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The Joint Tort-Feasor in Missouri

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law. Although most of these questions have now become settled, new and more involved ones are coming forth with the introduction of color, the third dimension, and television in this field. It is therefore apparent that the "Shotwell Bill" should be given serious consideration in order that the benefits of past experimentation may be enjoyed and the "period of fumbling" in copyright litigation be ended. The clarification of the many confused issues which yet await logical settlement would permit and even induce a continuation of the rapid growth of the motion picture industry. There would undoubtedly be a consequent increase in the value of all literary and musical works possessing any substantial potentialities as material for use in future productions. Thus, all parties concerned—authors, composers, publishers, producers, distributors, exhibitors, and also consumers—would be directly or indirectly benefited by the adoption of the "Shotwell Bill."

MILTON H. ARONSON.

THE JOINT TORT-FEASOR IN MISSOURI

The gradual change in the concept of tort liability made of the tort-feasor a new man. At early common law, the liability of the tort-feasor was to a large extent imposed as a penalty for his wrongdoing.[1] If two or more were liable for the tort, any or all might be held to pay. And, according to *Merryweather v. Nixan*,[2] those upon whom a levy was made could not enforce contribution by the others. Today, tort liability is no longer imposed as a penalty. Its purpose is to shift the burden of loss caused by tortious conduct to those who may be properly required to bear it. With this change in concept there came a feeling that the rule denying contribution between joint tort-feasors operated too harshly in many situations. Nevertheless, the majority of jurisdictions which have not modified the rule by statute still deny any right to contribution between joint tort-feasors.[3] Some

1. Bohlen, Contribution and Indemnity between Tortfeasors (1936) 21 Corn. L. Q. 552, 554. Pollock, *The Law of Torts* (13th ed. 1929) 4: "In the medieval period the procedure whereby redress was obtained for many of the injuries now classified as torts bore plain traces of a criminal or quasi-criminal character, the defendant against whom judgment passed being liable not only to compensate the plaintiff, but to pay a fine to the king."

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

3. Bohlen, supra note 1, at 552; Leflar, Contribution and Indemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130, 141.

courts, however, have refused to follow the rule except in respect to judgments based on intentional wrongs.[4] This result is usually justified by reference to the fact that contribution originated in equity and is in accord with "the broad principles of natural justice."[5] It has also been suggested that contribution might be recovered on the basis of "unjust enrichment."[6]

In order to avoid the injustices flowing from adherence to the rule of no contribution, Missouri passed a contribution statute in 1855.[7] A subsequent addition to the statute allows the injured party to release certain of the tort-feasors without impairing his right of action against the others. Each of these clauses of the statute, related though they are, gives rise to different types of problems. This follows from the fact that release deals with the relationship between the plaintiff and the defendants, while contribution centers on the relationship between the defendants themselves. Consequently, this note is divided into two main sections, each dealing with one of the aspects and its particular implications.

ACTIONS AGAINST JOINT TORT-FEASORS

The principle that every tort-feasor who by wrongful act concurs in causing injury is liable for the resulting damage is one firmly established in the law.[8] One who has been injured may sue, either singly or jointly, each tort-feasor whose negligence contributed to cause the injury.[9] The right to join the defendants in such an action is recognized by Revised Statutes of Missouri (1929) section 703:[10]

4. Leflar, supra note 3, at 141.

5. Leflar, supra note 3, at 136. See Williams, The Rule in *Merryweather v. Nixon* (1901) 17 L. Q. Rev. 293, 299: "But suppose the plaintiff in *Merryweather v. Nixon* had * * * filed his bill in the more dingy atmosphere of a Court of Equity. Would the result have been the same? It seems permissible to doubt it."

6. Woodward, *Law of Quasi-Contracts* (1913) 409, sec. 259. See Keener, *Quasi-Contracts* (1893) 408; Leflar, supra note 3, at 136, 137, especially footnote 33; Note (1930) 18 Calif. L. Rev. 522.

7. R. S. Mo. (1855) c. 51, sec. 8 (now contained in R. S. Mo. (1929) sec. 3268).

8. Shafir v. Sieben (Mo. 1921) 233 S. W. 419, 424.

9. Page v. Freeman (1854) 19 Mo. 421; Mitchell v. Brown (Mo. App. 1916) 190 S. W. 354, 356; Hendrix v. Corning (1919) 201 Mo. App. 555, 214 S. W. 253; 4 Restatement, *Torts* (1939) sec. 882.

10. Hutchinson v. Richmond Safety Gate Co. (1912) 247 Mo. 71, 152 S. W. 52, 64; Nokol Co. v. Becker (1927) 318 Mo. 292, 300 S. W. 1108, 1117 (suit in equity for an injunction). A person riding in an automobile and injured in a collision with another car can join both drivers as defendants in an action for damages. Sanders v. Marks (1933) 228 Mo. App. 1079, 60 S. W. (2d) 692.

> Every person who shall have a cause of action against several persons, * * * and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper; * * *.

Where two defendants were sued jointly in a tort action, it was contended that proof that only one committed the tort was not sufficient basis for judgment even as against the defendant who was guilty. However, by the accepted law of Missouri, joint liability need not be proved in such situations[11] and "consequently a misjoinder of defendants will not defeat a recovery."[12] This rule is not altered or modified by the contribution statute as the provisions of that statute are enabling and not restrictive. Furthermore, the contribution statute "relates to actions in which a joint liability exists, not to actions in which joint liability is merely charged and does not exist."[13]

Subject to much more controversy than the right to sue joint tort-feasors in one action is the right of the plaintiff to release one or more of them from liability. The effect of such a release has undergone far-reaching changes during the past half-century. In order to understand the problems arising in connection with release, one must be aware of the distinction between a technical "release" and a "covenant not to sue." At common law the former operates to extinguish the right of action, while the latter merely gives the covenantee a means of redress, such as a suit for damages for breach of the covenant. Thus in a case decided before the amendment of the contribution statute, it was held that where

> the injured party releases one joint tort-feasor he will discharge all, yet a covenant not to sue is *not a release* and it could not be pleaded by the covenantee in bar of an action by the injured party against him and the other wrongdoers.[14]

As indicated above, the release of one joint tort-feasor operated at common law as a discharge of all the others.[15] Adherence

11. Accord: 4 Restatement, *Torts* (1939) sec. 883.
12. Winn v. Kansas City Belt Ry. (1912) 245 Mo. 406, 151 S. W. 98.
13. Id. at 414, 151 S. W. at 100. See infra, p.
14. McDonald v. Goddard Grocery Co. (1914) 184 Mo. App. 432, 440, 171 S. W. 650. But even though the instrument were a covenant not to sue, the other defendants would be discharged if the plaintiff received full satisfaction, notwithstanding an intention not to discharge. *Dictum* in Arnett v. Missouri Pacific Ry. (1896) 64 Mo. App. 368, 376.
15. 1 Cooley, *Torts* (4th ed. 1932) 264, sec. 83; 4 Restatement, *Torts* (1939) sec. 885(1).

to this rule was based on several grounds. As a cause of action is one and indivisible, it was thought necessarily to be destroyed by the release.[16] The releasor is not entitled to receive more than full compensation.[17] If the release were under seal, complete satisfaction was presumed to have been given.[18]

Before the private seal was abolished in Missouri, a release under seal was regarded as being in complete satisfaction and, therefore, as discharging the other tort-feasors.[19] When the force of the seal was abolished,[20] a release effective to discharge the other tort-feasors was required to recite a full satisfaction or declare a release in express terms.[21]

In order to prevent discharge of all tort-feasors by a release, injured parties often framed the release so as to reserve the right to sue certain of the tort-feasors. At early common law such a reservation was void as repugnant to the fundamental character of a release.[22] But the Missouri courts gave force to the reservation[23] on the theory that a release with a reservation is similar to a covenant not to sue, and that consequently the release of one tort-feasor would not discharge all.[24]

When a reservation of a right to sue the other tort-feasors was given effect, those against whom the rights were reserved were liable only to the extent that the consideration for the release did not satisfy the claim.[25] Consequently, if the plaintiff acknowledged *full satisfaction* of the injuries complained of, any effort to reserve a cause of action against those jointly liable would not prevent the operation of the bar as to those not included in the release.[26]

16. Comment (1928) 38 Yale L. J. 124, and cases there cited.
17. Ibid.
18. McBride v. Scott (1903) 132 Mich. 176, 93 N. W. 243; Comment (1920) 18 Mich. L. Rev. 680.
19. Arnett v. Missouri Pacific Ry. (1896) 64 Mo. App. 368.
20. Mo. Laws of 1893, 117; R. S. Mo. (1929) sec. 2957.
21. Dulaney v. Buffum (1903) 173 Mo. 1, 73 S. W. 125; Hubbard v. St. Louis & Meramec River R. R. (1903) 173 Mo. 249, 72 S. W. 1073, where plaintiffs gave a receipt "in full settlement and satisfaction of all claims and demands in our favor"; Chicago Herald Co. v. Bryan (1906) 195 Mo. 574, 92 S. W. 902; Judd v. Walker (1911) 158 Mo. App. 156, 164, 138 S. W. 655.
22. Comment (1931) 79 U. of Pa. L. Rev. 503.
23. Funk v. Kansas City (Mo. App. 1912) 208 S. W. 840. In Dulaney v. Buffum (1903) 173 Mo. 1, 15, 73 S. W. 125, the court refused to give effect to a reservation of a cause of action as to those not released; but this was because the plaintiff had acknowledged full satisfaction of all injuries complained of in the petition.
24. Funk v. Kansas City (Mo. App. 1912) 208 S. W. 840; Berry v. Pullman Co. (C. C. A. 5, 1918) 249 Fed. 816.
25. Funk v. Kansas City (Mo. App. 1912) 208 S. W. 840.
26. Dulaney v. Buffum (1903) 173 Mo. 1, 73 S. W. 125.

In 1915 the common law of release was modified by the following addition to the Missouri contribution statute:

> It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released.[27]

Under the present statute the release of one joint tort-feasor does not release the others unless the release is "in full of all damages."[28] For example, one who had been struck by a falling awning accepted $500 from the owner of the awning before bringing suit and gave the owner a receipt "in full of all demands from injury received by the falling of the awning." Because of this, a subsequent suit against the city was discharged.[29] But, where the release was "in full of all claims of every kind and character against the said defendant," the court refused to release the other tort-feasor. The court distinguished the awning case, stating that the release there was in full of all demands arising from the injury, but that in the latter case it was restricted to "all claims * * * against the said defendant."[30] In the former case there was nothing to imply that the settlement was for anything less than the full amount he had suffered from the injury.

These two cases lend support to the theory that the courts are really seeking to carry out the intention of the parties. If the language and the surrounding circumstances evince an intent to accept a sum in complete satisfaction of all damage, the agree-

27. R. S. Mo. (1929) sec. 3268. Clark v. Union Electric Light & Power Co. (1919) 279 Mo. 69, 213 S. W. 851, was decided after the amendment of the contribution statute but followed the common law since the instrument of release had been executed a year before the amendment. Although the cause of action in Start v. National Newspaper Ass'n (1920) 222 S. W. 870, arose before the amendment of the statute, the statutory rule was applied because the actual settlement was made subsequent thereto.

28. Burton v. Joyce (Mo. App. 1930) 22 S. W. (2d) 890.

29. Abbot v. Senath (Mo. 1922) 243 S. W. 641.

30. Knoles v. Southwestern Bell Telephone Co. (1924) 218 Mo. App. 235, 265 S. W. 1005.

ment will bar further suit against any of the other tort-feasors.[31] Strangely, however, where the plaintiff made "*full* settlement for an automobile accident" with one tort-feasor, it was unsuccessfully argued that the words "we hereby release *him* from all further liability in the matter" limited the release solely to the tort-feasor with whom the settlement had been made.[32]

Where one defendant is primarily liable, the plaintiff may settle with the co-defendants who were also negligent, but not primarily so, without affecting his right to proceed against the one primarily liable.[33]

Merely pleading full settlement of the cause of action is not sufficient. This defense must be proved as must any other issue. To hold otherwise would be to regard a release of one as a release of all as a matter of law.[34] The construction and interpretation of a written release " 'like that of any other instrument' is for the court."[35]

Instead of making a full settlement, the plaintiff may accept part satisfaction from one or more of the joint tort-feasors. In such instances, those from whom the part satisfaction has been received may be released in full and the others held for the balance.[36] Thus, a settlement of "all matters and things in controversy between the plaintiff and the defendant, Linus Pinzel" and an agreement that "the cause be dismissed as to the defendant, Linus Pinzel" was held to be a separate settlement and release of that defendant—not impairing the plaintiff's right to collect the balance from the other defendant joint tort-feasors.[37] Even though there be no release, such payments by one tort-feasor "are available *pro tanto* to the use of the other as a matter of mitigation in the final award of damages accrued because of the tort of both."[38]

Not to be overlooked, however, is the basic principle of law

31. Comment (1936) 21 ST. LOUIS LAW REVIEW 270, and cases there cited.

32. McEwen v. Kansas City Public Service Co. (1929) 225 Mo. App. 194, 19 S. W. (2d) 557 (Italics supplied).

33. Jamison v. Kansas City (1929) 223 Mo. App. 684, 17 S. W. (2d) 621.

34. Booker v. Kansas City Gas Co. (1936) 231 Mo. App. 214, 96 S. W. (2d) 919.

35. State ex rel. Caraker v. Becker (1933) 333 Mo. 400, 62 S. W. (2d) 899.

36. R. S. Mo. (1929) sec. 3268; Clifton v. Caraker (Mo. App. 1932) 50 S. W. (2d) 758; Booker v. Kansas City Gas Co. (1936) 231 Mo. App. 214, 96 S. W. (2d) 919; 4 Restatement, *Torts* (1939) sec. 885(3).

37. Clifton v. Caraker (Mo. App. 1932) 50 S. W. (2d) 758, 761.

38. Judd v. Walker (1911) 158 Mo. App. 156, 169, 138 S. W. 655.

that there can be but one satisfaction for one wrong.[39] Consequently, where the settlement is in full satisfaction of the plaintiff's claim, nothing can be recovered from the tort-feasors not released.[40] So also, an injured person who sues one tort-feasor and recovers a judgment in complete satisfaction of his injury cannot subsequently sue another tort-feasor who contributed to the injury. This is true even though the tort-feasors are guilty of different acts of negligence.[41]

In *Farrell v. Kingshighway Bridge Co.*,[42] defendants *A* and *B* were sued jointly. During the prosecution of the suit, the plaintiff agreed with *A* not to sue out execution against him in consideration of a payment by *A* of $3,500. This was unknown to the jury. Thereafter the jury returned a verdict against *both* defendants in the sum of $2,500. Defendant *B* moved to quash the levy, stating that the plaintiff had already received full satisfaction. The St. Louis Court of Appeals upheld the verdict on the ground that the payment of $3,500 could not constitute a payment of the judgment because the judgment was not yet in existence and one defendant cannot object to the release of another—no right of contribution arising before judgment. It did not regard the agreement as a settlement in satisfaction but rather as a "gamble on the amount of the plaintiff's verdict."

The Missouri statute changes the common law rule as to discharge and consequently should be strictly construed. It has already been stated that under the statute a release of one joint tort-feasor does not impair the plaintiff's right to recover the balance from the others. By implication, if there is no balance, there should be no recovery against the others. This is in line with the generally accepted proposition that there can be but one satisfaction for one injury. If there had been a release of *A* for $500 and judgment had been against both for $2,500, the plaintiff would have been limited to the recovery of $2,000. In the *Farrell* case the plaintiff received $3,500 while the jury assessed his damage by both defendants at $2,500. Surely he was not entitled to receive the additional $2,500. Satisfaction for an injury may be shown in two ways: "as a matter of law" or as

39. Arnett v. Missouri Pacific Ry. (1896) 64 Mo. App. 368; Judd v. Walker (1911) 158 Mo. App. 156, 138 S. W. 655; Booker v. Kansas City Gas Co. (1936) 231 Mo. App. 214, 96 S. W. (2d) 919.

40. Abbot v. Senath (Mo. 1922) 243 S. W. 641; Burton v. Joyce (Mo. App. 1930) 22 S. W. (2d) 890.

41. Payne v. Bertman and Kelly (1930) 224 Mo. App. 690, 27 S. W. (2d) 28.

42. (1938) 117 S. W. (2d) 693.

a "matter of fact."[43] True, there was here no intention to discharge the other defendant, but actually and as a "matter of fact," the plaintiff had received *more* than what the jury considered full satisfaction for the injury. A *dictum* in one of the earlier cases indicates that this would discharge the other defendant even in the case of a covenant not to sue.[44] Since we have involved here a covenant not to sue out execution and since the basis of the rule is the idea of one satisfaction for one injury, it would appear that the court should have entered an order to quash the $2,500 levy—possibly conditioned on the payment by the defendant *B* of one-half the money actually paid out by *A*. For practical purposes this would have been equivalent to treating the motion to quash as an equitable prayer for an injunction against levying an execution.

ACTIONS BETWEEN JOINT TORT-FEASORS

A. The Rule Denying Contribution

The rule that there can be no contribution between joint tort-feasors has been repeated often and is well-known. But this absolute statement contains elements of untruth. In reality, every case in which it may be correctly applied could probably be matched with another in which its use would be incorrect.[45]

It is true that the English common law formerly regarded this as a settled rule. The doctrine had its inception in 1799 in *Merryweather v. Nixan*.[46] In that case, Lord Kenyon, Ch. J., relied on no previous decision denying contribution in tort to justify his departure from the rule of contribution[47] obtaining in other fields of the law. On the contrary, the only reason he gave was that he could recall no instance where such relief had been granted. It should be noted that this case was one in which the tort-feasors had acted in concert and were probably conscious of the fact that they were doing wrong. Nevertheless, the courts, relying on this case as authority, denied contribution where the one seeking it was a wrongdoer only to the extent that he was liable in a tort action. The explanation of this probably lies in the fact that at the time all tort liability seems to have been imposed as a penalty for wrongdoing.[48]

Certain rules of public policy continue to be advanced to justify

43. Arnett v. Missouri Pacific Ry. (1896) 64 Mo. App. 368, 373.
44. Id. at 376.
45. See supra, pages 572, 573.
46. (K. B.) 8 T. R. 186, 101 Eng. Rep. 1337; Williams, supra note 5.
47. Woodward, op. cit. supra note 6, at 401, sec. 255.
48. Bohlen, supra note 1, at 557; Pollack, op. cit. supra note 1, at 4.

the denial of a right of contribution: (1) such denial will serve to deter the commission of misconduct because the tort-feasor would know that he would very likely be forced to shoulder the entire liability himself; (2) no one should be allowed to make his own misconduct the grounds for an action in his favor; (3) courts have no interest in, nor have they time for, those who disregard the law; (4) " 'The law has no scales' to measure the relative fault of two negligent persons."[49]

In answer to these arguments, it may be said that they can be justly applied only where the tort-feasor is conscious of the fact that he is doing wrong. Those liable in tort without moral fault, and possibly only secondarily liable by operation of law, cannot so readily be attacked on the basis of these arguments. Furthermore, some of these arguments are of doubtful validity even in those cases where there is a conscious commission of a wrong. There would be little likelihood of a deterrent effect in the commission of torts inasmuch as the rule of no contribution would probably be unknown to most of those contemplating the commission of a tort. Some might know of it and yet be willing to take the chance that the other tort-feasor would have to pay. Furthermore, that the law has scales for the measuring of relative fault is shown by the application in certain courts of a rule which makes contributory negligence a consideration in arriving at the amount of damages to be given.[50]

The rule denying contribution is objectionable for various reasons. No longer is tort liability imposed as a penalty for wrongdoing. Today, it is intended to shift the loss caused by tortious conduct to those who may properly and justly be required to bear it. On this basis, the justice of allowing contribution between joint tort-feasors would seem to follow as a matter of course. Another objection to the denial of contribution is the likelihood of undesirable social consequences. A fertile field for collusion is laid open—one tort-feasor may approach the injured party with attractive offers and thus induce him to proceed against one of the other tort-feasors.

> It is common knowledge that such undercover dealings occur constantly in personal injury cases involving joint tort-feasors, although affirmative record of them seldom appears in the reported decisions.[51]

49. Bohlen, supra note 1, at 557; Leflar, supra note 3, at 133.
50. Bohlen, supra note 1, at 557-560.
51. Leflar, supra note 3, at 137, footnote 35.

B. The Missouri Contribution Statute— Its Nature and Extent

Because of the hardships and injustices arising from a strict adherence to the rule of no contribution, many of the states have modified and relaxed it by statute or decision. In 1855 Missouri enacted its contribution statute:

> Defendants in a judgment founded on an action for redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract.[52]

The meaning and effect of this statute depends, of course, upon its interpretation. Therefore it is essential to focus attention on the cases which have arisen under the statute.

An understanding of the cases is of necessity dependent upon the definition of the essential terms. Formerly, the Missouri Supreme Court regarded the contribution clause of the statute as applying only to persons between whom there was an intentional unity or concert of action; this excluded those between whom there had been merely an unintentional concurrence of acts which produced a single injury.[53] The court in a subsequent case changed its opinion and held that the statute

> applies to a case of a negligent omission of duty on the part of several tort-feasors which concurred in causing an injury, though there was no unity or concert of action on their part.[54]

Furthermore, a distinction must be made between "contribution" and "indemnity." The right to indemnity arises from an express or implied contract, while contribution does not spring from a contract but is based on the principle "that equality of burden as to a common right is equity, and that wherever there is a common right the burden is also common."[55] Full reimbursement is recovered in an indemnity action, but contribution affords recovery of only a portion of the judgment.[56] Thus, if two de-

52. R. S. Mo. (1855) c. 51, sec. 8 (now contained in R. S. Mo. (1929) sec. 3268). For a list of contribution statutes of other states, see Note (1931) 45 Harv. L. Rev. 369.

53. Paddock-Hawley Iron Co. v. Rice (1903) 179 Mo. 480, 495, 78 S. W. 634, 638.

54. Kinloch Telephone Co. v. St. Louis (1916) 268 Mo. 485, 188 S. W. 182.

55. Missouri District Telegraph Co. v. Southwestern Bell Telephone Co. (1936) 338 Mo. 692, 704, 93 S. W. (2d) 19.

56. Ibid.

fendants are joined in a judgment, the one paying the judgment may recover from the other one-half of what he paid. If three or more are involved, each must contribute an equal amount.

As has been previously indicated,[57] contribution originated in equity which sought to alleviate the hardships of the common law rule.

> The obligation may well be rested on quasi contractual principles, for in so far as one tort-feasor pays what in equity and good conscience another tort-feasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust.[58]

But has the enactment of a statute permitting contribution changed the remedy from one of an equitable to one of a legal nature? The prevailing opinion in Missouri is that it has. In *Missouri District Telegraph Co. v. Southwestern Bell Telephone Co.*,[59] a judgment for personal injuries had been rendered against three corporations. One of the corporations paid the judgment and sued the other two for contribution in an action joining the causes and the two parties. The court regarded the action as one clearly at law and held that there was a misjoinder of actions and parties. *Brewster v. Gauss*,[60] which was brought in equity, was distinguished by the statement that it "involved not only numerous parties but also facts which properly invoke principles of equity jurisprudence."[61]

The *Telegraph Company* case, setting forth the prevailing opinion, was decided by a court of seven judges. Three of them, basing their opinion on what appear to be valid grounds, did not agree that an action for contribution was solely legal. They stated that, since jurisdiction to enforce contribution was originally equitable, nothing beyond facts showing a right to contribution from more than one person need be stated to bring an action in equity. They reasoned that

> the statute neither makes provision concerning the form of the action nor provides whether the right granted may be enforced at law or in equity. It does provide that joint tort-

57. See supra, pages 573, 574.

58. Woodward, op. cit. supra note 6, at 409, sec. 259.

59. (1936) 338 Mo. 692, 93 S. W. (2d) 19. But the court found that, a jury having been waived, the misjoinder and the hearing of the case as though in equity "worked no injury" to the defendants, and affirmed the decision of the lower court.

60. (1866) 37 Mo. 518. Discussed infra, pages 584-586.

61. Missouri District Telegraph Co. v. Southwestern Bell Telephone Co. (1936) 338 Mo. 692, 703, 93 S. W. (2d) 19.

> feasors against whom a judgment has been rendered "shall be subject to contribution . . . *in the same manner and to the same extent as defendants in a judgment founded on contract.*" This means that to find the remedy available to enforce contribution among joint tortfeasors, we must find what remedy there was for contribution between defendants in a judgment based on contract. * * * The statute is not susceptible of any other interpretation.[62]

Contribution was found to have originated in equity. This being so, the concurring judges felt that there was no reason why a contribution suit might not still be brought in equity and cited a statement of Mr. Justice Story that jurisdiction assumed by law in no way affected that which "originally and intrinsically" belonged to equity.[63]

May contribution be recovered in Missouri except under the statute? Judge Goode stated that "Independently of a statute, both indemnity and contribution are allowed among wrongdoers under proper circumstances."[64] He indicated that contribution might be had in the case of a negligent tort, "when there was no intentional wrong or moral guilt, but two or more tortfeasors were actually to blame in fact as well as in law * * *."[65] In support of this he cites decisions by the courts of various states but none from Missouri. He says, in effect, "If we had no statute, this would be the rule."

But Missouri has a statute; and, as a general rule, it is the only path which will lead to contribution. This is indicated by those cases which refuse contribution between joint tort-feasors simply because no joint judgment was had against them as required by the statute.[66] It has been said that there is an exception to the rule, where *A* committed no active wrong but paid the damages because liable by legal imputation, while *B* actually committed the wrong and was really the one at fault.[67] Actions in which the negligence of one defendant is primary and that of the others secondary or constructive, are cases of indemnity and not contribution and logically fall outside the statute. Thus, a city which has paid a judgment for injuries sustained by an

62. Id. at 714, 93 S. W. (2d) at 29.
63. Missouri District Telegraph Co. v. Southwestern Bell Telephone Co. (1936) 338 Mo. 692, 93 S. W. (2d) 19.
64. Eaton & Prince Co. v. Mississippi Valley Trust Co. (1906) 123 Mo. App. 117, 128, 100 S. W. 551.
65. Id. at 131, 100 S. W. at 554.
66. See infra, page 588, and cases there cited.
67. Kilroy v. St. Louis (1912) 242 Mo. 79, 145 S. W. 769; Flenner v. Southwest Missouri R. R. (1926) 221 Mo. App. 160, 290 S. W. 78.

individual who fell because of a hole next to a sidewalk can recover against the person whose active negligence caused the dangerous condition.[68] The city by proving the primary negligence of the defendant is entitled to recover as indemnity the amount which it had paid. "The principle on which such indemnities are allowed is that the ultimate loss ought to fall where the blame rests."[69] But if

> * * * the facts are such that each may be liable to the party injured by reason of some wrongful act or neglect of his own which has contributed to the injury and such act has been committed by him jointly with the other party charged with the tort, or is disconnected from any act of the other party but committed in such a way as to make him liable to the injured party independently of any act committed by the other party, then the right of contribution does not exist except by force of the statute.[70]

The cases in which the tort-feasors are *equally guilty* may be divided into two basic groups—one in which the torts were intentional, and a second in which mere negligence was involved.

Can there then be contribution between *intentional* wrongdoers? Under the common law all courts refuse contribution where the joint tort-feasors are intentional wrongdoers.[71] The effect of the contribution statute on this type of case in Missouri cannot be definitely stated, for the decisions give no certain or satisfactory answer. All that can be said must be gathered from scattered statements in the opinions. In *Brewster v. Gauss*[72] the plaintiff and defendant had successively and independently levied attachments upon goods not the property of the judgment debtor. They were erroneously sued as joint trespassers, and judgment was recovered against them on that basis. Since no objection was made to that error in the judgment, contribution was allowed the one who paid the judgment. Actually, although they were regarded as joint trespassers, there is nothing in the case that shows the "trespass" to have been of an intentional nature. To the contrary, it would appear that, since the two creditors levied attachments independently and successively, there was

68. Kinloch Telephone Co. v. St. Louis (1916) 268 Mo. 485, 188 S. W. 182; Springfield v. Clement (1920) 205 Mo. App. 114, 225 S. W. 120, rev'd on other grounds (1922) 296 Mo. 150, 246 S. W. 175.

69. Eaton & Prince Co. v. Mississippi Valley Trust Co. (1906) 123 Mo. App. 117, 129, 100 S. W. 551.

70. Flenner v. Southwest Missouri R. R. (1926) 221 Mo. App. 160, 164-65, 290 S. W. 78.

71. 1 Cooley, op. cit. supra note 15, at 297, sec. 89.

72. (1866) 37 Mo. 518.

more probably negligence in ascertaining just where the title to the goods lay. The St. Louis Court of Appeals in *Spalding v. Citizens' Bank* interpreted the opinion of the supreme court in the *Brewster* case as saying that the "statute is general in its nature and applies to *all* judgments for private wrongs."[73] In reality the court had said only that the statute "applies to all judgments of *this* character."[74]

In *Eaton & Prince Co. v. Mississippi Valley Trust Co.*, the court, through Judge Goode, intimated that the effect of the statute on contribution between intentional wrongdoers was questionable by stating that it covered the case there involved "whatever may be said about its effect on the common law rule in cases of torts either willful or tainted with moral turpitude."[75] But a subsequent statement in the same case seems to proceed on the theory that contribution *would* be allowed under the statute as between intentional wrongdoers.

> Shall contribution be allowed among those who conspired to commit an assault and battery, or a trespass, or to libel, and not among those who hurt another by failing in some precaution they should have taken? Surely the Legislature, in enacting the statute we are dealing with, contemplated no such interpretation of it.[76]

Perhaps the most definite statement of all is a *dictum* in *Judd v. Walker*[77] to the effect that the statute "confers the right of contribution between joint tortfeasors after judgment, although the joint tort involved moral turpitude, indeed fraud and deceit as here." In support of this statement the court cited the *Brewster* case and the *Spalding* case. But it must be remembered that the *Spalding* case stretched the language of the court in the *Brewster* case, which was at best an uncertain foundation upon which to build.

As is evident from the foregoing discussion, there is no Missouri case which squarely holds that contribution is allowed in cases of intentional wrong or in those involving moral turpitude. Professor Bohlen suggests that:

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73. (1899) 78 Mo. App. 374 (Italics supplied).
74. Italics supplied.
75. (1906) 123 Mo. App. 117, 100 S. W. 551, 555.
76. Id. at 134, 100 S. W. at 556.
77. (1911) 158 Mo. App. 156, 168, 138 S. W. 655. In Avery v. Central Bank of Kansas City (1909) 221 Mo. 71, 88, 119 S. W. 1106, the court stated that "the rule of no contribution applies between members of a corporation who have conspired to defraud it." But there had been no joint judgment against the tort-feasors, and contribution under the statute would have been impossible regardless of the type of wrong.

> 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.[78]

The second group of cases involving tort-feasors who were equally guilty is that in which the injuries were not intentional but resulted from *negligence.*

First may be considered those injuries for which the parties are jointly liable because of a *concert of action.* There seems to be no question that, eliminating the cases involving a guilty intent, contribution is allowed where there has been concert of action.[79] In fact, at one time the Supreme Court of Missouri stated that, by the weight of authority and the law of the state, "the right to contribution does not exist unless there has been concert of action between the tort-feasors."[80] But this statement was repudiated by the St. Louis Court of Appeals in the *Eaton* case which allowed contribution where there was no concert of action.[81] This view was subsequently approved by the higher court.[82]

Secondly, there are those injuries which have as their cause the *concurrence of separate acts of active negligence.* As previously stated, the facts in *Brewster v. Gauss*[83] would seem to point to negligent action by the tort-feasors. There the plaintiff and defendant successively and independently levied attachments upon goods not the property of their debtor. They were sued as joint trespassers, and judgment was recovered against both of them. Brewster paid the judgment and brought an action for contribution. The acts here were separate, the separate negligences active, and contribution was allowed.

A third type arises out of injuries caused by a *concurrence of*

78. Bohlen, supra note 1, at 566. A new English statute allows contribution, not only where the claimant was conscious of wrongdoing, but also where his misconduct was in violation of a statute carrying criminal penalties. (1935) 25 & 26 Geo. V, c. 30, Part II.

79. Paddock-Hawley Iron Co. v. Rice (1903) 179 Mo. 480, 495, 78 S. W. 634, 638.

80. Ibid. (Italics supplied).

81. Eaton & Prince Co. v. Mississippi Valley Trust Co. (1906) 123 Mo. App. 117, 100 S. W. 551. Discussed infra, p.

82. Kinloch Telephone Co. v. St. Louis (1916) 268 Mo. 485, 188 S. W. 182.

83. (1866) 37 Mo. 518.

independent negligent omissions of duty, i. e., passive negligence on the part of all the tort-feasors. This group has apparently been productive of more decisions and more language in favor of contribution than any other group.

In *Missouri District Telegraph Co. v. Southwestern Bell Telephone Co.*,[84] contribution was again allowed in this type of case. An employee of the telegraph company was climbing a pole owned by the telephone company and leased to the telegraph company when a cross-arm maintained on the pole by a light company gave way and injured him. He recovered judgment against all three companies. The telegraph company paid the judgment and sued the others for contribution. It was found that each company owed him a duty of ordinary care to inspect and discover the dangerous condition of the cross-arm. The court held that the negligent omissions of the three companies were "coincident, concurrent, and contributing equally and alike to constitute one composite cause of the injury."[85] The court's certainty as to the correctness of its decision is evident from its statement, "The conclusion is irresistible that respondent is entitled to contribution against each appellant."[86]

In the *Eaton* case[87] a widow sought damages for the death of her husband, a workman, against the owner of a building and an independent contractor who was installing an elevator. The evidence showed that both had been negligent. The contractor failed to warn the workman that the elevator was being moved; the building owner negligently allowed the elevator to run despite a promise to the deceased that it would not be moved. The court held that

> the remedy ought to lie if the tortfeasors were guilty of only involuntary and passive breaches of duty which concurrently and proximately caused the damage, and that the statute was enacted, among other purposes, to set at rest the uncertainty of the law in such cases.[88]

Both parties need not have failed in the omission of the identical care, but it is sufficient under the statute if they omitted separate acts of care at the same time.

The holding in this type of case is summarized in a *dictum* in *Miller v. United Rys.:*

84. (1936) 338 Mo. 692, 93 S. W. (2d) 19.
85. Id. at 709, 93 S. W. (2d) at 26.
86. Ibid.
87. Eaton & Prince Co. v. Mississippi Valley Trust Co. (1906) 123 Mo. App. 117, 100 S. W. 551.
88. Id. at 134, 100 S. W. at 556.

> It has been determined that this statute intends the allowance of contribution among defendants in a judgment for tort on account of the negligent omission of duty of several independent tortfeasors whose combined negligence concurred and contributed to the same injury * * *.[89]

The discussion has thus far dealt with the type of wrong in which contribution will be allowed. Next to be considered is the effect of the statute on the right of a tort-feasor who has committed such a wrong. Can he recover contribution if no judgment has been rendered against the other defendant? Can he bring in a third party who has not been joined by the plaintiff? How must he plead his case? Can he object to the dismissal of another defendant? If he appeals, can he rely on errors applying to the other defendants?

The right of one joint tort-feasor to recover contribution from another is limited by the Missouri statute to cases in which a judgment has been rendered against both.[90] Such a requirement need be met in only a few of the jurisdictions permitting tort contribution.[91] By the language of the statute, it is to apply only to "defendants in a judgment." "The right to contribution does not arise, even under the statute, until a joint judgment is had, and until then one wrongdoer may not complain if the injured party elects to pursue another alone."[92] Consequently, this remedy is not available where judgment goes against one defendant and in favor of the other defendant,[93] where the plaintiff sues only one of several tort-feasors,[94] or where he sues all but dismisses as to all but one.[95]

Because of the necessity of complying with this requirement, the statute really places contribution under the control of the injured plaintiff. He is the only one who can say whether he wishes to recover judgment against any particular tort-feasor. In other words, the burden rests where the injured person

89. (1911) 155 Mo. App. 528, 547, 134 S. W. 1045. Cited again in Kinloch Telephone Co. v. St. Louis (1916) 268 Mo. 485, 496, 188 S. W. 182.

90. Moudy v. St. Louis Dressed Beef & Prov. Co. (1910) 149 Mo. App. 413, 130 S. W. 476.

91. Md. Ann. Code (Bagby, Supp. 1929) art. 50, sec. 12A; N. M. Stats. Ann. (1929) sec. 76-101; N. Y. Thompson's Laws (1939) Civil Practice Act, sec. 211-a; Tex. Vernon's Stats. (1936) art. 2212; W. Va. Code (1932) sec 5482.

92. Judd v. Walker (1911) 158 Mo. App. 156, 138 S. W. 655.

93. Flenner v. Southwest Missouri R. R. (1926) 221 Mo. App. 160, 290 S. W. 78.

94. *Dictum* in Cunningham v. Franke (Mo. App. 1929) 18 S. W. (2d) 106.

95. Ibid.

chooses to place it. It seems anomalous that contribution, a remedy for the promotion of justice and equity between joint tort-feasors, should be thus dependent on the personal whim of the injured party. Under a statute of this type, some method by which one tort-feasor could bring in another as co-defendant might prove very desirable.[96]

In an action for contribution under the Missouri statute, a prior judgment rendered against joint tort-feasors *is* sufficient to constitute *prima facie* evidence in a subsequent action for contribution. Thus a petition, which alleged that the judgment was obtained against both parties because of *their* negligent acts and that the plaintiff seeking contribution paid under compulsion, stated a cause of action. Proof of this was regarded as sufficient to state a *prima facie* case. "Then the burden would fall on respondent to show no contribution ought to be awarded, because appellant was primarily and actually in fault and respondent only secondarily so."[97]

Before the addition of the release clause to the contribution statute, the right of one joint tort-feasor to object to the dismissal of another presented an interesting problem. The view was expressed that

> * * * natural justice alone requires that they should both be permitted to defend throughout the entire course of the litigation in order to reduce the amount of recovery against either or both, to the payment of which they may eventually be called upon to contribute in equal parts.[98]

But this statement ignores the fact that the person dismissed need not fear being approached for contribution—that right exists only as between joint judgment debtors.

In *Berkson v. Kansas City Cable Ry.*,[99] the contribution clause of the statute was considered, and the same result was reached as would be the case under the statute as it stands today. The court pointed out that as between joint tort-feasors no right of contri-

96. An amendment of R. S. Mo. (1929) section 703, relating to the permissive joinder of defendants, so as to authorize the third party practice described in No. 14 of the New Federal Rules of Civil Procedure, would be of great aid in this connection.

97. Eaton & Prince Co. v. Mississippi Valley Trust Co. (1906) 123 Mo. App. 117, 138, 100 S. W. 551. For a typical form of petition in a contribution action, see 5 Houts, *Missouri Practice and Pleading* (1936) 434, sec. 2055.

98. Miller v. United Rys. (1911) 155 Mo. App. 528, 547, 134 S. W. 1045, 1051.

99. (1898) 144 Mo. 211, 45 S. W. 1119. Accord: Kilroy v. St. Louis (1912) 242 Mo. 79, 82, 145 S. W. 769.

bution existed except as between those joined in a judgment. Consequently, it was held that one tort-feasor could not object that all the tort-feasors had not been joined and that the plaintiff could have dismissed as to one of the defendants without the consent of the others at any stage of the proceedings without affecting his right of action or the character or the amount of judgment he receives.

Furthermore, a case decided since the amendment of the statute states that its contribution clause

> * * * creates rights and obligations as between defendants in a judgment founded upon an action for tort. It imposes no duty whatever upon the plaintiff with respect thereto. It neither requires plaintiff to bring his action against all the joint tort-feasors, nor does it require him to obtain a valid judgment against all whom he does elect to sue.[1]

Still important is the question of the right of an appealing defendant to rely on errors applying to another defendant. In *Flenner v. Southwest Missouri R. R.*,[2] a railroad passenger, injured by the collision of a train and a bus, sued the two jointly. Judgment was in favor of the bus owner and against the railroad. During the trial, the court had committed an error which operated to benefit the bus owner. On appeal, the railroad sought a reversal because of that error. As judgment was not had against both, the court stated that

> * * * no right of contribution exists, and, since it does not, each party must defend just as he would if sued alone and on appeal can only take advantage of errors that apply to him alone or to both jointly. This appellant cannot, on this appeal, take advantage of any error that applies only to defendant Cook.[3]

By implication it would appear that, had judgment gone against both, one defendant would have been permitted to allege errors committed with respect to the other. The St. Louis Court of Appeals apparently relied upon this implication, for they allowed an appeal by one defendant on the basis of errors committed as to the other defendants, citing the *Flenner* case.[4] However, the supreme court regarded the decision as unsound and quashed the opinion and the judgment with the explanation that

1. State ex rel. Cunningham v. Haid (1931) 328 Mo. 208, 40 S. W. (2d) 1048, 1050; Lavignon v. Dietzel (Mo. 1931) 34 S. W. (2d) 92; Newdiger v. Kansas City (1937) 342 Mo. 252, 114 S. W. (2d) 1047.
2. (1926) 221 Mo. App. 160, 290 S. W. 78.
3. Id. at 165, 290 S. W. at 79.
4. Cunningham v. Franke (Mo. App. 1929) 18 S. W. (2d) 106, 107.

> This court has repeatedly held that in such actions one defendant will not be heard to complain of an error committed against a co-defendant, even though the error necessitates a reversal of the judgment as to the co-defendant.[5]

In *Gabelman v. Bolt*[6] the appellant conceded the fact that ordinarily a defendant in a tort case could not complain of error committed during the trial as to a co-defendant. He did not base his appeal on the grounds that he had been deprived of a possible right to contribution from his co-defendant, but argued that the usual rule did not apply if the error as to the other defendant adversely affected and prejudiced his interests. The court of appeals concurred in his argument, found that his defense had been affected injuriously, and allowed his appeal on the basis of the errors as to the other defendant. A dissenting judge certified the case to the supreme court which agreed with the argument of the appellant but held that he had not been prejudiced.[7] The court stated that the argument was good law and based on right and justice. In support of this statement, it cited *Barr v. Nafziger Baking Co.*[8] That case affirmed the right of one defendant to appeal on the theory that he was prejudiced by an erroneous instruction in favor of the other defendant.

CONCLUSION

The purpose of this note has been to collect the Missouri authorities with respect to this subject—only occasionally questioning the validity of a statement or decision. As is apparent, no attempt has been made to weigh the effectiveness or to criticize the general application of the Missouri statute dealing with release and contribution. That aspect of the problem would require numerous practical considerations necessarily omitted because of limitations of space.

Retrospection leads to the hope that in the application of our contribution statute, the following two factors will be kept in mind. First, tort liability is no longer imposed as a penalty for wrongdoing; its purpose is to shift the burden of loss caused by tortious conduct to those who may be properly required to bear it. Second, and almost equally important, contribution after all originated in equity; its application should reflect that origin.

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5. State ex rel. Cunningham v. Haid (1931) 328 Mo. 208, 212, 40 S. W. (2d) 1048, 1050.
6. (Mo. App. 1934) 68 S. W. (2d) 909.
7. Gabelman v. Bolt (1935) 336 Mo. 539, 80 S. W. (2d) 171.
8. (1931) 328 Mo. 423, 41 S. W. (2d) 559.