which the actor or another vicariously responsible for his conduct is liable. Unfortunately, there is again an absence of any single word to describe one whose conduct is not "tortious" in character. Therefore, occasionally the phrase "innocent of tortious misconduct" is used as an adjective to describe him, although the very word "innocence" indicates the absence of fault. Where this phrase is used it is hoped that the context will explain its meaning.

^{1a}*Cf. infra* note 9. For the statutory rule in New York and its interpretation, see Gregory, *Tort Contribution Practice in New York* (1935) 20 CORNELL L. Q. 269. See also the notes in (1932) 17 *id.* 691, and (1931) 16 *id.* 246, 400, and 598.

²Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 208 N. W. 13 (1926); *Cf.* Mayberry v. Northern Pac. Ry., 100 Minn. 79, 110 N. W. 356 (1907). ³Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928).

⁴Mitchell v. Raymond, 181 Wis. 591, 195 N. W. 855 (1923); Standard Acc. Ins. Co. v. Runquist, 209 Wis. 97, 244 N. W. 757 (1932); *Cf.* Ellis v. Chicago & N. Ry., 167 Wis. 392, 167 N. W. 1048 (1918).

⁵See Furbeck v. I. Gevurtz & Son, 72 Ore. 12, 22, 143 Pac. 654, 657 (1914).

⁶For collection of cases denying contribution, see COOLEY, TORTS (4th ed. 1932) § 89. See also, as to contribution in contract, 2 WILLISTON, CONTRACTS (Rev. ed. 1936) § 345.

have been the idea a hundred and forty years ago as to the basis and function of tort liability, the modern concept is that its primary and, except in a limited number of situations, its exclusive function is the allocation of the burden of bearing the loss caused by tortious conduct upon those who can properly be required to sustain it. In the absence of some very good reason for so doing, it appears to the modern mind unjust that an injured person, by choosing to effect his remedy by suit or by execution of a joint judgment against one of two persons whose tortious conduct has concurred in bringing about his injury — a choice determined by their comparative solvency rather than their comparative culpability — should irrevocably put the entire burden upon that particular tortfeasor. Until the injured person has made his choice, all those who might be liable as defendants stand in equal peril. It is a general principle not merely of equity and admiralty but of the common law that those who stand in equal risk should bear the burden equally.

The denial of the protection of this otherwise universal privilege to all tortfeasors irrespective of whether they are actual wrongdoers or, though personally innocent, are wrongdoers "by intendment of law", requires a better justification than the outmoded concept of the basis and function of tort liability. Attempts have been made to justify the denial of contribution but, as will be seen, none of the grounds advanced appear to be tenable. Further, and more important, the denial of contribution and the concept of tort liability upon which that denial is itself founded have greatly handicapped the intelligent development of the law of torts, and particularly the law of negligence. Had the right to contribution been recognized, particularly had it been made effective through a process by which the one of two co-tortfeasors against whom a separate action was brought could bring the other into court as a co-defendant, the burden of bearing the cost of the liability to which they were both subject could have been fairly divided between them. Had this been done, it would have been more than possible that the instinctive reaction of the bulk of mankind, that in some way or other the later of two wrongdoers is the more responsible for an accident of which both wrongdoings are a substantial cause, would have found a proper expression by requiring the later of the wrongdoers to pay a larger part of the damages than the earlier. Not only would all the intricacies and uncertainties of what the English lawyers call the doctrine of "*novus actus interveniens*" have been avoided, but a far more equitable result would have been attained. The actual contributory effect of the earlier wrong, while less than that of the later, is often not so negligible as to make it fair to place the whole burden upon the later wrongdoer. However, where a choice must be made between

one or the other it is natural that the burden should be so placed. Again, and this is a matter which is more directly attributable to a denial of contribution between joint "tortfeasors", in many cases in which the disparity between the fault and the causal relation between the conduct of two tortfeasors might make it just to require the one to bear a greater share of the burden than the other, the inability to grant this fair contribution has led to the allowance of indemnity where the disparity is not so great as to make it clearly just to throw the whole burden upon him against whom it is allowed.

Here, in passing, a highly unfortunate consequence, not of the rule denying contribution but of the concept of tort liability which underlies it, may be mentioned. The view that tort liability is based on fault and is, therefore, punitive underlies the denial of damages to a plaintiff guilty of contributory negligence. If one of two tortfeasors cannot transfer to his fellow delinquent any part of the burden caused by the injured person's election to seek redress from him, it is natural that it should also seem proper that a contributorily negligent plaintiff should recover nothing from even the most obviously negligent defendant. The general idea that each delinquent must bear unaided whatever burdens his misconduct has contributed to bring upon him has prevented the adoption of the admiralty rule or some variant of it by which the negligent plaintiff would be entitled to a fair part of the damages which he has suffered. That there is nothing inherently improper in this is shown by the tendency in common law states and countries to enact statutes which make the plaintiff's contributory negligence a matter which is to be taken into account only in assessing the damages recoverable by him.⁷ Had some such rule been adopted, there would have been no need to invent and elaborate the "last clear chance" doctrine with all its intricacies and extreme difficulty of application. It must not be overlooked that the last clear chance doctrine varies enormously in different states. In some, a distinction is drawn between lack of vigilance to perceive danger or precaution to provide for meeting it when discovered and a lack of care after its discovery. It seems difficult to find any such disparity between these two types of fault as should justify the placing of the whole burden upon him whose negligence is of the latter sort. Even more it seems difficult to see the justice of relieving the plaintiff of his loss and putting

⁷*E.g.*, FLA. COMP. GEN. LAWS (1927) § 7052 (as to actions against railroads); GA. CODE (Michie 1926) § 2781 (same); VA. CODE ANN. (Michie 1930) § 3959 (same); MISS. CODE (1930) § 511; WIS. STAT. (1931) § 331.045 (in death actions); see in general Mole and Wilson, *A Study of Comparative Negligence* (1932) 17 CORNELL L. Q. 333, 604.

the whole of it upon the defendant where the "humanitarian doctrine" gives an inattentive plaintiff a right of action against a defendant who is no more inattentive than he.

In *Merryweather v. Nixan*,⁸ the first and leading case which denied contribution between tortfeasors one of whom had paid the damages for which at the election of the injured person both were liable, the plaintiff was seeking contribution from the defendant for £ 840 which the plaintiff had been forced to pay under a joint judgment rendered against them in an action on the case brought by a third person for the injury done to his reversionary interest in a mill. Lord Kenyon held that the plaintiff could not recover, since there was no precedent for contribution where such a judgment had been rendered against two persons in an action of tort. In the course of the argument, the counsel for the defendant advanced the proposition that there could not be contribution between "joint wrongdoers". It appears from the very brief statement of the facts given by the reporter that the two tortfeasors were acting in concert and, furthermore, it seems probable that they were conscious of their actual wrongdoing. Therefore, they were wrongdoers in the actual and not merely in the technical sense.

However, *Merryweather v. Nixan* has been treated as authority for denying contribution where the claimant is a "wrongdoer" only in the sense that the circumstances are such as to subject him to liability in a tort action, even though personally not guilty of anything which could be properly considered as either moral or social fault. The criticism which has been directed against the rule in *Merryweather v. Nixan* has been of its application to cases in which the claimant was not conscious of wrongdoing, and in the few jurisdictions in which contribution is allowed it is denied only in such cases.⁹

One thing is clear: Lord Kenyon did not regard the fact that the judgment was a joint judgment against the claimant and defendant

⁸ T. R. 186, 101 Eng. Rep. 1337 (K. B. 1799).

⁹"In an action for contribution by one joint wrongdoer against another, the test of recovery is whether the plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful." *Goldman v. Mitchell-Fletcher Co.*, *supra* note 3. It is highly doubtful whether contribution should be denied even where the claimant is conscious of his wrongdoing. It is significant that the very recent English Act [25 & 26 Geo. V, c. 30, Part II (1935)], which permits contribution between tortfeasors, allows it, as does the New York Act [N. Y. CIV. PRAC. ACT § 211a (1928)], not only where the claimant is conscious of tortious wrongdoing, but even where his misconduct is a violation of a statute which carries criminal penalties. It is impossible in the space here permissible to present an adequate discussion of this highly important and controversial matter. For a discussion of the recent English statute, see note (1935) 49 HARV. L. REV. 312.

rather than a several judgment against the claimant as giving a peculiar right to contribution.¹⁰ Today Lord Kenyon's decision seems highly unfortunate. The profession, particularly those members of it who are law teachers or students, have come to realize that the primary if not the sole function of a tort action is to place the burden of bearing the loss caused by tortious conduct upon those who *should* bear it. One effect of this view has been the inclusion in the Federal Employers' Liability Act^{10a} of a provision that the plaintiff's contributory negligence should not bar his action but should merely be a matter to be consulted in determining the amount of damages which he is entitled to recover. Statutes to the same effect have been enacted throughout the Dominion of Canada and in many American states.¹¹ Furthermore, the idea that the burden of bearing the loss caused by the tortious misconduct of two or more persons should not be determined by the choice of the injured person, but by a fair distribution among all those responsible for it, has led not only to the enactment of more or less, but generally less, effective acts allowing contribution in England,¹² in many of the Canadian provinces, and in twelve American states,¹³ but also to an express rejection of the rule in *Merryweather v. Nixan* by direct decision in Minnesota, Pennsylvania, and Wisconsin, and by a strong dictum in Oregon.¹⁴

It is unfair to condemn Lord Kenyon's opinion because it is inconsistent with a modern view of the proper function of tort liability. It in all probability expressed the view which was then prevalent and of which we find persistence even in comparatively modern American decisions. The action of trespass was in its origin in part what today we would call criminal. By it, not only was the plaintiff given redress, but the grievance of the Crown was also satisfied. Indeed, at the time of its introduction the machinery by which the Crown could punish offenses against its dignity and peace was so rudimentary that the vindication of its order was necessarily left to the private individual aggrieved. The action of trespass on the case was naturally conceived

¹⁰Lord Watson, in *Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] A. C. 318, bases his view that contribution should be allowed under the Scottish law in part upon the fact that a joint judgment had been executed against the claimant.

^{10a}35 STAT. 65 (1908), 45 U. S. C. A. §§ 51-59 (1928).

¹¹See *supra* note 7.

¹²25 & 26 GEO. V, c. 30, Part II (1935).

¹³For a list of such statutes see Leflar, *Contribution and Indemnity Between Tortfeasors* (1932) 81 U. OF PA. L. REV. 130, n. 66; see also note (1931) 45 HARV. L. REV. 369. For proposed New York statute see Leg. Doc. No. 65 (K), a study by the Law Revision Commission of that state.

¹⁴See cases cited *supra* notes 2, 3, 4 and 5.

as partaking of the character of the parent action. The pleadings, particularly the plea of not guilty, preserved so much of the criminal aspect of the actions as to make tort liability appear to be imposed solely as a penalty for wrongdoing, which itself gave to tort actions the appearance of a purely punitive function akin to the function of criminal prosecution. If this were a real kinship, it would follow that it would be as improper to allow one tortfeasor to force his fellow wrongdoer to share his punishment as it would be to permit a person who jointly with another was guilty of a crime to require his fellow criminal to serve part of his sentence. Therefore, this idea that tort liability was a penalty for fault and, therefore, that the duty to make good the harmful consequences of tortious conduct was imposed as a penalty for wrongdoing, naturally resulted in requiring the wrongdoer to pay all or nothing.

When the defense of contributory negligence was recognized,¹⁵ this same concept prevented the common-law courts from dealing with contributory negligence as admiralty courts had for generations done. The plaintiff, if in fault, could recover nothing. It was not until thirty-three years later¹⁶ that the hardship of such a practice led to the introduction of the last clear chance doctrine which, in an effort to do justice to negligent plaintiffs, has been in many jurisdictions so extended as to give the plaintiff a right to recover the whole of a loss which under all the circumstances should have been shared, perhaps in different proportions, between himself and the defendant.

While Lord Kenyon was satisfied to base his decision upon lack of precedent, commentators, both judges and textwriters have felt that the rule announced in his decision must be justified by some better reason.

Two principal reasons of so-called public policy have been constantly advanced in justification of this rule, founded as it was on a decision based purely on lack of precedent and rendered in a case in which the two parties had joined in what apparently was a deliberate act of conscious wrongdoing. The first is that the denial of contribution will serve to deter the commission of misconducts. The second is that the plaintiff's wrongdoing debars him from a redress to which otherwise he would be entitled. A third has also occasionally been suggested, namely, that "the law has no scales" to measure the relative fault of two negligent persons.

As to the first, it is clear that the denial of contribution can not be an effective deterrent to wrongdoing by anyone who does not realize

¹⁵*Butterfield v. Forester*, 11 East 60 (K. B. 1809).

¹⁶*Davies v. Mann (The Donkey Case)*, 10 Mees. & W. 546 (K. B. 1842).

three things. First, he must realize that his conduct is such as to subject him to liability for injury legally caused thereby, and that such an injury is likely to result from it. This realization is a prime requirement if the denial of contribution is to have a deterrent force. It can not have such force if the wrongdoer does not know that his conduct is wrongful, as where it is one of mere inadvertence. To say that the fear that he will be denied contribution will make a man more attentive to what he is doing is to carry supposition to the point of absurdity. Second, he must realize that there is a chance that such injury as results may not be caused solely by his own misconduct but may be in part due to the negligence of a co-delinquent. Except where the two are acting in concert in the commission of conscious wrongdoing, as was the case in *Merryweather v. Nixan*, this chance is to the last degree remote. If a man is not deterred from wrongdoing by his knowledge that he will be liable for harm which results solely from his own misconduct, it is altogether improbable that he will be impelled to better behavior by the fear of having to pay for an injury caused in part by the concurrent negligence of a third person. Third, and equally important, without knowledge of the rule which denies contribution, its denial can in no way affect anyone's course of conduct. It may be safely said that not one man in a hundred knows that such a rule exists.

Looking at the matter in a practical way and taking into account reality and not theory, the denial of contribution, if it could be imagined as having any effect upon the normal person's choice of conduct, would tend to relieve a man of doubtful solvency from any fear of having to pay for both his intentional and negligent misdeeds. The injured person, in determining against whom to bring his action, takes no account of the relative culpability of the two persons either of whom he might sue. He brings his action against the one whom he believes to have the greater ability to pay such judgment as he may recover. The less solvent of two wrongdoers has reasonable assurance that no action will be brought against him.

If the more solvent is held liable, however, and is allowed contribution, he has only one person from whom he can obtain it. While the injured man would be a fool to prefer suit against a man of doubtful solvency when he could bring his action against another whose ability to pay the judgment was clear, the less solvent man may have sufficient assets to make it worth the other's while to seek reimbursement by way of contribution from him. However, this argument is to a large degree theoretical, since, as has been seen, the deterrent force of the denial of contribution, save in rare instances, is itself entirely theoretical.

If it were conceivable that anything could be less than nothing, the validity of the argument that the denial of contribution will act as a deterrent to tortious conduct has even less validity where the person seeking it is guilty of no personal wrongdoing, but is liable only because of some policy of law or statute makes him vicariously responsible for the conduct of the actual tortfeasor. At most, the denial of contribution can have no other effect than to make it dangerous to employ carefully selected servants or to entrust the doing of a particular piece of work to a competent independent contractor. Yet neither of these things is socially improper. In fact, modern life makes them essential. What policy, then, can there be in the deterring of what is universally recognized as of social utility?¹⁷

The second reason why the claimant's wrongdoing debars him from a redress to which, but for it, he would be entitled, is not based upon a general principle which consistently denies the forum of the court to those whose conduct is in any way such as to subject them to tort liability. Courts should and do deny their forum to those who are consciously guilty of heinous wrongdoing. Of this *The Highwayman's Case*^{17a} is a conspicuous example. But wrongdoers have been constantly given relief. Indeed, in many states the fact that a fight or affray in which the plaintiff consents to take part is a criminally punishable breach of the peace actually gives him a right of recovery against his fellow criminal by treating his consent as a nullity because it is a consent to participation in a criminal act.¹⁸ That mistake under which a plaintiff has paid money is due to his own negligence is, except under exceptional circumstances, no bar to his recovering it back in an action of *indebitatus assumpsit*. There are many eases in which a negligent plaintiff may recover damages, and this though his negligence was something more than mere inadvertence. There is no reason to treat a negligent claimant seeking contribution more harshly than a negligent plaintiff seeking to recover damages. One thing is clear: The denial of the forum cannot be appropriate unless the person seeking it is con-

¹⁷It is the quintessence of fantastic absurdity to suppose that the fear of depriving their masters of contribution will make servants careful. One has heard of loyal servants, but not of such loyalty as to make it probable that a servant will be deterred from doing his appointed work badly by the fear that if he does so his master may be denied contribution in the unlikely event that his misconduct concurs with that of another in causing harm to a third person.

^{17a}*Everett v. Williams* (Ex. 1725), (1893) 9 L. Q. REV. 197, COSTIGAN, CASES ON LEGAL ETHICS (1917) 399.

¹⁸*Stout v. Wren*, 1 N. C. 420 (1820); see cases collected in Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace* (1924) 24 COL. L. REV. 818; BOHLEN, STUDIES IN TORTS (1926) 577.

siciously blameworthy. The second reason is, therefore, inapplicable unless the claimant is guilty of conscious and serious wrongdoing. There is absurdity in even suggesting that it justifies the denial of contribution to one whose liability is based solely on his vicarious responsibility for the actual wrongdoer and who is himself in no personal fault.

The third reason, namely, that the law has no scales to determine the relative guilt and, therefore, the relative responsibility of persons whose tortious conduct concurs in causing harm to third persons, has been refuted by experience. No complaint has been made of the manner in which courts and juries have administered the provision of the Federal Employers' Liability Act¹⁹ which makes the plaintiff's contributory negligence a matter to be taken into account only as affecting the amount of his damages. Throughout Canada and several states in the Union statutes are in force which make a like provision. The legal machinery of Canada and such states has proved adequate for the administration of such statutes. There is no reason why the determination of the respective amounts payable by joint or co-tortfeasors should present any greater difficulties.²⁰

Contribution is universally allowed in two situations. The first is where two or more persons who are themselves personally innocent are under a common vicarious responsibility as master or otherwise for the misconduct of the actual wrongdoer. The leading American case is *Bailey v. Bussing*,²¹ in which the plaintiff and defendant were jointly engaged in operating a stage route. The driver of one of their buses was negligent. The effect of this negligence, combined with the effect of the concurrent negligence of the plaintiff, resulted in injury to the third person. The plaintiff, having satisfied the claim of a third person

¹⁹45 U. S. C. A. § 53 (1928).

²⁰See LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936), in which Professor Charles O. Gregory describes the procedure under which the various states which, by statute or at common law, allow contribution, have given effect to it, and in which he suggests a statute which, while perhaps overly complicated for the ordinary lawyer's understanding, if properly understood supplies a very satisfactory method.

²¹28 Conn. 455 (1859); see also *Hurly v. Hobbs*, 117 Me. 449, 104 Atl. 815 (1918); *Acheson v. Miller*, 2 Ohio St. 203 (1853) [but cf. *Royal Ind. Co. v. Becker*, 122 Ohio St. 582, 173 N. E. 194 (1930)]; *Horbach's Adm'rs v. Elder*, 18 Pa. 33 (1851). In connection with the last case, note that Pennsylvania now allows contribution generally, *Goldman v. Mitchell-Fletcher Co.*, *supra* note 3. It is interesting to note that in the earliest case, *Wooly v. Batte*, 2 Car. & P. 417 (K. B. 1826), contribution was allowed without any reason being given, but the argument of counsel for the claimant stressed only the fact that there was no personal wrongdoing on his part.

who was injured by the negligence of the driver of one of their coaches, was allowed contribution. The second situation is where two or more persons deal with chattels in the bona fide and reasonable assertion of a common right.²² The typical case is where a number of creditors convert the chattels of a third person by an attachment. In such case, one of the creditors who is forced to pay the entire claim is entitled to contribution from the others in proportion to the amount of their several claims.²³ In the majority of these cases, particularly those of the first class, the court bases the right to contribution upon the claimant's personal innocence of any conscious wrongdoing. Therefore, it should logically follow that one who becomes a trespasser not only by the technical violation of a proprietary right but also by mere inadvertence should in all cases be allowed contribution. At the very least, it is implicit in these decisions that contribution should be granted to one whose liability is based solely upon his vicarious responsibility for the actual wrongdoer.

It is a curious fact that in many of these states recovery is denied to a claimant who has satisfied a claim for harm done by the misconduct of a servant whom he has employed individually and not in concert with the defendant from whom he is seeking contribution.²⁴ It would seem that if the fault of the servant is to be imputed to his exclusive master, "in Adam's fall they sinned all", and each of the employers should partake of the guilt of their common employee.²⁵ It may be

²²This situation is recognized by Lord Kenyon, in *Merryweather v. Nixan*, as an exception to the rule which he announced there.

²³*Farwell v. Becker*, 129 Ill. 261, 21 N. E. 792 (1889); s. c. 62 Ill. App. 624 (1896); *First Nat'l Bank of Pawnee City v. Avery Planter Co.*, 69 Neb. 329, 95 N. W. 622 (1903); *Central Bank & Trust Co. v. Cohn*, 150 Tenn. 375, 264 S. W. 641 (1924). In *Spalding v. Administrator of Oakes*, 42 Vt. 343 (1869), contribution was denied to one of two joint owners of a ram which, without actual negligence, had been permitted to escape. This was based, however, upon the view that fault must be found even where in fact the liability was absolute. This led the court to hold that the fact of the escape of the ram made its custody negligent, even though every practicable precaution had been taken to prevent it. So, too, in *Percy v. Clary*, 32 Md. 245 (1870), the court held that a mistake of law was not such a justification for the ejection of a tenant as to make it innocent and, therefore, to permit contribution.

²⁴See, for example, the statements in *Wise v. Berger*, 103 Conn. 29, 130 Atl. 76 (1925); *Rose v. Heisler*, 118 Conn. 637, 174 Atl. 66 (1934); *Pennsylvania Co. v. West Penn. Rys.*, 110 Ohio St. 516, 144 N. E. 51 (1924). As to the latter, however, note that the earlier case of *Acheson v. Miller*, *supra* note 21, has been considerably emasculated by *Royal Ind. Co. v. Becker*, *supra* note 21.

²⁵It may be suggested that the court may have been influenced by the fact that the joint employment of a servant in common is usually a part of a "joint enterprise", generally for profit, which differs only in its transitory character from

suggested as a reason for this apparent anomaly that the majority of accidents are caused in part by the misconducts of servants or agents of corporations. Not only is it natural to regard corporations as in a peculiar degree affected by the wrongdoing of their servants, but also, if contribution were permitted where the only basis of liability was the fault of a servant, contribution would be obtainable in substantially every instance by a corporation which was under a liability common to it and to an individual person, while the individual, being a personal tortfeasor, even though by mere inadvertence, could not recover contribution from a corporation whose servant's misconduct had been a contributing cause of the accident.

There is one other situation in which there is a split of authority as to the allowance of contribution. In *Nickerson v. Wheeler*,²⁶ the directors of a corporation were required by a general statute to file a report showing certain facts bearing upon its financial condition within thirty days after its annual meeting. Another section of the act provided that on failure to file this report the directors should be jointly and severally liable for the debts of the corporation during the time in which they failed to file it. The corporation failed to file the required report, and one of the directors satisfied a claim of one of the corporate creditors. He was allowed contribution from a number of his fellow directors. The opinion was based upon the court's view that the doctrine of *Merryweather v. Nixan* should not be applied to a case in which there was no intentional wrongdoing. In addition, however, the court spoke of the statute as being "remedial in . . . character and intended for the benefit of creditors", so that its purpose was served when the plaintiff paid.

In *Illinois State Bank v. Queen City Quarry Co.*,²⁷ a statute provided: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers, assenting thereto, shall be personally and individually liable for such excess, to the creditors of the corporation." The case is meagerly reported, but enough appears to show that the court regarded the director's liability as in

a partnership. Since a partner held personally for a tort committed by an employee in the course of the partnership business had always been allowed contribution from his co-partner, it was natural that the same rule should be applied to joint enterprises. See the very recent case of *Curtis v. Hanna*, 53 P. (2d) 795 (Kan. 1936), in which the court held that proof of a joint adventure was not a variance in a suit in which partnership was alleged, since one aspect of a joint adventure differs from a partnership only in that a partnership is general in its field of operation and length of duration while a joint adventure is limited to a particular enterprise or venture.

²⁶118 Mass. 295 (1875).

²⁷203 Ill. App. 176 (1916).

the nature of a "surety's liability". An officer who had performed necessary services for the corporation, and who thus became a creditor thereof, sought to compel another director to contribute toward the payment of the sum thus due. The court denied plaintiff's claim for contribution asserted in this manner, but only on the ground that the claimant himself actively and knowingly permitted the excessive debt to be contracted.

In *Rogers v. Bonnett*²⁸ and *Andrews v. Murray*,²⁹ on the other hand, recovery was denied. In the first of the two cases, the facts were identical with those in the Illinois case, except that the claimant was not, as there, the director responsible for the excessive debt. In the second case, the facts were substantially identical with those in *Nickerson v. Wheeler*. In both cases, contribution was denied on the ground that the liability was in the nature of a punishment for the violation of the provisions of the statute. A like result was reached on similar grounds in *Curtis v. Welker*,³⁰ the difference being that the claimant's liability arose not from a failure to obey a statutory requirement, but out of failure to perform his common-law duty as director to exercise reasonable care in supervising the corporate subordinates so as to prevent peculations. These cases cannot be reconciled. The divergent result is due to the difference of view as to the purpose of the statute or duty in question.³¹

In the states in which contribution is allowed without statutory aid, it is restricted to cases in which the claimant is not conscious of wrongdoing or, what is much the same thing, the circumstances are not such that he must be "presumed" to be so.³² It is noticeable that the for-

²⁸2 Okla. 553, 37 Pac. 1078 (1894).

²⁹33 Barb. 354 (N. Y. Sup. Ct. 1861).

³⁰54 App. D. C. 272 (1924). Cf. *Nettles v. Alexander*, 169 Ark. 380, 275 S. W. 708 (1925), where the statute imposed a fine. Held, no contribution permitted.

³¹In favor of the Massachusetts and Illinois cases, it is significant that the justice of allowing contribution in such case is recognized by the English statute, which provides: "§ 6 (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) . . ." contribution can be had.

³²It is suggested that the use of the term "presumption" is unfortunate. Presumption is used in at least four different senses. First, it may mean that certain facts are sufficient to support a finding by the jury that the ultimate fact (that is, the fact assumed by the so-called presumption) exists. Second, it may mean that the proof of such facts of itself requires a finding of the existence of the ultimate fact, in the absence of counter-proof which makes its existence so doubtful as to permit the jury to find either way. Third, it may cast upon the party against whom it operates the burden, not merely to produce evidence, but to convince the trier of the fact upon conflicting evidence of the nonexistence of the fact presumed. Fourth, it may be a so-called conclusive presumption of law, by which the substantive law is changed under the guise of a evidentiary

mulae used³³ conform exactly or very closely to the language almost universally used in the earlier cases to justify the allowance of contribution between joint or common employers of an actual wrongdoer.³⁴ While the facts in these cases present only the problem of dis-

rule by proving the truth of the basic facts tantamount in legal effect to the ultimate fact, although the evidentiary facts do not necessarily imply the existence of the ultimate facts.

If it is used in the former sense, no great harm is done. It would then mean nothing more than this, that contribution is denied if the circumstances are such as to justify the jury in finding as they do that the claimant was conscious of the wrongfulness of his act. Indeed, little harm would be done unless the presumption was regarded as a conclusive one. It may not be improper to require the claimant to show that although a normal man would have recognized the wrongfulness of the act, he for some reason peculiar to himself did not do so. However, in drafting the statute permitting contribution, if it be wise to restrict it to cases in which there is no conscious wrongdoing, the term "presumption" should be avoided, and the exact conditions under which contribution is to be denied should be specifically set forth.

³³"In an action for contribution by one joint wrongdoer against another, the test of recovery is whether the plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful." "The rule that no contribution lies between trespassers applies only to cases where the persons have engaged together in doing wantonly or knowingly a wrong." *Goldman v. Mitchell-Fletcher Co.*, *supra* note 3.

"There is, it is true, a general rule that the right of contribution does not exist between joint tortfeasors but it applies only between persons who by concert of action intentionally commit the wrong complained of. Where there is no concert of action in the commission of the wrong, the rule does not apply. In such cases the parties are not in *pari delicto* as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing between them. The rule does not apply to torts which are the result of mere negligence." *Mayberry v. No. Pac. Ry.*, *supra* note 2.

"Contribution between joint tortfeasors is the rule in this state, and may be enforced when the common liability exists, where the wrong is a mere act of negligence involving no moral turpitude." *Western Casualty & Surety Co. v. Milwaukee General Const. Co.*, 251 N. W. 491 (Wis. 1933).

³⁴"But an exception to this rule is equally well settled, and that is that when the parties are not intentional and wilful wrongdoers; but are made wrongdoers by legal inference or intendment, are involuntary and unintentional tort-feasors, so to speak, then the preceding rule does not apply and contribution may be enforced. The rule ceases because the reason for it has ceased. Contribution is not contractual. It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law." *Hobbs v. Hurley*, *supra* note 14, reviewing the earlier cases.

"From these and other cases referred to, we think the reasonable and common sense rule and the legal one are the same, viz: that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere." *Acheson v. Miller*, *supra* note 14.

tribution of a common liability between joint employers, the opinions do not allude to this as making contribution either exclusively or even peculiarly permissible. On the contrary, the language is so broad as to be applicable to all cases in which the claimant's fault is unintentional.³⁵

Unless cured by intelligent administration, even this relaxation of the rule in *Merryweather v. Nixan* seems too slight. If the words "conscious wrongdoing" are to include every act done with the realization that it contained a risk of harm to others—and this construction is quite possible—contribution would be allowable only to a claimant whose negligence was purely of inadvertence. There is little if any difference between the gravity of the two types of negligent conduct. Apart from this, and of greater practical importance, the point at which inadvertence passes into realization of danger is obscure and difficult of ascertainment, and even more of that intelligible description which is essential to the administration of a rule of law which must be applied by the jury under the instruction of the court. Last of all, it makes the right to contribution depend upon the subjective attitude of the plaintiff, than which nothing is less capable of satisfactory proof.

One thing is clear. Under present day conditions, to regard the breach of a statutory enactment, as has been done in Minnesota,³⁶ as conscious wrongdoing, in effect makes the rule in *Merryweather v. Nixan* in its full strictness applicable to the great majority of automobile accidents and many other accidents as well. The highway acts in the majority of American states contain the most detailed provisions as to the maintenance and operation of automobiles. The breach of many of these is punishable by fine and occasionally by imprisonment. That the standard of care in these particulars is fixed by statute, rather than by court decision or the verdict of a jury, does not alter the fact that the violation of such provisions is conduct falling below the standard required by society speaking through its legislative representatives, and is, therefore, negligence. To call even the conscious violation of such a statute "conscious wrongdoing" of the sort which should bar contribution is bad enough. It is far worse when coupled with an acceptance of the fiction that all men know the law so as to deny contribution

³⁵W. T. S. Stallybrass, in SALMOND, TORTS (8th ed. 1934), states that in his opinion the rule in *Merryweather v. Nixan* has not been regarded as applying to any claimant seeking contribution guilty of intentional or conscious wrongdoing or fraud.

³⁶*Fidelity v. Casualty Co. of N. Y. v. Christenson*, 183 Minn. 182, 236 N. W. 618 (1931) (statute prohibited parking at night without rear light). See, similarly, *Nettles v. Alexander*, *supra* note 30 (failure to file a required corporate report; statute imposed a fine for neglect).

if the claimant has violated an obscure and perhaps obsolete statutory provision of which, as a nonresident, he can not be expected to know.

Notwithstanding the inequity of the denial of the contribution between tortfeasors and the searching criticism of it by courts and text-writers,³⁷ the tendency of courts to follow precedent makes it rather remarkable that even four should have broken with the rule in *Merryweather v. Nixan*, unsupported though it be by either practical value or good reason. This being so, such change as can be expected must in all probability be made by statute. Therefore, it may not be amiss to point out certain matters to which the draftsmen of such statutes may well give careful consideration.

For reasons outlined above, it is clearly inadvisable to restrict the scope of such statutes to inadvertent negligence. At the most, contribution should be denied only where the claimant's conduct is not merely in violation of a statute carrying a criminal penalty, but seriously criminal, and perhaps where the claimant's conduct is intentionally wrongful, in the sense that it is intended to cause the harm which results from it, and not merely in the sense that a recognizably risky act has been deliberately done.

Indeed, there is no reason to restrict it to negligence. There are cases in which contribution may well be allowed between persons who are under a common liability for other torts, for example, the publication of a libel. In many such cases, the two tortfeasors may be entirely innocent of any intention to defame or even of a realization that the matter which they publish can be understood in a defamatory sense, or if so understood can be regarded as applicable to the plaintiff. Again, coming back to contribution between negligent tortfeasors, the last clear chance doctrine is a rough-and-ready way of mitigating the severity of the contributory negligence rule. It often places upon a defendant the entire burden of bearing a loss in the causing of which the plaintiff's hardly less culpable conduct had a share, indeed an equal share. The allowance of statutory contribution makes such an inequitable apportionment of the loss unnecessary, and the act should be so drawn as to make it impossible that in construing it courts should decide contribution cases by the analogy of the decision by the House of Lords in *The S. S. Volute*,³⁸ that the admiralty rule, permitting a negligent plaintiff to recover a proportion of his loss, is to be applied only where, under the principles of common law, including the last clear chance doctrine, he would otherwise be precluded from recovery. While a purely "contribution" statute does not deal with a plaintiff's

³⁷See Leflar, *supra* note 13 at n. 40, for a collection of literature on the subject.

³⁸[1922] 1 A. C. 129.

contributory negligence, nonetheless it should be so expressed that the last clear chance doctrine cannot creep in to place upon a particular delinquent, because he had such chance, the sole burden of a liability which the injured person might have enforced against him or a co-delinquent.

Furthermore, if contribution is allowed to all tortfeasors and not merely to those whose conduct is not intentionally wrongful, it should be provided that, insofar as the damages are punitive, they should be borne exclusively by him upon whom they were laid. It should be further provided, and this is one of the most important of provisions, that some procedural method should be established by which the one of two persons under a common liability against whom an action is brought may bring in as co-defendant his co-tortfeasor, as has been done in Pennsylvania.³⁹ A failure to utilize this procedure should not, however, prevent a defendant from bringing a separate action for contribution, particularly where, because of residence in another state, his co-delinquent is not amenable to the process of the court.

Two further situations must be dealt with. The gross injustice of making a release of one tortfeasor, unless so expressed as to amount merely to a covenant not to sue, operate as a release of all others, should be removed. The provision to this end in the statute submitted to the legislature of New York by its Law Revision Commission^{39a} is certainly worthy of attentive study. At all events, a release of one tortfeasor should not operate as the release of joint or co-tortfeasors unless this effect is plainly stated in it and in a way which is intelligible to the ordinary man from whom such releases are obtained. Secondly, provision should be made for the equitable distribution of the loss in the event that one of two tortfeasors has obtained a release of his, but only his, liability. If the injured man settles for a sum which, upon suit against the unreleased tortfeasor, is seen to be less than the proportion of the loss which the released tortfeasor should bear, the injured man who has consented to the settlement should bear the loss of this disparity. He should recover no more from the unreleased defendant than such proportion as the latter would have had to pay had the other delinquent been brought into the action as co-defendant. Thus, if *A*, the original plaintiff, settles with *B*, one of the persons liable for his injury, for the sum of one thousand dollars, and in a subsequent action against the other defendant his damages are assessed at ten thousand dollars, *A*'s recovery should be limited to five thousand dollars. *A* and not *C* should bear the loss entailed by the inadequate settlement which

³⁹PA. STAT. ANN. (Purdon, Supp. 1935) tit. 12, § 141.

^{39a}*Supra* note 13.

he has made with *B*. Here again the proposed statute submitted by the Law Revision Commission of the State of New York is deserving of attention.

It is a moot question whether the statute should provide the intimate details of the procedure by which the contribution is to be effected. Professor Gregory, of Chicago, in an extremely careful and able book, *Legislative Loss Distribution in Negligence Actions*,⁴⁰ has proposed a form of statute by which the entire loss is to be adjudicated in a single action in which all the parties concerned, possible plaintiffs as well as possible defendants, would be compelled to join. His suggested act goes far beyond a mere contribution statute. It includes the abolition of contributory negligence as a defense. It furthermore requires all parties who have a claim for damages to join in the action brought by any one of them. The advisability of attempting so many reforms in a single act is open to grave doubt, but the point to which attention is called is the elaborate procedural provisions of the act. To the writer, it would seem that such matters of detail are better left to rules promulgated by the highest court of the particular state. If the court is intelligent enough to understand and sympathetic enough to give an adequate administration of a contribution act, it should be competent to promulgate rules of procedure which will meet the needs of its own practice. There is always danger in setting out in advance too definite a procedural scheme. Conditions may arise, unforeseeable by the draftsman, which will make what appears to be a highly valuable process extremely inconvenient.

Last of all, as has been heretofore suggested, the persistent denial of contribution may well have resulted in the allowance of indemnity in cases in which the burden of the loss should have been borne by both tortfeasors rather than transferred to him in solido to either one of them. If it is constitutionally possible, the proportions in which the co-delinquent should bear the loss should be left to the judgment of the court, the jury finding merely the fact of negligence or other misconduct. Furthermore, the court should be given authority not merely to award contribution where the circumstances justify it, but also to award indemnity where the conditions require that form of relief, and to refuse it where contribution is more equitable. These provisions are in substance included in the English Act.^{40a}

Finally, the faulty draftsmanship of the many statutes which have been enacted in American states shows a necessity for the drafting of

⁴⁰(1936).

^{40a}*Supra* note 9.

a model statute, preferably by the National Conference of Commissioners on Uniform State Laws. A great mass of important data has been collected. Statutes good and bad have been passed in England, Canada and America. The material is available; the need, great. It is to be hoped that the Commissioners will seize this opportunity to confer a great benefit upon American jurisprudence.* †

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†This concludes the discussion of contribution. The second installment of this article, dealing with the problem of indemnity, will appear in a subsequent issue of the Quarterly.