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marks or erasures, nor should letter press copies be made of it, or any tracings save by the gentlest and most skilful hand. Generally the earlier such documents reach the control of the court or its custodians, the better.

Finally, counsel seeking the aid of an expert, should call upon him as soon as the necessity appears in order that he may have ample time within which to make his investigations and prepare for trial. As Prof. Wigmore well observes, "It is preposterous to expect him invariably to obtain by a brief inspection on the stand the necessary data for an opinion. Close measurements, detailed enlargement, and other expedients of the expert, may often require not only a length of time but a quantity of apparatus and a certain degree of seclusion."[86]

CONTRIBUTION BETWEEN JOINT TORT-FEASORS

CHAS. B. QUARLES.*

With all the litigation in negligence cases and the greater part of the cases tried in our courts is of this kind, it seems strange indeed that the courts have not since long settled and placed beyond dispute all questions as to the rights of persons liable on joint tort-judgments.

But such is far from being true. The right of the judgment creditor to enforce the judgment *in solido* against any of the defendants is plain. But where one such judgment debtor has been forced to pay more than his aliquot part of the liability, what his rights are if any he has against the others, is very much unsettled at least in the minds of most lawyers.

In the ordinary negligence case where there was no concert of action and no real intent to do the plaintiff an injury, it is obviously fair for each of the defendants to stand his proportionate share of the loss. But after such a judgment has been

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86. 3 Ev. sec. 2011.

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wholly paid and satisfied by one defendant, can he enforce contribution against the others?

If the statement so generally given in the text books and by way of obiter in the opinions found in the reports is correct, "there can be no contribution between joint tort-feasors." Fortunately, however the courts have quite generally, although not always, where the question was squarely presented for their decision, applied the rule as it should be applied, only to cases where the defendant was guilty of a wilful wrong. In such cases it seems correct that they should be denied recovery for the courts will not lend their aid to a wrongdoer, to minimize the loss for which he is morally responsible.

An examination of the reported cases and a search into the history of the doctrine reveals the fact that the rule against contribution is one of limited rather than of general application and one that is properly confined within the limits above suggested.

Merryweather vs. Nixan, 8 Term. Rep. 186, K. B. 1799 is generally considered as the first and leading case wherein contribution was denied between wrongdoers. Many text writers and some judges in their opinions have carelessly referred to this case as stating the general proposition that in no case can there be contribution between persons jointly liable for tort.

In the *Merryweather* case, supra, a judgment had been obtained against the then plaintiff and defendant for an injury done by them to a reversionary estate in a mill. The opinion states as to the first judgment creditor: "Having recovered 840 l. he levied the whole on the present plaintiff who thereupon brought this action against the defendant for a contribution of a moiety as for so much money paid to his use." A non-suit was granted on the ground that no contribution could by law be claimed as between joint wrongdoers. The rule of that case should not be extended to dissimilar situations and text writers to the contrary notwithstanding, courts have generally limited the rule to cases where the defendants were as in the cited case guilty of conscious and wilful wrongdoing.

In 9 Cyc. 804, appears the statement:

> "Where one of several wrongdoers has been compelled to pay the damages for the wrong committed, the

> general rule is that he cannot compel contribution from the others who participated in the commission of the wrong."

Then the author gives exceptions to the rule limiting it to cases where the person seeking redress must be presumed to have known that he was doing a wrongful act and stating as examples cases of attaching creditors, innocent agents, persons guilty of mere negligence, and technical wrongdoers.

The general rule of law is that

> "Where two or more persons are jointly or jointly and severally bound to pay a sum of money and one or more of them are compelled to pay the whole or more than his or their share, those paying may recover from those not paying the aliquot proportion which they ought to pay."

7 Amer. & Eng. Enc. of Law (2nd ed.) 326.

Why would it not be better to give as an exception to the general rule the case of wilful or intentional wrongdoers rather than to state that the general rule is against contribution between wrongdoers and then except all cases but those of persons guilty of a wilful wrong? This statement of the law would certainly lead to less confusion and be more nearly accurate, because the doctrine is itself an exception rather than a rule.

It seems strange that the situation does not arise more frequently where defendants held to joint liability because of negligence are forced to seek contribution by reason of being required to pay more than their aliquot proportion of a judgment for which they are liable *in solido*. It is significant that in this state there is no reported decision of this kind although the reasoning in one of our late decisions strongly suggests what the Wisconsin Supreme Court would hold in such a case.

In *Merten vs. Puffer*, 157 Wis. 576, a claim for contribution was brought by one partner against the estate of his deceased co-partner. The firm had received a fee for legal services in carrying out an arrangement whereby an estate was distributed in a manner which was later declared by the court to be different from that provided by the will. The settlement having been

declared invalid, the sum received by the firm was required to be paid back to the trustee of the estate. One of the partners made the payment and then sued the estate of the other for contribution. Such contribution was allowed and approved by the supreme court because the partners acted honestly and in good faith but under a mistaken conception of the law, and because they were not conscious wrongdoers.

It is interesting to note that in the decision, Winslow, C. J., says:

> "The principle that there can be no contribution between wrongdoers is very familiar and is frequently applied."

The decision, however, does not hold that there can be no contribution between wrongdoers but does decide that there *can* be contribution between persons liable *ex delicto* but not guilty of conscious or intentional wrongdoing.

There is no obstacle in principle or authority to contribution between persons guilty of mere negligence, and when a case of this kind does come before our supreme court it seems that court will hold that the rules of law and equity will entitle plaintiff to a recovery.

Where the situation has arisen in other states the courts have almost uniformly so held. For instance in the case of *Ankeny vs. Moffett,* 37 Minn. 109, 33 N. W. 320—personal injury action—Mitchell, J., says:

> "That rule (the rule against contribution) is applicable only where the person seeking the contribution was guilty of an intentional wrong, or, at least, where he must be presumed to have known that he was doing an illegal act. It is immaterial whether the ground of Walter's recovery was the negligence of Moffett and Johnson personally, or that of their agent, the builder. In neither one was there any intentional wrong. In the one case it would be mere negligence in doing a lawful act; in the other case there would be no personal fault whatever on their part. In neither case would the rule apply."

In a later case, *Mayberry vs. R. R. Co.*, 110 Minn. 79; 110 N. W. 356 at page 357, the court says:

> "One of the principal reasons assigned by those courts which hold such a joinder improper is that the right of contribution is lost and cannot be resorted to by one against the other co-defendant. This reason, as applied to cases of this kind, is unsound. There is, it is true, a general rule that the right of contribution does not exist as between joint tort-feasors; 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. *Ankeny vs. Moffett*, 37 Minn. 109, 33 N. W. 320."

The rule as to contribution is expressed by the Ohio court as follows:

> "The common sense rule and the legal rule are the same, namely, 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."

Achinson vs. Miller, 2 Ohio (N. S.) 203, quoted in Cooley on Torts (2d ed.) p. 170.

Another complication which frequently arises or which is apt to arise out of a misconception of this rule, is where one or more of the persons jointly chargeable with negligence is insured with a liability company. Where such insurance company pays the judgment or takes an assignment of it, is there any reason why it cannot recover the whole amount of the judgment from the other parties or at least have contribution? If the insurer stands in the shoes of its assured, taking an assignment would not place it in any different position than if it had paid the judgment and caused it to be released, but as its liability is on contract only, and it is not itself a wrongdoer, it could hardly be

successfully maintained that it would be barred of recovery under any principles of equity.

A somewhat similar situation was considered in *Kolb vs. National Surety Co.*, 176 N. Y. 233, 68 N. E. 247, in which case a judgment was obtained against several tort-feasors. An appeal was taken, one of the defendants filing an undertaking on the appeal. The surety on such undertaking paid the judgment and sued to recover against the other tort-feasors. The court says at page 248

> "The appellant argues that when the surety company paid the judgment recovered by Smith, the effect was the same as though Adwen, for whom it was surety, had paid the judgment against him and his co-defendants; that, as a judgment recovered in tort, it was extinguished by the payment and no right of contribution against this plaintiff or Theodore Smith who were joint tort-feasors with Adwen survived or existed."

The court then discusses this question and states further:

> "In the second place, the surety in this case does not come within the reprobation of the court in any aspect; for, the principle of equal contribution being a just one, even as between wrongdoers, and the denial of its recognition resting upon especial grounds, which would be peculiar to the complainant in the bill for equitable relief, this surety is not embarrassed by asking for that which the court had, in the Adwen proceeding, accorded to it. It is innocent of any wrongdoing. That it has paid an indebtedness, arising upon a judgment in tort against several, for one of the judgment debtors, should not, as a matter of natural justice, deprive it of the right, approved as it is by a decree of the court, to compel the joint debtors to contribute proportionately to the payment of the judgment now its property. The right of subrogation is founded in natural justice, and it should be given effect upon purely equitable considerations. * * *
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> "But there is another conclusive objection to the maintenance of this action, and that is that this appellant does not commend himself to the equitable consideration of the

court. As a joint tort-feasor, he is subject to the operation of the rule that a court of equity will not listen to one seeking to be relieved of his liability under a joint judgment in tort. He has no more right to demand equitable intervention in his behalf than if the judgment creditor had assigned his judgment to some stranger to the parties, and the purchaser was enforcing it against him as one of the judgment debtors. How can the appellant come into a court of equity and ask that he be relieved from paying a proportion of the judgment which he had agreed to pay, and which, in fact, is less than what might be exacted from him as his proportion? His position is highly inequitable whether he be regarded as one of several joint tort-feasors seeking immunity from contribution, or whether he be regarded as violating his express agreement and as seeking to escape the liability he had recognized as existing under the judgment against him.

"I think the judgment appealed from is right, and that it should be affirmed, with costs."

This case was approved in *Brinkerhoff vs. Holland Trust Co.*, 159 Fed. 191 at 201.

The writer recently had occasion to prosecute a case involving the questions discussed in this paper, but unfortunately that litigation terminated before reaching the Supreme Court and too soon to become the occasion of a direct precedent on a somewhat misunderstood or carelessly quoted rule.

But a careful briefing of the subject disclosed the fact to be that the great weight of authority in the decisions holds to the rule of contribution in all cases of persons liable on judgments *ex delicto* excepting for wilful wrongs. The statement frequently found in text books and as obiter in decisions that there can be no contribution between tort-feasors is wrong and grossly misleading in that it states what is really an exception as though it were the rule.