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and opportunity at hand, and backed by the active interest of the bar, the efforts at recodification promise for Montana a bright chance to achieve a new modern code in the Revised Codes of 1947.

James A. Nelson.

MODERN TREND OF THE LAW OF CONTRIBUTION AMONG JOINT TORTFEASORS

The law of contribution is founded upon equitable principles and based upon the desire for a proportionate distribution of a common burden among those obligated. Thus it seems strange to hear the general rule stated today, in most American jurisdictions, that there can be no contribution among joint tortfeasors. The policy of the Anglo-American common law has been to deny assistance to tortfeasors simply on the theory that they are wrongdoers and therefore not entitled to a proportionate distribution of the common burden. To gain a clearer concept of the reasons for such a rule, its application today, and the trend away from the same, it is necessary to take a brief glance at the historical background of the law on this subject.

It is quite generally accepted that the rule had its origin in 1799 in the famous case of *Merryweather v. Nixon*.¹ In this case a judgment was recovered jointly against the plaintiff and defendant in an action for injury to a reversionary interest in a mill and trover for certain machinery. Plaintiff was levied on for the whole judgment, and he then sued the defendant for contribution. Plaintiff was denied such a right on the grounds that his action rested upon what was, in the eyes of the law, his own deliberate wrong. In spite of the meager report of the case, it seems clear that the action proceeded on the theory of a malicious and wanton tort. Therefore, it appears that the rule set down was merely that no contribution should be allowed between wilful and intentional wrongdoers, but later authorities seized upon the decision as stating the general rule that no contribution should be allowed among joint tortfeasors as a class.

Subsequent English cases, however, seemed to recognize the limitation of the doctrine of *Merryweather v. Nixon* and applied the rule against contribution only where the plaintiff was a wilful and conscious wrongdoer.² In 1894 a case arose in

¹8 Term Rep. 186.

²*Adamson v. Jarvis* 1827, 4 Bing. 66; *Betts v. Gibbons* 1834, 2 Ad. & El. 57; *Pearson v. Skelton* 1836, 1 M. & W. 504.

Scotland in which a judgment was recovered against two workmen for negligently causing the death of a third. Contribution was allowed in favor of the workman from whom the judgment was recovered on the grounds that the rule against contribution did not apply to cases involving mere negligence.³ Therefore, today, it may be reliably stated that the better English common law view appears to be that contribution is not denied in cases of mere negligence, accident, mistake, or other unintentional breaches of the law of torts.⁴

In the United States early cases seemed to hold that the denial of the right to contribution among tortfeasors was not the general rule to be applied, but that such was an exception to be applicable only where the party claiming the right was guilty of wilful misconduct.⁵ In *Theweatt's Adm'r. v. Jones*,⁶ decided in 1825, the Court refused to deny contribution where the party claiming the right was guilty of a tort committed due to negligence or mistake. In this case the tortfeasors were co-inspectors of tobacco who by negligence delivered tobacco to a wrong party. The reasoning of the Court was expressed as follows:

“The reason why the law refuses its aid to enforce contribution amongst wrongdoers is that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences; a reason which does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties.”

However, the reason for the rule prohibiting contribution in cases of wilful torts, but allowing it where the tort committed was due merely to the negligence or inadvertent act of the tortfeasor was lost sight of when joinder in one action of those who had caused the same damage was permitted. Irreconcilable conflict arose in the various jurisdictions as to whether the rule denying contribution was one of general application. Apparently, the majority of American courts, at

³Palmer v. Wick & Pulteneytown Steam Shipping Co. 1894, A. C. 318.

⁴Palmer Case, *Supra* note 3; Burrows v. Rhodes 1899, 1 QB 816; Hillen v. I. C. L., 1934, 1 KB 455.

⁵Peck v. Ellis, 1816, 2 Johns. Ch. N. Y. 131; Miller v. Fenton, 1844, 393, 11 Paige N. Y. 18; Hunt v. Lane, 1857, 9 Ind. 248; Rhea v. White, 1859, 3 Head, Tenn. 121; Atkins v. Johnson, 1870, 43 Vt. 78, 5 Am. Rep. 260.

⁶1 Rand. 328, 22 Va. 328, 10 Am. Dec. 528; See also Horback's Adm'rs. v. Elder 1851, 18 Pa. 33; Acheson v. Miller 1853, 2 Ohio St. 203, 59 Am. Dec. 663; Bailey v. Bussing 1859, 28 Conn. 455; Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Dec. 368; Nickerson v. Wheeler, 1875, 118 Mass. 295.

the present writing refuse to permit contribution even where independent, though concurrent, negligence, has contributed to a single loss.⁷

The reasoning of such courts seems influenced to a great extent by a faulty historical interpretation of the Merryweather Case. The rule is generally and flatly stated that there can be no contribution among joint wrongdoers, or tortfeasors, and the logic of such rule is said to be that the law will not lend equitable aid in the form of requiring one joint wrongdoer to contribute his share to another tortfeasor who has satisfied the judgment, when the latter was guilty of some wrong. These decisions fail to realize that all tortfeasors are not guilty of intentional injury to others, and that most several and joint liability results from inadvertently caused damage. They adopt the view that tort liability, in whatever form, is based on fault, and is therefore "punitive," and the rule denying contribution extends to all tortfeasors. Perhaps this "extension" of the rule can be attributed to the unfortunate meaning attached to the term "tortfeasor." The word tort, from its derivation and usage, carries with it the suggestion of wrongdoing. At the time of the Merryweather case, the meaning of the term was actually so limited and narrow and had not come to be applied to actions involving negligent and unintentional injuries.⁸

The extent to which this rule became implanted in the minds of many courts may be fairly well indicated by the view taken by the Supreme Court in 1905 in the *Union Stock Yards Case*.⁹ Although this case involved an action for indemnity, Mr. Justice Day stated, in an extrinsic discussion of the principles of contribution, "that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all of the damages for the wrong done." Such a statement is striking due to the fact that the alleged "wrong" in such case was the failure to inspect defective brakes, an action founded upon negligence. A further, and perhaps more notable illustration of such a view, is shown by the *Restatement of Restitution*,¹⁰ which states:

⁷*Union Stock Yards Co. v. Chicago B. & O. R. Co.*, 196 U. S. 217, 49 L. Ed. 453; *Ill. Cent. R. Co. v. La. Bridge Co.*, 1916, 188 S. W. 476, 171 Ky. 445; *Village of Portland v. Citizens Tel. Co.* 1919, 173 N. W. 382, 206 Mich. 632; *Adams v. White Bus Line*, 1921, 195 Pac. 389, 184 Cal. 710; *Cain v. Quannah Light & Ice Co.* 1928, 267 Pac. 641, 131 Okla. 25; *Royal Indemnity Co. v. Becker*, 1930, 173 N. E. 194, 122 Ohio St. 582, 75 A. L. R. 1481.

⁸12 H. L. R. 178.

⁹*Supra* note 7.

¹⁰Sec. 102.

“Where two persons acting independently or jointly have negligently injured a third person or his property for which injury both became liable in tort to a third person, one of whom has made expenditures in discharge of their liability is not entitled to contribution from the other.”

The effect of this section, and the lack of any sound legal basis for such a rule, becomes apparent by the fact that Comment (a) of this same section states that such a rule “is explainable *only* upon historical grounds.”

Thus the rule which, except where modified by statute, appears to be accepted law in every American common law jurisdiction other than Minnesota,¹¹ Pennsylvania,¹² Wisconsin,¹³ Louisiana,¹⁴ and perhaps Oregon,¹⁵ is that there can be no contribution between joint tortfeasors, irrespective of whether the claimant is in moral or social fault, as where he is conscious of the wrongfulness of his conduct or is merely a tortfeasor in the sense that for one reason or another he is liable in an action in tort.

Three principal reasons of so-called public policy have been constantly advanced in justification of such a rule, founded as it was on a decision based purely on lack of precedent and rendered in a case in which the two parties had joined in what apparently was a deliberate act of conscious wrongdoing.

The first contention is that by denying the claimant contribution he will be deterred from committing misconducts. It is clear, however, that denial of contribution could not be an effective deterrent to wrongdoing by anyone who does not realize that his conduct will subject him to liability for an injury caused thereby. To say that the fear that he will be denied contribution will make a man more attentive to what he is doing “is to carry supposition to the point of absurdity.”¹⁶ The argument that the denial of contribution will act as a deterrent to tortious conduct has even less validity where the person seeking it is guilty of no personal wrongdoing, but is liable only because some policy of law or statute makes him vicariously responsible. The assumption of the courts that such a rule will cause prospective tortfeasors to refrain from

¹¹Underwriters at Lloyds of Minneapolis v. Smith, 1926, 208 N. W. 13; 166 Minn. 388; Duluth, M. & N. R. Co. v. McCarthy, 1931, 236 N. W. 766, 183 Minn. 414.

¹²Goldman v. Mitchell-Fletcher Co., 1928, 141 A. 231, 22 Pa. 354.

¹³Ellis v. Chicago & N. W. R. Co. 1918, 167 N. W. 1048, 167 Wis. 392; Mitchell v. Raymond 1923, 195 N. W. 855, 181 Wis. 591; (Matter is now regulated by statute in Wis.).

¹⁴Quatray v. Wicker 1933, 151 So. 208, 178 La. 289.

¹⁵See Furbeck v. I. Gevurtz & Son, 1914, 143 P. 654, 72 Ore. 12.

¹⁶See 21 CORN. L. Q. 558.

acts which might render them liable for the entire damages, instead of a ratable proportion of them, is somewhat more persuasive when applied in cases of wilful torts. But here, also, this is but a supposition which is not supported by any factual showing that it has a deterrent effect. The fact that one tortfeasor may be compelled to pay the entire damages, means that his fellow wrongdoers will go scot-free. Thus under this rule of no contribution there is also the possibility of escaping all liability, a fact that might cause many to be more willing rather than less willing to engage in wrongful activity."

The second justification given in support of the rule is that due to the fact that the claimant is a "wrongdoer," the court should deny him the use of its forum. Such a reason has some strength where the tortfeasor has been guilty of a wilful and flagrant tort, but such reasoning breaks down where the claimant has been guilty only of inadvertently caused damage due to negligence. And there is absurdity in even suggesting that this reason justifies the denial of contribution to one whose liability is based solely on his vicarious responsibility for the actual wrongdoer and who is himself in no personal fault.

The third reason, namely that the law has no scales to determine the relative guilt and, therefore, the relative responsibility of persons whose tortious conduct concurs in causing injury or damage to a third person, has been refuted by experience. For example, the FEDERAL EMPLOYERS' LIABILITY ACT¹⁸ makes the plaintiff's contributory negligence a matter to be taken into account only as affecting the amount of his damages, and there is no reason why the determination of the respective amounts payable by joint tortfeasors should present any greater difficulties.

These obvious defects, both theoretical and practical, have caused contribution among joint tortfeasors to become an important item of law reform in this country. Before discussing the attributes of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT,¹⁹ it would be well to glance briefly at the various statutory attempts of certain states to remedy the law on the subject.²⁰

In 1904 Kansas²¹ abrogated the strict common law rule by an opportune, if inaccurate, application of a statute providing

¹⁸See 81 PA. L. REV. 133.

¹⁹45 U. S. C. A. 53.

¹⁹9 UN. L. ANN. 159.

²⁰See 45 HARV. L. REV. 369.

²¹Fort Scott v. Kansas City, 66 Kans. 610, 72 P. 238.

that a judgment debtor who "pays more than (a due proportion)—may compel contribution."²²

In 1861 Georgia enacted a bill permitting a suit for contribution when a joint judgment had been entered against two trespassers.²³ The scope of such a statute, however, has been confined only to injuries to property caused by acts of trespass.²⁴ A Missouri act²⁵ passed in 1855 did not so confine the effect of the statute, and extended the right to defendants in judgments for "redress of a private wrong." Similar phraseology was employed in a West Virginia statute²⁶ passed in 1872 and in a Virginia statute²⁷ passed in 1872, and in other statutes passed more recently.²⁸

A restriction of the right of contribution to specified classes of joint tortfeasors is found in three states other than Georgia. In Kentucky and Virginia the statute is applicable only where the tort is "a mere act of negligence and involves no moral turpitude,"²⁹ a limitation suggestive of the rule set down in the heretofore mentioned states which modified the common law rule by judicial decision. Under the Michigan statute,³⁰ contribution can be had only as between "joint libelers," although the reasoning prompting such a limited extension can not be easily detected.

Under the majority of these statutory grants of the right of contribution, such a right is impaired by the usual requirement of a joint judgment as a condition precedent.³¹ At common law a party injured by a joint tort could elect to sue one or more of the wrongdoers,³² and by a voluntary nonsuit he

²²KAN. REV. STAT. ANN. Sec. 3437.

(Other states have similar enactments. CAL. CODE CIVIL Proc. Sec. 709; MONT. R. CODES Sec. 9451; OKLA. COMP. LAWS ANN. Sec. 730; ORE. CODE ANN. 3-411; UTAH COMP. LAWS Sec. 6950; WASH. COMP. STAT. Sec. 593; MINN. STAT. Sec. 9410; N. J. COMP. STAT. p. 2962; PA. STAT. ANN. tit. 12, Sec. 208; None of these states, however, have held such statutes applicable to joint tortfeasors.)

²³See GA. CODE ANN. Sec. 2012.

²⁴Cox v. Strickland, 47 S. E. 912, 120 Ga. 104.

²⁵Mo. REV. STAT. Sec. 3268.

²⁶See W. VA. CODE (1931) c. 15, art. 7, 13.

²⁷See VA. CODE ANN. Sec. 5779.

²⁸N. M. STAT. ANN. Sec. 76-101; N. C. CODE ANN. Sec. 618; TEXAS REV. CODE ANN. Sec. 2212; N. Y. LAWS, 1928 c. 714.

²⁹KY. STAT. (1930) Sec. 484a; VA. CODE ANN. (1930) Sec. 5779; See note 18, 45 HARV. L. REV. 371. "An act 'merely negligent' which involves moral turpitude defies imagination."

³⁰MICH. COMP. LAWS (1920) Sec. 14497.

³¹GA.; CODE ANN. Sec. 2012; MO. STAT. ANN. Sec. 3268; N. M. STAT. ANN. Sec. 618; TEXAS STAT. art. 2212; W. VA. CODE ANN. Sec. 5482; N. Y. C. P. A. Sec. 211-a; N. C. ANN No. 618.

³²See Atlantic & Pac. R. R. Co. v. Laird, 1896, 164 U. S. 393; Dow v. Oroville 134 P. 197, 22 Cal. App. 215.

could dismiss the action as to any of those he had named as defendants.³³ Since under the contribution acts one defendant has no rights against his co-defendant until a joint judgment has been rendered, the courts have generally held that the plaintiff's privileges remain unaffected by statute.³⁴ In one instance, this weakness in the statutes was largely remedied by a judicial decision,³⁵ and the statutes of Kentucky and Virginia³⁶ provide simply "that there shall be contribution among tortfeasors," thus dispensing with the requirement of a joint judgment and permitting separate suits to be brought against co-tortfeasors wherever personal jurisdiction can be obtained. But these latter statutes are in turn defective as they fail to provide a method whereby a defendant may implead his fellow tortfeasors when they are within reach of process. The North Carolina act³⁷ apparently meets all of these difficulties by giving the defendant an election either to sue his joint tortfeasors separately or to implead them in the initial cause.³⁸

The terms "pro rata" and "proportionate part,"³⁹ used to describe the amount of recovery, have ordinarily not been expressly defined, but the courts applying the statutes have assumed that an equal division among the tort defendants was intended.⁴⁰ This is stated expressly in the Texas statute.⁴¹ The North Carolina act, however, contains a provision patterned after the equitable rule of contribution among co-sureties.

Thus it is obvious that the legislatures or courts in many of our states agree that the common law rule denying contribution is no longer satisfactory. But they have not agreed on a substitute for this rule.⁴² As noted in the aforementioned statutes, such states all provide for contribution in one form or another, but some of these jurisdictions have so limited the right that its effect as a material or beneficial change of the common law rule is slight.

Other jurisdictions permit contribution without stipulating that the common liability must rest on negligence or arise out of torts of inadvertence, but even in such jurisdictions it

³³See *Amer. Express Co. v. Patterson*, 1881, 73 Ind. 430.

³⁴*Mashburn & Co. v. Dannenberg Co.* 44 S. E. 97, 117 Ga. 567; *Flenner v. Southwest Mo. R. R.*, 290 S. W. 78, 221 Mo. App. 160.

³⁵*Lottman v. Cuilla* 228, S. W. 123 (Texas 1926).

³⁶*Supra* note 29.

³⁷N. C. CODE ANN. Sec. 618.

³⁸Same election is allowed in the limited MICH. ACT. Sec. 14497.

³⁹N. Y. C. P. A. Sec. 211-a; N. C. CODE ANN. Sec. 618; (remainder of acts employ term "contribution.")

⁴⁰Note 32, 45 HARV. L. REV. 374.

⁴¹TEXAS REV. CODE ANN. Sec. 618.

⁴²For a general comparison of the statutes, see 45 HARV. L. REV. 371.

is questionable whether the courts will permit contribution among tortfeasors guilty of intentional harm. However, as indicated before, the reasons for so limiting are not too sound. There are some practical reasons for not confining contribution to common liability for negligence. For instance, a breach of a criminal statute is frequently regarded as more reprehensible than "common law negligence," and a person held liable for such a breach is therefore denied recovery of contribution. This view is hard to reconcile with the generally accepted view that the inadvertent breach of such statutes as a basis of liability for damages is treated as "negligence per se." As one of the foremost authorities in this field⁴² has stated:

"In the interest of practical administrative convenience, if for no other reason, the best proposal is to permit contribution among all tortfeasors commonly liable for the same damage, regardless of the nature of the particular derelictions involved."

Also as noted, the legislature in some of the states have confined contribution among tortfeasors to those subjected to joint and several judgment liability, thus virtually leaving to the injured person the control of the distribution of loss through contribution. He cannot be compelled to take judgment against the tortfeasors whom he does not wish to sue. By refusing to sue or take judgment against one or more of several tortfeasors commonly liable to suffer judgment, even though the trial would have proven them equally responsible with the one against whom judgment was taken, the injured person may confer immunity from contribution and at the same time secure complete compensation from the luckless tortfeasor whom he wishes to hold liable.

The tendency to alter the old common law doctrines in this field in the light of modern conditions is well shown by the recent ENGLISH JOINT TORTFEASORS ACT.⁴³ As noted above, the English common law view was that contribution should be denied only in cases of wilful and intentional torts. However, the English Act, in recognition of the lack of justification for denying contribution in any type of tort action, allows contribution between any persons liable for the same tort "whether a crime or not."⁴⁴ By extending contribution to "any tortfeasor liable," it apparently does away with the requirement of a judgment as a condition precedent. Another intelligent pro-

⁴²Gregory, *Contribution Among Tortfeasors*, 1938, WIS. L. REV. 365.

⁴³LAW REFORM ACT, 1935, 25 & 26 Geo. V, c. 30, Secs. 6, 7, and 8.

⁴⁴Sec. 6(1).

vision embodied in the act is that which provides that "the amount of contribution recoverable from any person shall be such as may be found by the court to be just and equitable, having regard to the extent of that person's responsibility for the damage, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution shall amount to a complete indemnity."⁴⁶

The need for revision of the law regarding contribution in the United States, as has been shown, is very evident. In about one-fourth of the states, the statutory attempts at such revision have not been too satisfactory, and in the remainder of the states, with few exceptions, the strict common law view is adhered to, although the courts in these latter jurisdictions seem to be aware of the defects and injustice of such a rule. The scattered legislation and decisions have failed to establish any uniformity in result, but have succeeded in indicating very strongly the need for the adoption of some common policy.

In recent times, cases which require the application of the rule of contribution among tortfeasors have increased rapidly in volume, due primarily to the rapid increase in the number of automobile accidents, causing the legal and social aspects of this field of law to become extremely important. Therefore the legislatures of the respective states, in light of the present confused state of the law regarding contribution and its growing importance, should very seriously consider the benefits which would accrue upon the adoption of a uniform act covering the subject.

Montana has no statute applicable where the question of contribution among tortfeasors is raised, and as yet no cases have been decided directly in point, so in all probability the Montana Court would feel found to follow the majority common law view. But due to the injustice of this strict common law view, and the failure of certain states to remedy the same entirely by piece-meal legislation, it would be well for the Montana Legislature to consider the provisions embodied in the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT.⁴⁷ An adoption of legislation modeled upon this act would seem advisable before Montana Courts are called upon definitely to commit themselves in decisions in which a joint tortfeasor is called upon to bear his fair share of the liability imposed.

The UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS

⁴⁶Sec. 6(2).

⁴⁷9 UN. L. ANN. 159.

NOTE AND COMMENT

ACT was sponsored jointly by the American Law Institute and the Conference of Commissioners on Uniform State Laws. The draft of this Act was approved in 1939.⁴⁸

The principal provisions of this Act, which alter the accepted view, may be summarized as follows:

(1) The act permits contribution among all tortfeasors whom the injured person could hold liable jointly and severally for the same damage. Joint and several judgment liability is not a necessary prerequisite to the recovery of such contribution.⁴⁹

(2) The creation of the right of contribution by the act is not confined to any particular class of tortfeasors.⁵⁰

(3) The pro rata shares of contribution should be determined on the basis of the "equity rule," to the effect that such are to be determined according to the number of tortfeasors commonly liable who are available within the jurisdiction and who are financially solvent.⁵¹

(4) An optional provision in the act stipulates that where there is such a disproportion of fault among the tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares.⁵²

(5) A release by the injured person of one tortfeasor whether before or after judgment does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the others in the amount paid for the release.⁵³ An injured person acting in collusion with, or out of sympathy for, one of the tortfeasors cannot relieve him from the obligation to contribute to the other tortfeasors by releasing him.

⁴⁸The following states have adopted the act to date: Ark. 1941; Hawaii, 1941; Md. 1941; R. I. 1940.

⁴⁹Sec. 1.

⁵⁰Sec. 2(1).

⁵¹Sec. 2(1) (see ann.)

⁵²Sec. 2(4). This section is inserted in the Act as an optional provision. There is a very strong case to be made for the adoption of this subsection, although two of the four states in which the Act has been adopted, Md. & Ark., have omitted it. The apportionment device is intended to work as follows: If the evidence indicates that there is a disproportion of fault the court shall instruct the jury that if it finds the tortfeasors to have been negligent, they shall also fix their relative degrees of fault. Thus if the court believes that an apportionment of fault is inappropriate in a particular case, none will be made.

⁵³Sec. 4 (ann.). See *Black v. Martin*, 1930, 292 P. 577, 88 Mont. 256; *Meinecke v. Intermountain Transp. Co.*, 1936, 55 P. (2d) 680, 101 Mont. 315; *Towner v. Brown*, 34 Mont. 121; *Chisholm v. Vocational School*, 103 Mont. 503, 512, 64 P. (2) 838.

The only way that such a release can free the tortfeasor from his duty to contribute is to include a provision to the effect that the other tortfeasors shall be released from the injured person's pro rata share of the common liability.⁵⁴

(7) Another optional section of the act enables one or more of several tortfeasors sued by the injured person to add as third-party defendants any fellow joint tortfeasors whom they believe to have been also responsible for the tort. In this way the interests of justice may be promoted by obviating the necessity of a separate action for contribution.⁵⁵

As can be easily seen, a legislative adoption of these provisions of the Uniform Act would establish a system whereby the respective liabilities of the tortfeasors could be equitably and conveniently determined, and the distribution of loss would be governed by the respective degrees of fault.⁵⁶

Robert Brooke.

IS A LANDLORD IN MONTANA ANSWERABLE IN TORT FOR BREACH OF COVENANT TO REPAIR THE LEASED PREMISES?

In this paper we shall deal with the question of a landlord who contracts with his tenant to repair defects in the leased premises and fails to do so. Injury results to the tenant proximately caused by such defect not being remedied by the landlord as he had agreed. Can the tenant recover in a tort action,

⁵⁴Sec. 5 (ann.)

⁵⁵Sec. 7 (the procedural aspect of this section is modeled as closely as possible after the new FEDERAL RULES OF CIVIL PROCEDURE, 28 U. S. C. A., following 723c.

⁵⁶It might be well to note a recent criticism directed towards this modern view of the law of contribution among joint tortfeasors. Mr. James, in 54 HARV. L. REV. 1170, advocates a program of socialization of loss by the simple theory of retaining the common law rule against contribution. His argument boils down to the premise that joint and several liability among tortfeasors, without contribution, gives the injured person a free hand in shifting the loss to that tortfeasor best able to bear it thus passing it on to society in general. This argument seems inconclusive due to the fact that it appears to be predicated on the rapid increase in joint tort liability in automobile accidents where if no contribution is allowed, the loss in the majority of cases would be borne by an insurance company, thus effecting a wider distribution of loss. In innumerable other tort actions, this result would not follow.

For an excellent defense of the law allowing contribution among joint tortfeasors, in answer to the theory broached by Mr. James, see Mr. Gregory's reply in 54 HARV. L. REV. 1170.