Torts—Contribution—Rights between Insurers of Joint Tortfeasors—[Ohio].—X Insurance Co. and Y Insurance Co. were respectively insurers of a bus and a truck company, and a joint judgment had been recovered against their assureds by a person injured in a collision caused by their assureds' concurring negligence. To prevent a levy upon its assured's property, X. Co. paid the judgment and sued for contribution from Y. Co. *Held*, no recovery. *U.S. Casualty Co. v. Indemnity Ins. Co. of North America*, 195 N.E. 85 (Ohio 1935).

In reaching this decision the court invoked the traditional rule against contribution among joint tortfeasors with all of its inequitable rigor. The first authoritative statement of the rule is found in *Merryweather v. Nixan*, 8 T.R. 186, 101 Eng. Repr. 1337 (1799), which involved intentional joint tortfeasors. The justifications for the rule as stated by later courts were that it tended to deter tortious conduct, and that courts would not aid wrongdoers. But exceptions have become established. Where parties intentionally do an act, which in good faith they think lawful, but which in fact is tortious the courts allow contribution. *Farwell v. Becker*, 129 Ill. 261, 21 N.E. 792 (1889). So, too, a partner who has had to pay a judgment resulting from a common employee's tort can get contribution from the other partners. *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918). (And yet if two independent employers are vicariously liable for the negligence of their respective employees there is no contribution. *Union Stockyards of Omaha v. Chicago B. & Q. R.R. Co.*, 196 U.S. 217 (1905)). Courts have allowed indemnity to A from B, where A innocently committed a tort acting at the request of or for the benefit of B. *Horrabin v. City of Des Moines*, 198 Ia. 549, 199 N.W. 988 (1924).

Indemnity also is allowed where B primarily caused the injury, but A paid the judgment. *Gray v. Boston Gas Light Co.*, 114 Mass. 149 (1873). Also one vicariously liable is allowed indemnity from the actual tortfeasor, e.g., an employer from an employee. *Smith v. Foran*, 43 Conn. 244 (1875). The same is true where B created and A merely failed to discover the danger which caused the injury. *S. W. Bell Tele. Co. v. East Texas Pub. Serv. Co.*, 48 F. (2d) 23 (C.C.A. 5th 1931).

The refusal of the courts to distinguish between intentional and unintentional torts may have resulted in substantial justice when the great mass of tort cases involved intentional acts. But today, when the majority of torts involve only negligence, enforcement of the rule often leads to unnecessary hardships. To remedy this some courts have, without aid of statutes, allowed contribution in negligence cases. *Armstrong Co. v. Clarion Co.*, 66 Pa. 218 (1870); *Underwriters at Lloyd's etc. v. Smith*, 166 Minn. 388, 208 N.W. 13 (1926); *Ellis v. Chicago and N.W. Ry. Co.*, 167 Wis. 392, 167 N.W. 1048 (1918); *Palmer v. Wicks & P. Ship Co. Ltd.*, A.C. 318 (1894); see *Furbeck v. I. Gevurtz & Son.*, 72 Ore. 12, 22, 143 Pac. 654, 657 (1914). Leflar, Contribution and Indemnity between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932). Twelve states have given the right to contribution in negligence cases by statute. See 45 Harv. L. Rev. 369 (1931).

Ohio has no such statute and the court was already committed to the rule against contribution. *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 173 N.E. 194 (1930). In several earlier cases the court had manifested sympathy toward the right of contribution. See *Acheson v. Miller*, 2 Ohio St. 293 (1853); *Baltimore & Ohio R. Co. v. Walker*, 45 Ohio St. 577, 16 N.E. 475 (1888).

Even though bound by the rule against contribution between tortfeasors, the court in the instant case might have distinguished this case from the usual one on two grounds: (1) The two companies where not themselves wrongdoers, but insurers, and

directly liable to the injured party only by statute. Throckmorton's Ann. Code Ohio 1929, § 9510–4. The court might have modified and applied one of the exceptions to the rule, namely, that a person vicariously liable for the tort of another can indemnify himself from the wrongdoer. Since the defendant insurance company was not a tortfeasor, the court might have allowed the plaintiff not the severe remedy of indemnity, but contribution from the defendant. (2) The right of contribution is not based upon contract, but upon the equitable maxim "equality is equity." *Deering v. Winchelsea*, 2 Bos. & P. 270, 1 Cox 318 (1787); Stearnes, Suretyship 473 (2d ed. 1915). It is available in many widely different situations when one party has "relieved them of a common burden and hence they ought to reimburse him for their proportionate part of his loss" (2 Williston, Contracts §1278 (1920)). *Ward v. Ward's Heirs*, 40 W.Va. 611, 21 S.E. 746 (1895) (necessary repairs on common property made by one co-tenant); *Asylum of St. Vincent De Paul v. McGuire*, 239 N.Y. 375, 146 N.E. 632 (1925) (broker criminally but effectively pledged securities of several parties, pledge sold A's to satisfy debt); *Baltimore & Ohio R. Co. v. Walker*, 45 Ohio St. 577, 16 N.E. 475 (1888) (one railroad paid for maintenance and repairs of common crossing which statute made joint duty of both railroads). Contribution exists among cosureties, and the plaintiff in the instant case contended that they and defendants were cosureties by virtue of the statute (Throckmorton's Ann. Code Ohio 1929, § 9510–4) which made the joint judgment the direct liability of the insurers, thus constituting the common obligation with the injured party as the common principal. Because the court would not accept this theory, they refused any relief. But in doing this they ignored the equitable nature of contribution, and the fact that it is permitted in many cases where there is no contractual relationship between the parties.

Although these ideas might have disposed of the principal case the great mass of cases involving contribution among joint tortfeasors would remain under the old rule. The remedy lies with the legislature.

Trusts—Liability of Settlor of Trust for Her Minor Children on National Bank Stock Held by the Trust—[Federal].—In 1926 the settlor transferred national bank stock in two banks to trustees for the benefit of her minor children reserving no control over the trust or the trustees. In 1931, one of the banks became insolvent, and the receiver thereof, after having collected and realized on the remaining funds of the trust which were insufficient to cover the assessment, sued to recover the balance from the settlor under the shareholder's liability clause of the National Banking Act, 38 Stat. 273 (1913), 12 U.S.C.A. § 64 (1927). *Held*, no recovery. *Pottorff v. Dean*, 77 F. (2d) 893 (C.C.A. 1st 1935).

A transfer of bank stock, to relieve the transferor of liability, need not be made to a financially responsible party if made in good faith, *Earle v. Carson*, 188 U.S. 42 (1903); *Sykes v. Halloway*, 81 Fed. 432 (C. C. Ky. 1897), but it must be made to a party capable of accepting and holding the stock. *Aldrich v. Bingham*, 131 Fed. 363 (D.C. N.D. 1904). A transfer of shares to a minor does not release the transferor from liability to assessment because a minor is without legal capacity to assume this statutory obligation. *Early v. Richardson*, 380 U.S. 496 (1930); *Foster v. Chase*, 75 Fed. 797 (C. C. Vt. 1896); 43 Harv. L. Rev. 1150 (1931).

Under the National Banking Act, 13 Stat. 118 (1864), 12 U.S.C.A. § 66 (1927),