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Battersey's Case (1623): Some Ups and Downs of the Rule Three Pronounced, Affecting Contributions between Joint Wrongdoers

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BATTERSEY'S CASE (1623)

SOME UPS AND DOWNS OF THE RULE THERE PRONOUNCED, AFFECTING CONTRIBUTIONS BETWEEN JOINT WRONGDOERS.

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The earliest English cases I have found of actions between joint wrongdoers are *Arundel v. Gardiner*,[1] and *Battersey's Case*,[2] decided in 1622 and 1623, respectively. Each case permitted the recovery of indemnity. The former declared no abstract principle of law. The latter said indemnity could not be had where the tortious act "appears in itself to be unlawful, but otherwise it is, as in our case, where the act stands indifferent." My attention has been drawn to no other such action antedating 1799 (though doubtless there were many), when *Merryweather v. Nixan*,[3] without reference to any earlier decision on this subject, is taken to have held that no contribution whatever could be had between joint tortfeasors. This holding was recognized in *Farebrother v. Ansley*,[4] *Wilson v. Milner*,[5] and other cases of that generation. But, in 1827, *Adamson v. Jarvis*[6] limited that holding in this manner: "from reason, justice and sound policy, the rule that wrongdoers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." This limitation was followed in *Betts v. Gibbons*,[7] in which *Battersey's Case* was referred to, though *sub nom. Fletcher v. Harcot*, Chief Justice Lord Denman saying, "The case of *Merryweather v. Nixan* seems to me to have been strained beyond what the decision will bear. . . . The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself."[8] And as far as I am advised, this exception to the general rule has remained the law of England to this day.[9] The exception was recognized in the United States, cer-

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1 Cro. Jac. 652, 79 Eng. Rep. R. 563 (1622).

2 Winch 49, 124 Eng. Rep. R. 41, *sub. nom.* Fletcher v. Harcot, Hutton 55, 123 Eng. Rep. R. 1097 (1623).

3 8 T. R. 186, 101 Eng. Rep. R. 1337 (1799).

4 1 Camp. 343, 170 Eng. Rep. R. 979 (1808).

5 2 Camp. 452, 170 Eng. Rep. R. 1215 (1810).

6 4 Bing. 66, 130 Eng. Rep. R. 693 (1827).

7 2 Ad. & E. 57, 111 Eng. Rep. R. 22 (1834).

8 At p. 74. *Accord*: Pearson v. Skelton, 1 M. & W. 504, 150 Eng. Rep. R. 533 (1836).

9 See POLLOCK, TORTS (13th ed.) 203.

tainly as early as 1800 in the New York case of *Allaire v. Ouland,*[10] though no citation of authority or statement of law was made. In 1819, however, the same court in *Coventry v. Barton,*[11] (another indemnity case), recognized the exception, citing *Battersey's Case* and other authorities. Then, in 1823, in *Thweatt's Adm'r v. Jones,*[12] Judge Green, though not mentioning *Battersey's Case,* declared, in effect, its postulate. After discussing the reason underlying the general rule against contribution amongst joint wrongdoers, he said the reason "does not apply to torts or injuries arising from mistakes or accidents. . . . The act which precludes a party from the right to claim contribution from those who are equally liable to the burthen as himself, must be *malum in se,* as actual fraud or voluntary wrong." Since the supreme court of Virginia prior to the Civil War was the curial predecessor of our own court, further comment on the *Thweatt-Jones* suit would seem pertinent. In this suit contribution was sought by the administrator of an inspector of tobacco against the administrator of a co-inspector on account of judgments paid by the former, inasmuch as "nakedly" alleged in the bill, "the recoveries were for a joint malversation in office." The trial chancellor dismissed the bill. The Virginia court then consisted of five judges, Fleming, Green, Coalter, Cabell and Brooke. Fleming was absent when the cause was decided. Green and Cabell would have reversed the decree; Coalter and Brooke affirmed it; so it stood. Cabell stated as a general principle, that contribution would not be enforced among the participators in a tort; but that the principle had never been extended "to the non-performance of a civil obligation or duty, where that non-performance does not proceed *ex maleficio.*" Both Coalter and Brooke stated the general principle above; both recognized that there were exceptions to it; but both were of opinion that the allegations of the bill were insufficient to bring the suit within an exception. Coalter did not define abstractly what joint wrongs were not included in the general rule. Brooke said that courts of equity would "relieve in all cases, in which the parties are in *aequali jure,* but would not do so where the parties are *in pari delicto.*" The syllabus (presumably prepared by Peyton Randolph) would uphold the right of contribution in equity, where the dereliction "does not proceed *ex maleficio* or from some actual fraud or voluntary wrong." Recognition of this qualification followed in a num-

[10] 2 Johns. 52 (N. Y. 1800).
[11] 17 Johns. 142 (N. Y. 1819).
[12] 1 Rand. 328 (Va. 1823).

ber of cases, including *Bailey v. Bussing,*[13] which, after reviewing the English decisions, including *Battersey's Case,* held: "The rule that there can be no contribution among wrongdoers, has so many exceptions that it can hardly with propriety be called a general rule. It applies properly only to cases where there has been an intentional violation of law, or where the wrongdoer is to be presumed to have known that the act was unlawful." Other early accordant cases are *Acheson v. Miller,*[14] *Horbach's Adm'rs v. Elder,*[15] *Hunt v. Lane,*[16] *Davis v. Arledge,*[17] *Jacobs v. Pollard,*[18] *Moore v. Appleton,*[19] *Ankeny v. Moffett,*[20] and *Herr v. Barber.*[21] There are many later accordant cases, including such strong cases as *Hobbs v. Hurley,*[22] *Ellis v. Chicago & Northwestern R .Co.,*[23] *Goldman v. Mitchell-Fletcher Co.,*[24] *Eureka Coal Co. v. Louisville & N. R. R.,*[25] *Horrabin v. Des Moines,*[26] and *Turner v. Kirkwood.*[27] Exceptions to the general rule (so-called) are noted in many encyclopedias and textbooks.[28]

On the other hand a number of the earlier American decisions did adopt the rule of *Merryweather v. Nixan,* despite its limitation by the English courts. Addison says the rule is that of the states.[29] But, according to Theodore W. Reath, attorney, who in 1898 carefully reviewed the decisions pronouncing the rule, the facts in every one showed "either an intentional tort or an act, as a basis of joint liability, which is *malum in se* or immoral. No case has been found applying the rule to a joint tort or *quasi delict* not

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[13] 28 Conn. 455 (1859).
[14] 2 Ohio St. 203 (1853).
[15] 18 Pa. St. 33 (1851).
[16] 9 Ind. 248, 250-1 (1857).
[17] 3 Hill 170 (S. C. 1836).
[18] 10 Cush. 287, 57 Am. Dec. 105 (Mass. 1852).
[19] 26 Ala. 633 (1855).
[20] 37 Minn. 109, 33 N. W. 320 (1887).
[21] 2 Mackey 545, 556 (Dist. Col. 1883).
[22] 117 Me. 449, 104 Atl. 815 (1918).
[23] 167 Wis. 392, 167 N. W. 1048 (1918).
[24] 292 Pa. 354, 141 Atl. 231 (1928).
[25] 219 Ala. 286, 122 So. 169 (1929).
[26] 198 Iowa 549, 199 N. W. 988, 38 A. L. R. 554 (1924).
[27] 49 F. (2d) 590, 596 (C. C. A. 10th, 1931).
[28] 7 AM. & ENG. ENCY. LAW 365-6; 13 C. J. 829 *et seq.;* 18 C. J. S. 15 *et seq.*; (1915) 6 R. C. L. 1054 *et seq.*; 13 AM. JUR., Contribution § 37 *et seq.*; COOLEY, TORTS (4th ed.) 297 *et seq.*; 1 JAGGARD, TORTS (1895) 215-216; POLLOCK, TORTS 203; 1 SHEARMAN & REDFIELD, NEGLIGENCE (6th ed. 1913) 24b; BISHOP, NON-CONTRACT LAW (1889) 22-23; 2 CHITTY, CONTRACTS (11th ed. 1881) 897; 2 POMEROY, EXTRAORDINARY REMEDIES 1484.
[29] 1 ADDISON, TORTS (1887) 98.

intentional and not immoral.'"[30] Following 1898, a number of courts, "the great majority of modern authority", says one commentator,[31] did deny contribution where the wrongs were neither intentional nor immoral but simply negligent, notably the supreme court of Virginia. *Walton v. Miller,*[32] decided in 1909, without citation of authority, held flatly that the right of contribution did not exist among joint tortfeasors. This holding was repeated in several later Virginia cases until checked in 1919 by the following statute: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude." Thus the statute revived, in effect, the doctrine of *Battersey's Case* as well as the judicial declarations in *Thweatt's Adm'r v. Jones,* which seemingly had been unchallenged in Virginia from 1823 to 1909. And the Supreme Court of West Virginia, in *Buskirk v. Sanders* (1912),[33] referred to that decision and held that contribution between joint tortfeasors may be had, except where the wrong is *malum in se.*[34]

Some authorities say that the common law did not permit contribution among wrongdoers. This statement seems ill-advised. The brief acceptance of the rule of *Merryweather v. Nixan* by the English courts from 1799 to 1827 cannot be taken to establish the rule as the common law of England, when opposed by nearly three centuries of preceding and succeeding English cases limiting the rule; and the American cases in line with *Merryweather v. Nixan* can hardly be taken to establish its rule as the common law of the states when consistently opposed by such a vigorous array of other American cases qualifying the rule. It would seem the most to be said is that the decisions conflict on what the common law is. Amid such confusion, I see no reason to desert the side of the conflict heretofore adopted by our own court, the side on which lies, according to *Adamson v. Jarvis,* "reason, justice and sound policy".

This study, obviously, does not include *West Virginia Revised Code* (1931) c. 55, art. 7, sec. 13.

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[30] Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan* (1898) 12 HARV. L. REV. 176, 182.

[31] Leflar, *Contribution and Indemnity Between Tortfeasors* (1932) 81 U. OF PA. L. REV. 140-141.

[32] 109 Va. 210, 63 S. E. 458 (1909).

[33] 70 W. Va. 370, 73 S. E. 937 (1912).

[34] *Accord*: Hutcherson v. Slate, 105 W. Va. 184, 190, 142 S. E. 444 (1928); Payne v. Charleston Nat. Bank, 112 W. Va. 251, 164 S. E. 252 (1932).