

with protection of the dissenting union member the keynote throughout. American legislation was extremely harsh and, read literally, completely prohibitive. Considerable watering down of Section 304 by the courts has resulted in uncertainty as regards both coverage and constitutionality and has enabled the courts to introduce criteria not necessarily relevant to the policy considerations underlying the statute. New legislation is called for. As to the protection of minority members, British legislation suggests possible solutions for the guidance of American legislators, but the problem of labor's undue influence is much more difficult. At best a difficult concept to define in the financial context of Section 304, the undue influence problem might better be handled by being left to general election laws, as in Great Britain; by strengthened publicity requirements; or by some system limiting but not prohibiting unions' financial participation in elections.

---

### CONTRIBUTION AND INDEMNITY IN ILLINOIS NEGLIGENCE CASES

The authorities agree that contribution between intentional co-tort-feasors should be denied since they are wrongdoers "not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden."<sup>1</sup> It is also quite generally agreed that if one co-tort-feasor is adjudged liable for an injury although he was without fault, the law will grant total recovery, or indemnity, to the guiltless tort-feasor who has paid the injured person.<sup>2</sup> While agreement thus exists when intentional or innocent tort-feasors are involved, controversy remains as to the right of contribution when the tort-feasors are negligent.

With the early English decision of *Merryweather v. Nixan*<sup>3</sup> as a foundation, American courts at first refused to apply the rule against contribution among tort-feasors to cases involving mere negligence.<sup>4</sup> The origin and reason for the

<sup>1</sup> Commissioner's Prefatory Note to Uniform Contribution Among Tortfeasors Act, 9 U.L.A. 153 (1951).

<sup>2</sup> E.g., *George A. Fuller Co. v. Otis Elevator Co.*, 245 U.S. 489 (1918); *Griffiths & Son Co. v. Nat'l Fireproofing Co.*, 310 Ill. 331, 141 N.E. 739 (1923); *Farwell v. Becker*, 129 Ill. 261 (1889). See Prosser, *Torts* 1114 (1941).

<sup>3</sup> 8 Durnf. & E. 186 (K.B., 1799). There is a very incomplete report of the case but the authorities seem agreed that the tort-feasor had acted in concert and wilfully. Later English cases so limited the decision, and held that the rule against contribution did not apply unless the plaintiff was a wilful wrongdoer. *Betts v. Gibbins*, 2 Ad. & Ell. 57 (K.B., 1834); *Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] A.C. 318.

<sup>4</sup> *Thweatt's Adm'r v. Jones*, 22 Va. 328, 10 Am. Dec. 538 (1823) (tobacco inspector may obtain contribution from co-inspector where their joint liability for conversion of tobacco did not arise out of intentional tort); *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368 (1870) (county held liable for injury resulting from negligent maintenance of bridge allowed contribution from another county jointly responsible for maintenance); *Nickerson v. Wheeler*, 118 Mass. 295 (1875) (other corporate officers liable in contribution to president whose property had been taken in satisfaction of execution obtained by corporate creditor against all officers personally liable because of failure to file certificates).

rule were soon lost sight of, and today, in the absence of statutes, the great majority of courts refuse to permit contribution even where the joint tort-feasors<sup>5</sup> have not acted in concert or intentionally.<sup>6</sup> Most legal scholars, however, maintain that negligent tort-feasors are not such "rascals" that they should be denied access to the courts.<sup>7</sup> Recognizing the apparent injustice of thrusting upon one defendant alone the entire burden of a loss for which two defendants are unintentionally responsible, some courts have completely repudiated the no-contribution dogma.<sup>8</sup>

Criticism of the rule has not, however, been unanimous, and unsuspected virtues have been found in the rule under new theories of loss distribution.<sup>9</sup> The rule has also been backed by a goodly portion of the very persons who in theory should benefit from the contribution doctrine, companies insuring defendants to whom the contribution remedy would be available.<sup>10</sup> The insurance companies have argued that contribution would often be useless against irresponsible persons and that its introduction would increase litigation and impede settle-

<sup>5</sup> Originally the term "joint tort-feasors" included only those who acted in concert to commit a wrong. But it has been broadened by the courts to include parties who have an undivided liability for a single injury. It will be used in that sense in this note. Thus it matters little whether the respective fault of the parties was concerted, concurrent, or successive, although such factors undoubtedly have a bearing on their rights to contribution and indemnity. One authority has argued that the use of "joint tort-feasors" in this manner is one of the primary causes for the extension of the no-contribution rule by the courts to tort-feasors even though they did not act in concert or intentionally. Prosser, *Joint Torts and Several Liability*, 25 *Calif. L. Rev.* 413 (1937).

<sup>6</sup> Prosser, *Torts* 1113 n. 29 (1941).

<sup>7</sup> E.g., Reath, *Contribution between Persons Jointly Charged for Negligence*, 12 *Harv. L. Rev.* 176 (1898); Leflar, *Contribution and Indemnity between Tortfeasors*, 81 *U. of Pa. L. Rev.* 130 (1932); Bohlen, *Contribution and Indemnity between Tortfeasors*, 21 *Cornell L.Q.* 552 (1936); Gregory, *Legislative Loss Distribution in Negligence Actions* (1936).

<sup>8</sup> See cases cited note 64 *infra*. The American Law Institute codifies the no-contribution rule in relation to negligent tort-feasor. *Rest., Restitution* § 102 (1937). But the Restaters note that the rule is explainable only on historical grounds. *Ibid.*, § 102, Comment a.

<sup>9</sup> James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, 54 *Harv. L. Rev.* 1156 (1941). James' thesis is that tort liability should be distributed over society as a whole since society is best able to bear the loss, and that where such distribution is not possible those who can best pay for the injury should bear the loss. Since the injured plaintiff will probably sue the wealthier defendant, James asserts that the loss should remain on him and not be shifted. Gregory answered this contention: "I agree that in torts shifting of statistically unavoidable loss to society as a whole is advantageous; workmen's compensation has certainly proved most desirable. . . . While Mr. James' share of this debate has impressed me with the need for cutting clear of our common-law heritage of tort law . . . until we do cut clear, almost anything, even contribution among tortfeasors, is an improvement on the present state of affairs." Gregory, *Contribution among Joint Tortfeasors: A Defense*, 54 *Harv. L. Rev.* 1170, 1171, 1189 (1941).

<sup>10</sup> James and Gregory brought the position of the insurance companies to the attention of lawyers and law students in a series of enlightening articles in the *Harvard Law Review*. James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, 54 *Harv. L. Rev.* 1156 (1941); Gregory, *Contribution among Joint Tortfeasors: A Defense*, 54 *Harv. L. Rev.* 1170 (1941); James, *Replication*, 54 *Harv. L. Rev.* 1178 (1941); Gregory, *Rejoinder*, 54 *Harv. L. Rev.* 1184 (1941).

ments.<sup>11</sup> In practice, however, a rule permitting contribution in negligence cases should not impede settlements reached by amicable agreement between plaintiff and co-defendants. The deterrent effect on settlements of such a contribution rule would only be of importance in instances where the insurance company of one co-tort-feasor settled with plaintiff quickly, cheaply, and in return for a covenant not to sue.<sup>12</sup> Should the plaintiff exercise his right to sue the other co-tort-feasor, the latter would have a right to contribution from the covenantee to the extent that the covenantee's share of the plaintiff's recovery was greater than the settlement.<sup>13</sup>

Courts retaining a strict no-contribution rule have often been confronted with situations in which flagrant injustice would result from an application of the rule. Consequently, where one tort-feasor was guilty of only slight negligence and another's action was the "substantial cause" of the damage, many courts allowed full recovery, or indemnity, to the former because he was said to be liable "secondarily" or guilty of only "passive" neglect.<sup>14</sup> In so doing, these courts have further confused the already vague line between negligence and absolute liability by extending indemnity principles from the orthodox situation in which one co-tort-feasor has been held liable without fault to situations in which both co-tort-feasors were guilty of negligence although in different degrees. Serious question arises whether this extension of indemnity does not undermine the hitherto inviolable no-contribution rule in negligence cases, since contribution should not be denied where indemnity is allowed.

A recent Illinois Appellate Court decision<sup>15</sup> appears to achieve precisely this paradoxical result by granting indemnity to a less negligent co-tort-feasor who could not have obtained contribution under what is said to be the Illinois rule.

<sup>11</sup> James, *Replication*, 54 *Harv. L. Rev.* 1178, 1182 (1941).

<sup>12</sup> If the insurance company obtained a general release in return for the settlement, all tortfeasors (and their insurance companies) would, of course, be freed from further liability. Similarly, if the first insurance company paid its fair share of the total claim, there could be no recovery in a suit for contribution. Where a tortfeasor has received only a covenant not to sue as consideration for a settlement, he may not sue for contribution under the Uniform Contribution among Tortfeasors Act § 2(3). 9 *U.L.A.* 157-58 (1951). For a fuller description of the nature of contribution and indemnity under the Uniform Act see text and notes at notes 13 and 65-68 *infra*.

<sup>13</sup> Under §§ 2(3), 4 and 5 of the Uniform Contribution among Tortfeasors Act, for example, a "release" by an injured person of one joint tortfeasor cannot serve as a general release for the other tortfeasors unless it is explicitly so stipulated in the release; and where there is no such stipulation, the tortfeasor who was released is liable to contribute the difference between his payment for release and his pro rata share of the total liability unless his release specifically provided for a reduction of the total liability by the full amount of his pro rata share. 9 *U.L.A.* 157, 161-63 (1951).

<sup>14</sup> *E.g.*, *Southwestern Bell Tel. Co. v. East Texas Public Service Co.*, 48 F. 2d 23, 25 (C.A. 5th, 1931); *Colorado & Southern Ry. Co. v. Western Light & Power Co.*, 73 *Colo.* 107, 110, 214 *Pac.* 30, 31 (1923); *Washington Gas Light Co. v. District of Columbia*, 161 *U.S.* 316 (1896).

<sup>15</sup> *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 *Ill. App.* 148, 98 *N.E.* 2d 783 (1st Dist., 1951).

An analysis of Illinois contribution and indemnity law is here undertaken to demonstrate the need for judicial clarification of contribution and indemnity principles in negligence cases and for general legislative reform of contribution law.

#### I. CONTRIBUTION IN ILLINOIS

The few litigated cases involving contribution between tort-feasors warrant a belief that the no-contribution rule as to intentional tort-feasors is in full force in Illinois, although one decision militates against even this view. At the other extreme, contribution has generally been allowed between tort-feasors liable without fault. However, in the negligence category, under which most contribution cases would be expected to arise, no direct Illinois precedents exist. Hence the feeling of many Illinois attorneys that there is no contribution among negligent tort-feasors seems to be based more on supposition and the law of other jurisdictions than on direct Illinois authority.

In an early decision, *Goldsbrough v. Darst*,<sup>16</sup> contribution was allowed between two persons who had fraudulently attempted to acquire property through a foreclosure sale. After making restitution of \$4,800, one of the wrongdoers filed a bill in equity and recovered \$2,427.15. In allowing the suit, the Appellate Court stated that "[i]n certain cases of torts and trespasses, it is certain that courts will not interfere to equalize burthens, but there are so many exceptions to the rule that it has ceased to be a general one."<sup>17</sup> The case is unique in that, far from denying the contribution rule, it seems even to expand it so as to include certain types of intentional tort-feasors. Language in later cases and at least one direct holding<sup>18</sup> indicate, however, that the rule of *Merryweather v. Nixon*, denying contribution between intentional tort-feasors, is considered controlling in Illinois.<sup>19</sup>

Where two persons have engaged in an enterprise resulting in tort liability due to the fault of neither, contribution exists between such parties. Consequently if a number of creditors innocently convert the chattels of a third person by attachment, the creditor who is forced to pay the entire claim is entitled to

<sup>16</sup> 9 Ill. App. 205 (2d Dist., 1881).

<sup>17</sup> *Ibid.*, at 211. See *Stanton v. McMullen*, 7 Ill. App. 326, 329 (2d Dist., 1880), for language to the same effect.

<sup>18</sup> *Wanack v. Michels*, 215 Ill. 87 (1905). An owner of a building leased it for a dramshop and consequently, after being held liable in damages to a third person, he was not permitted to recover contribution from the tavern keeper. The court stated: "It is a general and long-established rule that neither contribution nor indemnity will be given to one of several tort feasors against the others. . . . And although this rule is only applied to cases of intentional and conscious wrongdoing . . . yet it cannot be said that, in the case at bar, the wrongdoing of the owner of the premises, who leases them with permission to the occupant to sell intoxicating liquor thereon, and with knowledge that such liquor is sold thereon, is not intentional. The owner, under the circumstances mentioned in the statute, must be regarded as committing the tortious act with guilty intent." *Ibid.*, at 94-95.

<sup>19</sup> The *Darst* case has been cited in only two cases, neither one an Illinois case.

contribution from the others in equal shares.<sup>20</sup> In so holding the Illinois Supreme Court stated in *Farwell v. Becker*: "There are cases which hold that no right of contribution exists between wrongdoers. *Merryweather v. Nixon* . . . may be regarded as a leading case on the subject. . . . But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one of construction or inference of law."<sup>21</sup>

Between the extremes of intentional torts and absolute liability, there is as yet no case which either grants or denies contribution where both tortfeasors were merely negligent. Dicta, however, support the right of contribution between directors of a corporation who create an indebtedness above the maximum allowed by statute,<sup>22</sup> or who fail to perform their duty of exercising reasonable care in conduct of the corporate enterprise but are not charged with an intentional wrong.<sup>23</sup> On the other hand, the obscure case of *Rend v. Chicago W. D. Ry. Co.*,<sup>24</sup> at first glance, seems to have denied contribution between negligent tortfeasors. A street-car owned by P collided with a horse-drawn wagon driven by D, thereby injuring one of the street-car passengers who recovered a judgment against P. P sought \$7,000 damages alleged to have resulted from D's negligence, including \$4,000 special damages, the amount paid to the injured passenger. In overruling a demurrer to the complaint, the appeals court held that it stated a cause of action on the theory that an allegation of special damages was not necessary in an action for wilful trespass such as the complaint averred.<sup>25</sup> After being instructed that if the injury resulted from the negligence of D, P should recover, but if the injury resulted from the negligence of P, it should not, the jury returned a \$2,000 verdict for P. Reversing the verdict and judgment, the Appellate Court insisted that the jury should also have been instructed that "if it [the injury] resulted from the joint operation of the negligence of both drivers," the verdict should nevertheless be for D.<sup>26</sup> In other words, if the jury had found that P was guilty of contributory negligence, P could not recover in a tort action against D. Neither could P then recover the special damages, or indemnity, for "[i]n that case both parties would have been responsible for the injury, and one party, after having been compelled to respond in

<sup>20</sup> *Farwell v. Becker*, 129 Ill. 261 (1889), rev'g 25 Ill. App. 432 (1st Dist., 1887); *Selz, Schwab & Co. v. Guthman*, 62 Ill. App. 624 (1st Dist., 1896). The *Selz* case illustrates the distinction between indemnity and contribution. It was held that the innocent sheriff was entitled to indemnity from the creditors, and a creditor was entitled to contribution after he had paid the indemnity.

<sup>21</sup> 129 Ill. 261, 269 (1889).

<sup>22</sup> *Illinois State Bank v. Queen City Quarry Co.*, 203 Ill. App. 176, 177 (4th Dist., 1916).

<sup>23</sup> *Wallach v. Billings*, 195 Ill. App. 605, 617 (1st Dist., 1915).

<sup>24</sup> 6 Ill. App. 243 (1st Dist., 1880); 8 Ill. App. 517 (1st Dist., 1881).

<sup>25</sup> *Chicago W. D. Ry. Co. v. Rend*, 6 Ill. App. 243 (1st Dist., 1880).

<sup>26</sup> *Rend v. Chicago West Division Ry. Co.*, 8 Ill. App. 517, 525 (1st Dist., 1881).

damages to the person injured, could not call upon the other party to contribute *all or any portion* of the damages so paid."<sup>27</sup>

Although it might be argued that the jury had in effect granted contribution to P when it returned the \$2,000 verdict, P had sued for full recovery of the amount paid the injured person, \$4,000. Hence, on its facts the case has nothing to do with contribution, and the decision may simply stand for the proposition that an action for *indemnity* will not lie where the negligence of both parties concurs to cause the injury. Equally, it may be distinguished as a simple case of contributory negligence if it is assumed that the jury's verdict was for damages to P's street car. But, as the above quotation indicates, the *Rend* court asserted that the same rule applied to a recovery for "any portion of the damages so paid." This appears to refer to the right of contribution; but it is dictum and without direct support in any Illinois decision.<sup>28</sup>

No case involving contribution for mere negligence between joint tort-feasors has been discovered in the appellate court records of Illinois for the past half-century. There has been consistent reiteration of the no-contribution rule, particularly in cases holding that it is unnecessary to join co-tort-feasors in a negligence action.<sup>29</sup> But this would be true whether the right of contribution existed or not.<sup>30</sup> These dicta, coupled with the prevalent belief among members of the Illinois Bar that the right of contribution does not exist among joint tort-feasors in Illinois,<sup>31</sup> probably accounts for the paucity of cases on the subject.

## II. INDEMNITY IN ILLINOIS

As already noted, when a person is adjudged liable for injury to another without fault on his part, he is entitled to indemnity from any person whose negligence or intentional wrongdoing caused the injury. A number of situations fall into this pattern. Thus where a principal is held responsible for the acts or omissions of his agent he may be without personal fault, and, if so, is entitled to

<sup>27</sup> *Ibid.*, at 525 (emphasis added).

<sup>28</sup> The *Rend* opinions have been cited a total of three times, once in an 1898 Illinois Appellate decision, but never on their indemnity-contribution aspects.

<sup>29</sup> See *Johnson v. Chicago & Pacific Elevator Co.*, 105 Ill. 462 (1882); *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481 (1888), *aff'd* 26 Ill. App. 466 (4th Dist., 1889); *Vieths v. Skinner*, 47 Ill. App. 325, 328 (4th Dist., 1893); *Consolidated Fireworks Co. v. Koehl*, 92 Ill. App. 8, 11 (2d Dist., 1900); *Aldridge v. Morris*, 337 Ill. App. 369, 86 N.E. 2d 143 (2d Dist., 1949). In the *Aldridge* case, the court displayed a curious intermingling of the joinder rule with the no-contribution rule by asserting: "[I]t is elementary that contribution by joint tort-feasors will not be enforced and that each is liable for the full damages on the ground that the law will not undertake to adjust the burdens of misconduct." *Aldridge v. Morris*, *supra*, at 375-76 and 146.

<sup>30</sup> See *Grewenig v. American Baking Co.*, 293 Ill. App. 604, 610, 13 N.E. 2d 183, 185 (1938); *Clark*, Code Pleading § 59 at 374-75 (2d ed., 1947); *Prosser*, Torts § 109 at 1103 (1941).

<sup>31</sup> The statement of this "belief" is based on an informal inquiry among a number of practicing attorneys in the Chicago area. All those contacted classified Illinois with the states not allowing contribution in negligence cases.

indemnity from the agent.<sup>32</sup> This is true even though the master and servant are sued jointly as joint tort-feasors.<sup>33</sup> Conversely, if an agent who relied upon his principal's direction as an assurance of a right to exercise dominion over certain property is adjudged a converter, he is entitled to indemnity from his principal.<sup>34</sup> In these cases, if the agent did not know that his actions were wrongful, his liability is purely technical and involves no notion of fault.<sup>35</sup>

Liability without fault also arises in situations where one is held responsible because of a nondelegable duty he owes to a special class of people. By statute or common law, a person may become liable because of the failure of an independent contractor to exercise the care and competence necessary for performance of what may be termed "dangerous" work. In these cases, he is entitled to indemnity from the independent contractor through whose fault he has become liable.<sup>36</sup>

The foregoing cases have involved situations where the indemnitee was without fault, yet held liable to a third person injured through the fault of the indemnitor. In other situations where the one seeking indemnity could not claim complete lack of fault, he was nevertheless permitted to recover. For example, it has been held in a long series of cases that while a municipality is liable "primarily" for injuries suffered as a result of a nuisance created by the occupier of premises adjoining a public highway, it has a right to be indemnified "from the person whose duty it was to keep the premises in repair."<sup>37</sup> It has been said

<sup>32</sup> *Sherman House Hotel Co. v. Butler Street Foundry & Iron Co.*, 168 Ill. App. 549 (1st Dist., 1912).

<sup>33</sup> *Skala v. Lehon*, 343 Ill. 602, 175 N.E. 832 (1931), aff'g 258 Ill. App. 252 (1st Dist., 1930); *Barron v. Adanick*, 251 Ill. App. 481 (1st Dist., 1929). Contra: *Herman Berghoff Brewing Co. v. Przybyski*, 82 Ill. App. 361 (1st Dist., 1899).

<sup>34</sup> It has been held that if P has a writ which authorizes him to take property of another and directs an officer serving it to take specified goods of a third person, the officer is entitled to indemnity if by seizing the goods he becomes a converter. *Grimes v. Taylor*, 93 Ill. App. 494 (2d Dist., 1901); *Selz, Schwab & Co. v. Guthman*, 62 Ill. App. 624 (1st Dist., 1895). See *Farwell v. Becker*, 129 Ill. 261, 21 N.E. 792 (1888), rev'g 25 Ill. App. 432 (1st Dist., 1887); *Nelson v. Cook*, 17 Ill. 443 (1856). If in fact the agent knows of the wrong, no indemnity will lie. See *Nelson v. Cook*, supra. Also, the officer is not entitled to indemnity when specified goods are not pointed out as in such cases he acts at his discretion and no principal-agency relationship arises. *Ibid.*

<sup>35</sup> In conversion, "neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action." All that is necessary is the exercise of control and dominion over the goods of another. *Prosser, Torts* § 15 at 101 n. 68 (1941).

<sup>36</sup> *Sherman House Hotel Co. v. Butler Street Foundry & Iron Co.*, 168 Ill. App. 549 (1st Dist., 1912). In this case one performing the dangerous work was held to be an employee, but the court stated that the employer would be liable "whether the iron company was an independent contractor or merely an employee. . . ." *Ibid.*, at 551. See *Scammon v. City of Chicago*, 25 Ill. 424 (1861); *Pfau v. Williamson*, 63 Ill. 16 (1872).

<sup>37</sup> *Gridley v. City of Bloomington*, 68 Ill. 47, 53 (1873). Further cases to the same effect are: *McDanel v. Logi*, 143 Ill. 487 (1892); *McDonald v. Village of Lockport*, 28 Ill. App. 157 (2d Dist., 1888); *Knox, Adm'r. v. City of Sterling*, 73 Ill. 214 (1874); *Fahey v. Town of Harvard*, 62 Ill. 28 (1871); *Severin v. Eddy*, 52 Ill. 189 (1869); *Scammon v. City of Chicago*, 25 Ill. 424 (1861).

that the municipality is held liable simply because many times it is the only party financially capable of satisfying the injured person and that consequently it has a right of action over if the tort-feasor is capable of reimbursing the city.<sup>38</sup> Because these strong public policy reasons exist, it might be wiser to treat the municipal liability cases as not within the area of the usual indemnity cases with which this note is concerned. The municipal liability decisions represent, however, an extension of indemnity law to situations where the indemnitee, who is under a duty to inspect, is guilty of concurrent negligence as against the injured third person, although probably to a lesser degree than the perpetrator of the nuisance.

Municipal liability decisions have been used to extend the principle of indemnity from the absolute liability situation to other cases where the indemnitee is also guilty of negligence to the third person. In *Chicago Rys. Co. v. R. F. Conway Co.*,<sup>39</sup> a street car company, which by agreement with the city was required to make repairs on its tracks, employed a contractor, D, to do this work giving him complete control. On a dark night, a policeman speeding by on his motorcycle ran into an excavation near the tracks was injured and recovered judgment against the street car company. The court allowed an indemnity action against D by the company on the theory that while the company was liable for not performing a nondelegable duty (to guard its excavations properly) imposed by city ordinance, it had a right over against one who had assumed to perform that duty for it. The gist of the decision is the right of the street car company to rely on the contractor to perform faithfully his contractual duty.<sup>40</sup> Failure to do so raised an implied promise to make whole the person who relied, the indemnitee.

Basing its decision on a different line of reasoning, however, the court stated that the "general rule" of no-contribution or indemnity between joint tortfeasors applied only in cases of intentional wrongdoing. Then, borrowing language used by courts in other jurisdictions, the court stated that the company and D "were not *in pari delicto* in the personal injury suit and [D] being guilty of the greater wrong, the plaintiff having paid the judgment is entitled to indemnity."<sup>41</sup> These words imply that in all other cases, one "guilty of the greater wrong" would be liable to pay the full amount to his fellow tort-feasor where the parties were not guilty of equal wrong. This case is, of course, a blood-brother of absolute liability decisions involving an independent contractor who is negligent in performing dangerous work. In both cases the employer is re-

<sup>38</sup> See Bohlen, Contribution and Indemnity between Tortfeasors, 22 Cornell L.Q. 469, 479 (1937); 4 Dillon, Municipal Corporations 3032 (5th ed., 1911). Another rationalization advanced to explain these cases is that the municipality has a right over because the indemnitor has also committed a tort against the city by creating a nuisance on public property. Consult Hodges, Contribution and Indemnity among Tortfeasors, 26 Tex. L. Rev. 150 (1947).

<sup>39</sup> 219 Ill. App. 220 (1st Dist., 1920).

<sup>40</sup> See note 51 infra.

<sup>41</sup> *Chicago Rys. Co. v. R. F. Conway Co.*, 219 Ill. App. 220, 224 (1st Dist., 1920).

sponsible because the law affixes a nondelegable duty upon him. Although the *Conway* case is distinguishable because of the presence of a mild degree of concurring negligence on the part of the employer who failed to perform his duty toward third persons, as against the contractor, the employer had a right of recovery based on the contractor's implied promise to perform the employer's duty for him. *Inter se* employer and contractor, the former was, in a sense, without fault.

Indemnity was extended to a new fact situation in *Pennsylvania R. Co. v. Roberts & Schaefer Co.*<sup>42</sup> D had contracted to construct a dry sand hopper for P railroad company for use in sanding the latter's locomotives. D had negligently secured a counterweight while installing a valve on the machine. One of P's employees was hit on his head when the counterweight fell from its suspension twenty-four feet above the ground. After settling with the severely injured employee, P sued D in case for the amount so paid. In remanding the case and holding that the complaint stated a cause of action, the Appellate Court asserted that "where a person had been compelled to pay damages on account of the negligence of a third party, the person so paying, when he is without fault or negligence on his part and the injury is solely the result of the negligence of the third party, may recover such damages from the third party."<sup>43</sup> After an adverse verdict by the jury, P appealed for a second time; and the Appellate Court on this occasion disapproved an instruction by the trial court to the effect that if P and D were both negligent in causing the injury, P could not recover. The Appellate tribunal felt that "not being *in pari delicto*, the rule of law which prevents contribution or indemnity between joint tortfeasors does not apply,"<sup>44</sup> citing the *Conway* case as support. The court reasoned that P did not create "the unsafe or dangerous condition from which the injury resulted,"<sup>45</sup> and was liable to the employee merely because "it failed to furnish him [the employee] a reasonably safe place in which to do his work."<sup>46</sup> Here again is a situation in which the indemnitee had a right to rely upon the indemnitor's implied promise to perform the indemnitee's duty. The *Schaefer* case might have been successfully brought on the theory that the vendor (contractor) impliedly warranted the fitness of the machine.<sup>47</sup> But the point was not considered by the court and apparently was not urged before it.

The last time the Illinois Supreme Court reviewed Illinois indemnity law the question was not perceptibly clarified, probably because the court had no

<sup>42</sup> 244 Ill. App. 646 (1st Dist., 1927), 250 Ill. App. 330 (1st Dist., 1928).

<sup>43</sup> *Pennsylvania R. Co. v. Roberts & Schaefer Co.*, unreported opinion: Abstract No. 31,469, abstract reported at 244 Ill. App. 646 (1st Dist., 1927).

<sup>44</sup> *Pennsylvania R. Co. v. Roberts & Schaefer Co.*, 250 Ill. App. 330, 335 (1st Dist., 1928).

<sup>45</sup> *Ibid.*, at 337.

<sup>46</sup> *Ibid.*

<sup>47</sup> See 1 Williston, Sales §§ 232, 235 (rev. ed., 1948); Bohlen, Contribution and Indemnity between Tortfeasors, 22 Cornell L.Q. 469, 477 (1937).

occasion to face the situation squarely. Simply stated, the issue was whether public policy prevented a contractor from undertaking to indemnify a building owner against loss due to the latter's negligence although a statute made it the owner's personal duty to see that the work was performed carefully.<sup>48</sup> Relying on cases which allowed indemnity under similar circumstances in the absence of express contractual provisions, the court held such a contract valid.<sup>49</sup> In so holding the court declared that in an action between negligent tort-feasors, "the law would inquire into the delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury."<sup>50</sup>

While the language of some of the decisions would warrant a much broader rule, the Illinois indemnity cases presented thus far have involved situations either where one tort-feasor acted without fault, or where, though guilty of some small concurring negligence, the indemnitee had a right to rely (because of his special relationship with the indemnitor) on the indemnitor's performing the indemnitee's duty.<sup>51</sup>

In light of this discussion, the significance of a recent ruling of the Illinois Appellate Court in *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*<sup>52</sup> becomes apparent. One Wehunt, a switchman employed by P railroad, was

<sup>48</sup> Indemnity actions based upon express contractual provisions are, of course, not within the scope of this note. Neither are indemnity rights, or actions of like nature, which are given expressly by statute, i.e., contribution between corporation directors, Ill. Rev. Stat. (1949) c. 32, § 157.42(h), and subrogation under the workmen's compensation statute, Ill. Rev. Stat. (1949) c. 48, § 166.

<sup>49</sup> *John Griffiths & Son Co. v. Nat'l Fireproofing Co.*, 310 Ill. 331, 141 N.E. 739 (1923).

<sup>50</sup> *John Griffiths & Son Co. v. Nat'l Fireproofing Co.*, 310 Ill. 331, 337, 141 N.E. 739, 741 (1923). The court also talks about "the justice of requiring the person whose actual negligence was the proximate cause of the injury" to pay indemnity to one who was merely guilty of "passive negligence." *Ibid.*, at 337 and 741. For similar language in other jurisdiction, consult Meriam and Thornton, *Indemnity between Tort-feasors: An Evolving Doctrine of the New York Court of Appeals*, 25 N.Y.U. L. Rev. 845 (1950).

<sup>51</sup> According to Bohlen: "Justifiable reliance is . . . the soundest ground upon which the right to indemnity can be placed." Bohlen, *Contribution and Indemnity between Tortfeasors*, 22 Cornell L.Q. 469, 478 (1937). The Illinois court in *Trego v. Rubovits*, 178 Ill. App. 127, 134 (1st Dist., 1913), restated the same rule in particularized form: "In all that class of cases where one party owes a legal duty to the public and to third persons to keep a place or instrumentality reasonably safe, whenever another, by contract, agrees to perform that duty for him upon sufficient consideration, such contract by implication of law becomes one of indemnity and renders the party assuming such duty by contract liable for all damages that may legally be recovered by third persons against such party upon whom the law had in the first instance cast such duty. . . ." On the basis of Texas decisions, another writer has given a general rule to cover the indemnity cases: "Where there are two tortfeasors, either or both of whom are liable to an injured third person, but one of whom has breached a duty which he owed both to his co-tortfeasor and to the injured third person, then the tortfeasor who, to his co-tortfeasor, is blameless, should be allowed indemnity." Hodges, *Contribution and Indemnity among Tortfeasors*, 26 Tex. L. Rev. 150, 162 (1947). The formulations of Bohlen and Hodges are similar. The indemnitor must owe a "special duty" arising by virtue of contract or tort and be free of fault as to his co-tortfeasor before the indemnitee can have total recovery from the indemnitor.

<sup>52</sup> 343 Ill. App. 143, 98 N.E. 2d 783 (1st Dist., 1951).

riding on a box car being pushed along P's tracks by a locomotive. D trucking company had parked one of its vehicles next to the tracks. When the box car reached a point adjacent to the parked trailer, Wehunt, who was hanging on to a ladder attached to the box car, was crushed between the parked trailer and the box car. Two years later P settled<sup>53</sup> with Wehunt paying him \$17,840 plus hospital and surgical expenses of \$6,658.80. Previous to this, P had notified D that P would look to D for full reimbursement of all expenses incurred because of D's alleged negligence in parking its trailer too close to the tracks. When D refused to admit responsibility,<sup>54</sup> P sued on implied indemnity for \$20,000.<sup>55</sup> The Appellate Court reversed a ruling of the trial court which had sustained D's motion to strike and dismiss the complaint.<sup>56</sup>

Justice Schwartz, in deciding for the plaintiff, lamented the fact that the vocabulary of negligence law is inadequate for our day. He dismissed the statements of some courts that the indemnitee must be without fault in order to recover with the assertion that "what is meant is that plaintiff by act of defendant was made liable . . . even though he, plaintiff, was not guilty of any active negligence,"<sup>57</sup> but only of "passive" negligence. In order to avoid difficulty in applying this test to the facts, the Justice noted that "mere motion does not define the distinction between active and passive negligence."<sup>58</sup>

<sup>53</sup> Because of the settlement, the indemnitee must, of course, prove he did not pay the injured third person voluntarily. *Fahey v. Town of Harvard*, 22 Ill. 28 (1871). At the trial the reasonableness of the amount of settlement is a matter of proof and plaintiff must establish by evidence the amount of damages it has sustained. *Pennsylvania R. Co. v. Roberts & Schaefer Co.*, unreported opinion: Abstract No. 31,469, abstract reported at 244 Ill. App. 646 (1st Dist., 1927). P evidently felt that it could prove liability because it was responsible under the Federal Employers' Liability Act for its failure to provide safe working conditions for its employees despite the seeming contributory negligence of the plaintiff employee, since, under the FELA, contributory negligence is not a complete defense. 35 Stat. 65 (1908), as amended, 45 U.S.C.A. § 51 (1943).

<sup>54</sup> If the injured employee had sued D, contributory negligence on his part would probably have defeated his cause of action (see text and footnote at note 62 *infra*) even though he might still have an action against P. Consult note 53 *supra*. This fact was urged by counsel for D as a reason for the denial of indemnity, since the result might be that P could recover against the trucking company, although D might have had a complete defense if it had been sued directly by the injured employee. Brief and Argument for Appellee at 32, *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.* 343 Ill. App. 148, 98 N.E. 2d 783 (1st Dist., 1951).

On facts almost identical with the Arthur Dixon case, a lower federal court has ruled that no indemnity action was available. *Wallace v. New Orleans Public Belt R. Co.* 78 F. Supp. 724 (E.D. La., 1948), *rev'd* on other (jurisdictional) grounds, 173 F. 2d 145 (C.A. 5th, 1949). There the court expressly stated: "To permit [P] to have its cross-claim would afford it the opportunity of transferring to [D] what may be termed the residuum of negligence, for which [E] alone should be held liable, if the jury should find that both [P] and [the injured employee] were negligent." *Ibid.*, at 726.

<sup>55</sup> Apparently P's payments had been in return for a complete release from Wehunt, rather than a covenant not to sue, so that D could have been held liable, if at all, only through a suit by P.

<sup>56</sup> *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E. 2d 783 (1st Dist., 1951).

<sup>57</sup> *Ibid.*, at 156, 787.

<sup>58</sup> *Ibid.*, at 158, 788.

The *Arthur Dixon* case carries the *pari delicto* rationalization of the prior Illinois indemnity cases to its logical conclusion. While there was no jury trial in the case to determine whether both parties were negligent and which was "more negligent," it is obvious from the complaint that the railroad company, the indemnitee, was negligent in some degree in failing to discover the parked truck and then moving its locomotive past it with an employee riding on the outside ladder. The doctrine of the *Conway* and *Schaefer* decisions was not applicable because here there was no relationship between indemnitor and indemnitee which would give the indemnitee a right to rely on the indemnitor's performing the indemnitee's duty. Justice Schwartz, however, apparently felt that the jury could find the railroad company less negligent than the trucking company and by so doing raise sufficient grounds for implied indemnity.<sup>59</sup>

The result of the *Arthur Dixon* case and the general language in other Illinois indemnity cases warrants the belief that as long as the parties are not *in pari delicto* the courts will award indemnity to the party guilty of the lesser wrong. If a general no-contribution rule with reference to negligence cases actually exists in Illinois, then a less negligent tort-feasor can recover indemnity (all) from his co-tort-feasors, but he cannot recover contribution (less). Manifestly, whatever inroads the *Arthur Dixon* case creates in indemnity law, it must also produce in contribution law.<sup>60</sup> Another result of the case may be to obliterate any distinction between orthodox indemnity cases, where the indemnitee has acted without fault as against the indemnitor, and to merge that category with the negligence decisions so that indemnity can be had in all situations except where the co-tort-feasors have acted intentionally or were guilty of "equal" negligence.

### III. CONCLUSION

Certain theoretical difficulties have been advanced as reasons why the no-contribution rule should remain in effect as to negligent tort-feasors. Judicial dislike of the comparative negligence doctrine has been offered as a justification for disallowance of contribution between negligent joint tort-feasors.<sup>61</sup> Since the desire to avoid aiding a wrongdoer is so strong in Illinois that lack of contributory negligence must be alleged as part of plaintiff's prima facie case,<sup>62</sup> a strict

<sup>59</sup> The case was later dismissed by stipulation of the parties presumably because a settlement had been reached.

<sup>60</sup> Apparently this was quite clear to the court in the *Arthur Dixon* decision for it repeatedly used the terms indemnity and contribution interchangeably as if there was no difference between them. For example, the court states: "The trial court gave no reasons for striking the complaint but undoubtedly it was on the supposition that the railroad was a tort-feasor seeking contribution from another and therefore could not recover on its theory of implied indemnity. There are many exceptions to the general principle of noncontribution between tort-feasors recognized by the courts of this and other states and by the federal courts." *Gulf, Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 152, 98 N.E. 2d 783, 785 (1st Dist., 1951).

<sup>61</sup> *Contribution or Indemnity between Joint Tort-Feasors*, 5 U. of Cin. L. Rev. 339, 342 (1931).

<sup>62</sup> *Illinois Central R. Co. v. Oswald*, 338 Ill. 270, 170 N.E. 247 (1930).

no-contribution rule in negligence cases follows almost as a necessary corollary of the same policy. In effect, however, the Illinois court in the *Arthur Dixon* case applied a modified comparative negligence test by first deciding which party was the "more negligent" and shifting the entire loss to him.<sup>63</sup> Such a total shift is warranted only where one party is largely without fault, as was true in the indemnity cases prior to the *Arthur Dixon* case. In other situations it may be fair, as between co-tort-feasors, for the one guilty of greater wrong to bear the total loss, yet it would be still fairer to apportion the loss proportionally and carry to its logical conclusion the comparative negligence test of the *Arthur Dixon* decision.

An enlightened Illinois court could dispel the confusion produced by intermingling the terms indemnity and contribution and award indemnity only where one party is without fault and contribution in all other cases.<sup>64</sup> The swiftest and most sensible solution is, of course, for the legislature to adopt a few statutory innovations, such as those contained in the Uniform Contribution among Tortfeasors Act,<sup>65</sup> as part of a general scheme of introducing comparative

<sup>63</sup> This position is strongly similar to the view formerly held by the Illinois courts in the related field of contributory negligence. There also the negligence of the tort-feasor and the plaintiff was once compared and "the end result was that the plaintiff either recovered in full or got nothing at all. The element providing for the apportionment of the damages, according to the relative amounts of negligence displayed, was missing." Turk, *Comparative Negligence on the March*, 28 *Chi.-Kent Rev.* 304, 308 (1950); Green, *Illinois Negligence Law*, 39 *Ill. L. Rev.* 36 (1944).

<sup>64</sup> Some jurisdictions have recently accepted this "enlightened" view. E.g., *George's Radio, Inc. v. Capital Transit Co.*, 126 F. 2d 219 (App. D.C., 1942), noted in 3 *Wash. & Lee L. Rev.* 307 (1942); *Preferred Accident Ins. Co. v. Musante, Berman & Steinberg Co.*, 133 *Conn.* 536, 52 A. 2d 862 (1947), noted in 22 *Conn. Bar J.* 171 (1948); *Davis v. Broad Street Garage*, 191 *Tenn.* 320, 232 S.W. 2d 355 (1950), noted in 31 *B.U.L. Rev.* 116 (1951).

Under a common-law contribution scheme in Illinois, the contributtee would have to begin a new law suit, after payment of the judgment recovered by the injured third person, in order to recover contribution. There is no third party practice in Illinois, and one tort-feasor cannot implead his co-tort-feasor even if the right to contribution existed. See Gregory, *Third Party Practice under the New Illinois Practice Act and Chicago Municipal Court Rules*, 1 *Univ. Chi. L. Rev.* 536 (1934).

<sup>65</sup> *Uniform Contribution among Tortfeasors Act*, 9 *U.L.A.* 159 (1951), adopted, as of 1951, in Arkansas, Hawaii, Maryland, New Mexico, Rhode Island and South Dakota. Consult Stevens, *A Proposal for Contribution among Joint Tortfeasors in Ohio*, 1 *Western Reserve L. Rev.* 50 (1951).

Many states have enacted other types of contribution statutes. A particular difficulty with some of the statutes is that they limit the right to contribution between tort-feasors to instances where the injured plaintiff has recovered a joint judgment against the co-defendants. *Md. Code Ann.* (Flack, 1939) Art. 50, § 13; *Mo. Rev. Stat.* (1939) § 3658; *Laws of N.Y.* (Thompson, 1939) *Civ. Prac. Act* § 211-a. But some statutes state that this fact is immaterial and allow contribution even if the plaintiff recovered a judgment against only one of the defendants. *Gen. Stat. of N.C.* (1943) § 1-240; *Va. Code Ann.* (1930) § 5779. Since the right of contribution is for the benefits of defendants, this view seems more sensible since they make the plaintiff's failure or refusal to procure a joint judgment unimportant.

Wisconsin's procedure obviates this difficulty and provides a method for introducing a complete contribution scheme. In that state the claimant may seek common-law contribution in the injured plaintiff's own action by a cross-claim against his co-defendant. After trial, assuming a verdict for the plaintiff, a "contingent judgment" is rendered fixing the right of the

negligence into Illinois law. Among co-tort-feasors guilty of intentional wrongs or of equal negligence such a statute would permit equal apportionment of the common liability.<sup>66</sup> Indemnity rules would remain in effect where the indemnitee was without fault as to the indemnitor.<sup>67</sup> Within the framework of the *Arthur Dixon* case, if the evidence had indicated that there was a disproportion of fault among the tort-feasors, the court would have instructed the jury that if it found the defendants to be negligent, they should also fix their relative degrees of fault; and contribution would have been granted accordingly.<sup>68</sup>

---

claimant to contribution when he himself has paid more than half of the judgment which plaintiff recovered. After the claimant has made such payment, he receives final and executable judgment for all that he has paid the plaintiff in excess of his own share of the obligation. *Wait v. Pierce*, 191 Wis. 202, 225, 210 N.W. 822 (1926).

For a complete discussion of the varied contribution statutes consult: *Modern Trend of the Law of Contribution among Joint Tortfeasors*, 6 Mont. L. Rev. 34 (1945); *Gregory, Legislative Loss Distribution in Negligence Actions* (1936); *Leflar, Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. L. Rev. 130 (1932).

<sup>66</sup> Consult Uniform Contribution among Tortfeasors Act § 1, 9 U.L.A. 156 (1951).

<sup>67</sup> *Ibid.*, at 163.

<sup>68</sup> *Ibid.*, at 161.