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Notice of Appeal.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

Action at Law.

To Public Service Railway Company, a corporation, and Henry H. Fryling, its Attorney:

TAKE NOTICE that the defendant, Joseph Matteucci, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

JOHN E. TOOLAN,

Attorney of the Defendant.

Grounds of Appeal.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

Action at Law.
On Appeal.

The defendant, Joseph Matteucci, states and urges the following grounds of appeal in this cause:

(1) The complaint filed by the plaintiff herein fails to state a cause of action.

(2) The Court committed an error in law in declining to strike out the complaint of the plaintiff on motion by the defendant.

(3) The trial court committed an error in law in finding a judgment in favor of the plaintiff instead of a judgment for the defendant.

(4) Because plaintiff, as a matter of law in New Jersey, was not entitled as a joint tort feasor to contribution from the defendant, Joseph Matteucci.

(5) Because the excess payment made by the plaintiff on account of the judgment obtained against plaintiff and defendant as joint tort feasors was a

voluntary payment and plaintiff is not entitled, as a matter of law, to collect from this defendant any part of said voluntary excess payment.

JOHN E. TOOLAN,
Attorney of the Defendant.

Summons.

THE STATE OF NEW JERSEY.

To Joseph Matteucci.

(L. S.)

You are summoned to answer the annexed complaint of Public Service Railway Company, a corporation, in an action at law in the New Jersey Supreme Court. And take notice, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton, this fourth day of March, Nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

JOSEPH COULT,
Attorney of Plaintiff.

Complaint.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

Action at Law.

Plaintiff, a New Jersey Corporation, with its principal office at the City of Newark, Essex County, says:

1. That on or about the twenty-fifth day of September, Nineteen hundred and twenty-five, one Julia Alexander sustained certain physical injuries by reason of the negligence of a servant of this plaintiff in the operation of a trolley car and of the servant of this defendant in the operation of a certain jitney bus at the Township of Raritan, Middlesex County, New Jersey.

2. That said Julia Alexander on or about the tenth day of January, Nineteen hundred and twenty-six, instituted a suit at law in the New Jersey Supreme Court against this plaintiff and this defendant to recover damages for said personal injuries.

3. That issue having been joined in said suit by both defendants the same came on for trial at the Supreme Court Circuit held in Middlesex County, New Jersey, on or about the twentieth day of May, Nineteen hundred and twenty-six, and on or about the twenty-

first day of May, Nineteen hundred and twenty-six, a verdict was rendered in said suit for the sum of Thirty-five thousand ($35,000) dollars in favor of said Julia Alexander and against this plaintiff and this defendant jointly.

4. That thereupon this plaintiff and this defendant each obtained rules of the said Supreme Court requiring the said Julia Alexander to show cause before said Supreme Court at the next term thereof why the said verdict should not be set aside and a new trial granted to both this plaintiff and this defendant, which said rules having been duly considered by the said Supreme Court were both discharged, with costs.

5. That the costs on said judgment, and on said rules to show cause, were duly taxed by the Clerk of the said Supreme Court against this plaintiff and this defendant jointly.

6. That the said defendant at the time of the injury to the said Julia Alexander hereinabove mentioned was indemnified against loss or damage to him, the said defendant, by reason of the said injury, by a certain policy of insurance issued by Globe Indemnity Company, a corporation, in the sum of Ten thousand ($10,000) dollars.

7. That on or about the fifth day of February, Nineteen hundred and twenty-seven, the said Julia Alexander caused a writ of execution to be issued out of the said Supreme Court on the judgment hereinabove mentioned, which writ of execution was directed to the Sheriff of the County of Essex, in said State of New Jersey, and commanded him to make the said judgment of the goods and chattels, rights and credits, moneys and effects, lands, tenements and hereditaments of this plaintiff and of this defendant in the said County of Essex.

8. That thereupon the said Globe Indemnity Company paid to the said Julia Alexander by her attorney of record the sum of Ten thousand ($10,000) dollars on account of said judgment, together with one-half of the said taxed costs on the said judgment and on said rules to show cause, and one-half of all of the accrued interest upon said judgment.

9. That on the eleventh day of February, Nineteen hundred and twenty-seven, this plaintiff, under compulsion of said execution, paid to the said Julia Alexander by her attorney of record the sum of Twenty-five thousand ($25,000) dollars, together with one-half of the said taxed costs upon the said judgment and upon said rule to show cause, and one-half of the interest upon said judgment to that date.

10. Wherefore by reason of the premises and of the payment of said sums of money as hereinabove set forth an action has accrued to this plaintiff to have and demand of said defendant, Joseph Matteucci, the sum of Seven thousand five hundred ($7,500) dollars, with interest.

11. Plaintiff demands Ten thousand ($10,000) dollars damages.

JOSEPH COULT,
Attorney of Plaintiff.

Answer.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

JOSEPH MATTEUCCI,
Defendant.

Action at Law.

The defendant herein, Joseph Matteucci, in answer to the complaint filed by the plaintiff, says that:

(1) Paragraph one is admitted.

(2) Paragraph two is admitted.

(3) Paragraph three is admitted.

(4) Paragraph four is admitted.

(5) Paragraph five is admitted.

(6) Paragraph six is admitted.

(7) Defendant does not have sufficient knowledge or information as to form a beleif as to the allegations in paragraph seven, and leaves plaintiff to its proof.

(8) Defendant is informed and believes that the Globe Indemnity Company paid the sum of ten thousand dollars ($10,000.00) together with one-half taxed costs and interest on said judgment and rule to show cause.

(9) Defendant does not have sufficient knowledge or information to form a belief as to the allegations in paragraph nine and leaves plaintiff to its proof.

(10) Paragraph ten is denied.

First Defense.

Defendant is not indebted to the plaintiff.

Second Defense.

Plaintiff's alleged claim arises by reason of a judgment obtained against plaintiff and defendant herein as joint tort feasors. Plaintiff as a matter of law is not entitled to any contribution from this defendant by reason of any excess amount paid by plaintiff herein on account of the satisfaction of said judgment.

Third Defense.

Any excess paid by plaintiff above the amount paid by defendant was a voluntary payment and plaintiff is not entitled to contribution from defendant for any part of said voluntary excess payment.

JOHN E. TOOLAN,
Attorney of the Defendant.

Answer Filed in Lieu of Answer Withdrawn for Purpose of Motion to Strike Complaint.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

} Action at Law.

The defendant herein, Joseph Matteucci, in answer to the complaint filed by the plaintiff says that:

(1) Paragraph one is admitted.

(2) Paragraph two is admitted.

(3) Paragraph three is admitted.

(4) Paragraph four is admitted.

(5) Paragraph five is admitted.

(6) Paragraph six is admitted.

(7) Defendant does not have sufficient knowledge or information as to form a belief as to the allegations in paragraph seven and leaves plaintiff to its proof.

(8) Defendant is informed and believes that the Globe Indemnity Company paid the sum of ten thousand dollars ($10,000.00) together with one-half taxed

costs and interest on said judgment and rule to show cause.

(9) Defendant does not have sufficient knowledge or information to form a belief as to the allegations in paragraph nine and leaves plaintiff to its proof.

(10) Paragraph ten is denied.

First Defense.

Defendant is not indebted to the plaintiff.

Second Defense.

Plaintiff's alleged claim arises by reason of a judgment obtained against plaintiff and defendant herein as joint tort feasors. Plaintiff as a matter of law is not entitled to any contribution from this defendant by reason of any excess amount paid by plaintiff herein on account of the satisfaction of said judgment.

Third Defense.

Any excess paid by plaintiff above the amount paid by defendant was a voluntary payment and plaintiff is not entitled to contribution from defendant for any part of said voluntary excess payment.

JOHN E. TOOLAN,
Attorney of the Defendant.

Reply.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

Action at Law.

Plaintiff by way of reply to the answer of the defendant filed herein, says that:

1. It joins issue on the allegations of the answer denying the allegations of the complaint.

2. It denies the allegations contained in the first and third defenses of the answer and joins issue thereon.

3. It admits that plaintiff's claim arises by reason of a judgment obtained against plaintiff and defendant as joint tort feasors as alleged in the second defense, but it denies the remaining allegations contained in said defense and joins issue thereon.

HENRY H. FRYLING,
Attorney of Plaintiff.

Stipulation of Facts.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

Action at Law.

It is hereby stipulated and agreed between the attorneys for the parties hereto, that the above cause be submitted for determination and judgment on the following agreed state of facts; without a jury:

(1) That on May 21, 1926, one Julia Alexander recovered a verdict in the Supreme Court Circuit held in Middlesex County, New Jersey, for $35,000.00 against this defendant and this plaintiff jointly, for certain physical injuries received by her by reason of the negligence of a servant of this defendant in the operation of a certain jitney bus, and of a servant of this plaintiff in the operation of a certain trolley car at the Township of Raritan, Middlesex County, New Jersey.

(2) That at the time of the injury to the said Julia Alexander, this defendant was indemnified against loss or damage to him by reason of the said injury by a certain policy of insurance issued by the Globe Indemnity Company, a corporation, in the sum of Ten Thousand Dollars ($10,000.00).

(3) That on or about the fifth day of February, 1927, the said Julia Alexander caused a writ of execution to be issued out of the said Supreme Court on the judgment hereinabove mentioned, which writ of execution was directed to the Sheriff of the County of Essex, in the said State of New Jersey, and commanded him to make the said judgment of the goods and chattels, rights and credits, moneys and effects, lands, tenements and hereditaments of this plaintiff and of this defendant in the said County of Essex.

(4) Said execution was never actually delivered to the Sheriff of Essex County nor was any levy made upon the goods and chattels, lands or other property of either of the defendants under said execution. Prior to any such levy being made each of the defendants contributed to the payment of said judgment as set forth in paragraphs five and six.

(5) That thereupon the said Globe Indemnity Company paid to the said Julia Alexander by her attorney of record the sum of Ten Thousand Dollars ($10,000.00) on account of said judgment, together with one-half of the taxed costs on the said judgment and on rules to show cause, and one-half of all of the accrued interest upon said judgment.

(6) That on the eleventh day of February, 1927, this plaintiff paid to the said Julia Alexander through her attorney of record the sum of Twenty-five Thousand Dollars ($25,000.00), together with one-half of the said taxed costs upon the said judgment and upon said rule to show cause, and one-half of the interest upon said judgment to that date.

(7) Plaintiff claims by reason of the payment of said sums of money as hereinabove set forth an action has accrued to it in the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, with interest from February 11, 1927.

(8) Defendant alleges, first, that plaintiff's alleged claim arises by reason of a judgment obtained against the plaintiff and defendant herein as joint tort feasors and that plaintiff as a matter of law is not entitled to any contribution from this defendant by reason of any excess amount paid by the plaintiff herein on account of the satisfaction of said judgment; second, that the excess paid by the plaintiff above the amount paid by the defendant was a voluntary payment and that plaintiff, therefore, is not entitled to contribution from defendant for any part of said voluntary excess payment.

HENRY H. FRYLING,
Attorney of Plaintiff.

JOHN E. TOOLAN,
Attorney of Defendant.

Notice of Motion to Strike Answer.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

JOSEPH MATTEUCCI,
Defendant.

} Action at Law.

To John E. Toolan, Esq.,
Attorney of Defendant.

Sir:

TAKE NOTICE that on Saturday, April 23rd, 1927, at the Court House, Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, before the Honorable William S. Gummere, Chief Justice, or such Justice or Judge as shall be presiding, I shall move to strike out the Answer filed by you on behalf of the above defendant, on the grounds that the said Answer is sham and frivolous and sets forth no defense to the Complaint filed herein.

And take further notice that at the same time I shall move to strike out the alleged defenses contained in said Answer and set forth as the first, second and third separate defenses, on the grounds that none of them constitute any defense to said action, and that they, nor any of them, do not set forth any defense to the allegations contained in the Complaint filed herein.

And take further notice that at the same time and

place I shall move to have judgment interlocutory and final entered against the defendant and in favor of the plaintiff, and annexed hereto and made part of this notice is a copy of the affidavit on which we shall rely for the entry of said judgment and on said motion.

JOSEPH COULT,
Attorney of Plaintiff.

Dated, April 7, 1927.

Affidavit.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

JOSEPH MATTEUCCI,
Defendant.

} Action at Law.

State of New Jersey, }
County of Essex, } ss.

Joseph Coult, of full age, being duly sworn on his oath says: I am a licensed and practising attorney and counselor at law of the State of New Jersey, and the attorney for the above-named plaintiff. I am familiar with all of the allegations contained in the Complaint filed herein, and particularly it is true that on May 21st, 1926, a verdict was rendered in the New Jersey Supreme Court, Middlesex County, in a suit by Julia Alexander, plaintiff, against Public Service Railway Company, a corporation, and Joseph Matteucci, jointly, for Thirty-five Thousand ($35,000) Dollars and costs; that subsequent thereto the said Public Service Railway Company and the said Joseph Matteucci each obtained rules of the said Supreme Court requiring the said Julia Alexander to show cause before said Supreme Court at the next term thereof why the said verdict should not be set aside and a new trial granted to both the Public Service Railway Company and the said Joseph Matteucci, which said rules having been duly considered by the said Supreme Court

were both discharged with costs, and the costs on the said judgment were duly taxed by the Clerk of the said Supreme Court against this plaintiff and this defendant jointly.

Particularly is it true that the said defendant at the time of the injury to the said Julia Alexander was indemnified against loss or damage to him, the said defendant, by reason of the said injury, by a certain policy of insurance issued by the Globe Indemnity Company, a corporation, in the sum of Ten Thousand ($10,000) Dollars.

That on or about the 5th day of February, 1927, the said Julia Alexander, through her attorney, caused a writ of execution ~~was directed to the Sheriff of the~~ to be issued out of said Supreme Court on the judgment hereinbefore-mentioned, which writ of execution was directed to the Sheriff of the County of Essex, in the said State of New Jersey, and commanding him to make the said judgment of the goods and chattels, rights and credits, moneys and effects, lands, tenements and hereditaments of this plaintiff and of this defendant, in the said County of Essex.

I know of my own knowledge that thereupon the said Globe Indemnity Company paid to the said Julia Alexander, by her attorney of record, the sum of Ten Thousand ($10,000) Dollars, on account of said judgment, together with one-half of the said taxed costs on the said judgment and on said rules to show cause and one-half of all of the accrued interest upon said judgment.

That on the 11th day of February, 1927, this plaintiff, under compulsion of the said execution, paid to the said Julia Alexander, by her attorney of record, the sum of Twenty-five Thousand ($25,000) Dollars, together with one-half of the said taxed costs upon the said judgment and upon said rules to show cause and one-half of the interest upon said judgment to that date.

Deponent further says that there is due to this

plaintiff from this defendant on the said judgment herein above referred to the sum of Seven Thousand Five Hundred ($7,500) Dollars, being the amount paid by this defendant under compulsion of the said execution herein-above referred to, over and above the amount that this plaintiff should have been required to pay on the said judgment, and that as a result of the said payment under compulsion of the said execution herein-above referred to, this defendant is indebted to this plaintiff in the sum of Seven Thousand Five Hundred ($7,500) Dollars, together with interest from the 11th day of February, 1927.

JOSEPH COULT.

Sworn and subscribed to before me,
this 7th day of April, 1927.

CARL T. FREGGENS,
A Master in Chancery of N. J.

Notice to Strike Complaint.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

} Action at Law.

To Public Service Railway Company,
and Joseph Coult, its Attorney:

TAKE NOTICE that on Saturday, May 21, 1927, at the Court House, Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, before the Honorable William S. Gummere, Chief Justice, or such Justice as shall be presiding, I shall move to strike out the complaint filed by you on behalf of the above plaintiff, on the ground that the said complaint fails to state a cause of action.

Dated, May 4, 1927.

JOHN E. TOOLAN,
Attorney of the Defendant.

Affidavit.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH MATTEUCCI, Defendant.

} Action at Law.

State of New Jersey,
County of Middlesex, } ss.

John E. Toolan, of full age, being duly sworn according to law, upon his oath deposes and says:

(1) I am a practising attorney with offices in the First National Bank Building, Perth Amboy, New Jersey, and am the attorney of record for the defendant in the above entitled cause.

(2) On or about the 25th day of September, 1925, the defendant herein, Joseph Matteucci, was the owner of an automobile bus which he was operating, through his servants and agents, along the highway known as New Brunswick Avenue, leading from the City of Perth Amboy to Metuchen, Middlesex County, New Jersey.

(3) On said date the plaintiff herein, Public Service Railway Company, was engaged in the business of transporting passengers for hire, and owned and operated, through its servants and agents, trolley cars

operating over rails along and upon the highway known as New Brunswick Avenue, between the City of Perth Amboy and Metuchen, Middlesex County, New Jersey.

(4) On said date one Julia Alexander sustained personal injuries as a result of the joint negligence of the servants and agents of Joseph Matteucci in operating the said automobile bus and of the servants and agents of the Public Service Railway Company in operating and driving its trolley car.

(5) Suit was brought by the said Julia Alexander to recover damages for the personal injuries sustained by her as aforesaid against the said Public Service Railway Company and Joseph Matteucci, alleging and charging that the said injuries, so sustained by her as aforesaid, were due to the joint negligence of the said Public Service Railway Company and Joseph Matteucci.

(6) Issue having been joined in said suit, the said cause was tried in the New Jersey Supreme Court, Middlesex Circuit, on or about the 20th day of May, 1926, and on or about the 21st day of May, 1926, the jury returned a verdict in favor of the plaintiff, Julia Alexander, and against the defendants in the amount of thirty-five thousand dollars.

(7) The said Joseph Matteucci paid or caused to be paid on account of said judgment the sum of ten thousand dollars and the Public Service Railway Company paid or caused to be paid on account of said judgment the sum of twenty-five thousand dollars.

(8) On or about the fourth day of March, 1927, plaintiff herein started suit against Joseph Matteucci to recover the sum of seventy-five hundred dollars, alleging and charging that the said Joseph Matteucci

was indebted to the Public Service Railway Company for said sum, being one-half of the amount paid by said Public Service Railway Company in excess of the amount paid by said Joseph Matteucci on account of the satisfaction of said judgment.

(9) Said complaint fails to allege or disclose any theory or ground cognizant in law why the said Joseph Matteucci is indebted to the Public Service Railway Company for the money claimed in said complaint and that said complaint utterly fails to allege a cause of action against the defendant.

JOHN E. TOOLAN.

Sworn and subscribed to before me,
this 4th day of May, 1927.

JAMES P. HANEY,
Notary Public of N. J.

Opinion of Chief Justice Gummere.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY CO.

vs.

MATTEUCCI.

John E. Toolan, Esq.,
Counsellor at Law.

My dear sir:

Although I have very grave doubts as to whether the complaint in the present case sets out a valid cause of action, I have concluded to deny the application to strike it out. The question involved is one of novel impression, so far as the courts of this state are concerned. Instead of attempting to determine it upon this application, I have decided that the wiser course is to leave it undetermined for the present, and to refuse the application for the reason indicated in the latter part of the opinion filed in the case of Young v. Sterling Leather Works, 96 Atl. Rep., p. 1016.

I have left your papers with Mr. Gmeiner, the Deputy Clerk, subject to your call.

Very truly yours,

WM. S. GUMMERE,
Chief Justice.

Decision.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY,
Plaintiff,

vs.

JOSEPH MATTEUCCI,
Defendant.

Action at Law.

Dungan, J.

This case was tried before the Court, without a jury, upon an agreed stipulation of facts, from which it appears that one Julia Alexander recovered a verdict in the Supreme Court, Middlesex County Circuit, New Jersey, for $35,000.00 against the Public Service Railway Company and Joseph Matteucci, the plaintiff and defendant herein, for physical injuries received by her by reason of the negligence of a servant of the plaintiff in the operation of a trolley car, and of a servant of the defendant in the operation of a jitney bus; that the defendant Matteucci was insured against loss to him by reason of the said injury in the sum of $10,000.00; that the said Julia Alexander caused a writ of execution to be issued on the judgment directed to the Sheriff of the County of Essex commanding him to make the amount of said judgment of the property of both defendants in her action against them, but which execution was never actually delivered to the Sheriff nor any levy made, but that prior thereto the defendants contributed to the payment of said judgment by the payment by

Matteucci of the sum of $10,000.00, and by the payment by the Public Service Railway Company of the sum of $25,000.00.

The Public Service Railway Company thereupon brings this suit against Joseph Matteucci claiming that by reason of the payment of said sum of money the Public Service Railway Company, the plaintiff herein is entitled to contribution from the defendant, Joseph Matteucci, in the sum of $7,500.00 with interest from February 11th, 1927, the date of the payment by the plaintiff herein to the said Julia Alexander, the plaintiff in the original action of the said sum of $25,000.00. The defendant claims that, as a matter of law, the plaintiff is not entitled to any contribution from the defendant by reason of the excess amount paid by the plaintiff on account of the satisfaction of said judgment, and that as a matter of fact the amount paid by the plaintiff was a voluntary payment.

It is undoubtedly the general rule that where one of several wrong doers has been compelled to pay the damages for the wrong committed, he cannot compel contribution from others who participated in the commission of the wrong.

While, in stating this rule in Newman vs. Fowler, 37 Law, page 89, Chief Justice Beasley apparently applied it to a case of mere negligence, the question of whether or not there might be contribution between two or more defendants whose concurring negligence resulted in damage to another, was not involved in that case; and, so far as appears from an examination of the New Jersey cases, that precise question does not seem to have been decided in this state.

In many states the decisions are to the effect that a person is not deprived of contribution from another who is also originally liable, where the ground of their liability is merely negligence of both, in carrying on a lawful transaction or business; while in others, it is held that there can be no contribution between per-

sons whose concurrent negligence was the proximate cause of the injury for which one of them has been compelled to respond in damages.

In this state we are free to adopt either principle, which appears to be more logical—more just. The weight of authority seems to favor the right to contribution.

Chief Justice Cornish, of the Supreme Judicial Court of Maine, in the case of Hobbs vs. Hurley, 104 Atl. page 815, states so convincingly the proposition in favor of the right to contribution and the reasons therefor, in a case similar to the one being here considered, that his argument is adopted in this case.

In the Maine case it appeared that one Pease was thrown from his wagon and injured by reason of an automobile, driven by one Herrick, a chauffeur who was in the employ of the defendants, Hobbs and Hurley, being backed against and frightening the horse of Pease. Pease brought suit against four persons, in which judgment was given in favor of Pease and against the defendants, Hobbs and Hurley. The defendant Hobbs paid the entire amount of the judgment and brought suit against Hurley, his co-defendant, for contribution.

Chief Justice Cornish said: "It is undoubtedly a general rule of law that as between joint tort-feasors in pari delicto there is no right of contribution. The reason of the rule is that the law will not lend its aid to him who founds his cause of action upon an illegal act. It leaves him where it finds him. The term 'Tort-feasors' as used here, applies to persons who by concert of action intentionally commit the wrong complained of.

"But an exception to this rule is equally well settled and that is that when the parties are not intentional and wilful wrong doers; but are made wrong doers by legal inference or intendment, are involuntary and unintentional tort-feasors, so to speak, then the preceding rule does not apply and contribution may be en-

forced. The rule ceases because the reason for it has ceased. Contribution is not contractual. It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law.

"It may be safely asserted that the rule denying the right of contribution as between joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction. In such cases the parties are tort-feasors, not wilfully, but by inference of law, and the term itself seems disproportionately harsh under such circumstances."

In that case the contribution was allowed.

In the foregoing opinion a number of cases are cited in support of this view, and there is quoted at length a part of the opinion in the case of Jacobs vs. Pollard, 10 Cush. (Mass.) 287, to the same effect.

In this case, as in that, the "Undertaking of both defendants was entirely lawful." "No element of wrong doing attached to it." "There was no community of wrong, and there could have been none;" therefore the plaintiff in this case having paid $25,000.00 of a judgment of $35,000.00, for which the plaintiff, Public Service Railway Company, and the defendant, Matteucci, were jointly liable, it can now recover of the defendant the excess above $17,500.00 which was one-half of the sum recovered against them, which would be $7,500.00.

The defendant claims that even though the right of contribution in such a case be allowed, yet the plaintiff cannot recover in this action because the payment was made voluntarily. That would undoubtedly be true if the Court should find that the $25,000.00 was voluntarily paid by the plaintiff.

By the stipulation of facts it is agreed that the judgment was entered against both plaintiff and defendant for $35,000.00, that an execution was issued on the judgment, directed to the Sheriff of Essex County, but was never actually delivered to him, or levy made, but that prior thereto each of the defendants made the foregoing payments, that is, the Public Service Railway Company $25,000.00 and the defendant, Joseph Matteucci, $10,000.00, being the amount for which he was insured.

Judgment having been entered and execution issued there can be no doubt but that the execution would have been delivered to the Sheriff and a levy made on the property of the Public Service Railway Company, the plaintiff here, had not prompt payment been made. There is no question about the liability of the Public Service Railway Company to make good any part of the judgment not paid by the other defendant, Matteucci, and no good reason appears, such as that given in the case of McCorory Stores Corporation vs. Braunstein, 99 Law, page 166, cited, where the plaintiff chose to make the payment of rent to the defendant rather than risk the possibility of an adverse decision in a tenancy proceeding, why the plaintiff should withhold payment of the judgment for which it was liable until after additional costs had been added by the delivery of the execution to the Sheriff and a levy made. The finding on this point, therefore, is that the payment was involuntary.

These views result necessarily in a judgment in favor of the plaintiff, Public Service Railway Company and against the defendant, Joseph Matteucci, for $7,500.00 with lawful interest thereon from February 11th, 1927.

NELSON Y. DUNGAN,
Circuit Court Judge.

Stipulation

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

JOSEPH MATTEUCCI,
Defendant.

} Action at Law.

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant in the above cause that motion was duly made and argument had before the Honorable William S. Gummere, Chief Justice of the New Jersey Supreme Court, on April 23, 1927, to strike out the answer filed by the defendant in this cause and that subsequently motion was duly made and argued on May 21, 1927, before the Honorable William S. Gummere, Chief Justice of the New Jersey Supreme Court, to strike out the complaint filed by the plaintiff in this cause, and that the Chief Justice denied both motions and declined to strike out the answer filed by the defendant or to strike out the complaint filed by the plaintiff.

JOHN E. TOOLAN,
Attorney of the Plaintiff.

HENRY H. FRYLING,
Attorney of the Defendant.

Postea.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

PUBLIC SERVICE RAILWAY COMPANY,
Plaintiff,

vs.

JOSEPH MATTEUCCI,
Defendant.

} Action at Law.

This case was tried before Honorable Nelson Y. Dungan, Circuit Court Judge, to whom the said cause was duly referred for trial, without a jury, at the Essex County Circuit, on December 1, 1927, the attorneys for the respective parties having waived a trial by jury, and having stipulated and agreed to submit the case on an agreed state of facts.

After having considered the evidence as submitted on such agreed state of facts, and heard argument of counsel for the respective parties the court finds:

1. That Julia Alexander recovered a verdict in the Supreme Court, Middlesex County Circuit, New Jersey, for $35,000.00 against the Public Service Railway Company and Joseph Matteucci, the plaintiff and defendant, for physical injuries received by her by reason of the negligence of a servant of the plaintiff in the operation of a trolley car, and of a servant of the defendant in the operation of a jitney bus.

2. That the defendant, Joseph Matteucci, was in-

sured against loss to him by reason of the said injury in the sum of $10,000.00.

3. That the said Julia Alexander caused a writ of execution to be issued on the judgment directed to the Sheriff of the County of Essex commanding him to make the amount of the said judgment of the property of both defendants in her action against them.

4. That the execution was never actually delivered to the Sheriff nor any levy made, but that prior thereto this plaintiff and this defendant contributed to the payment of said judgment by the payment by Joseph Matteucci of the sum of $10,000.00 and by the payment by the Public Service Railway Company on February 11, 1927, of the sum of $25,000.00.

5. That the payment by the said Public Service Railway Company was involuntary.

6. That the plaintiff Public Service Railway Company is entitled to contribution from the defendant, Joseph Matteucci, in the sum of $7,500.00 with lawful interest from February 11, 1927.

7. The Court finds for the Plaintiff and against the Defendant.

8. The damages of the Plaintiff are assessed at Seven Thousand Nine Hundred One Dollars and Twenty-five Cents ($7,901.25).

NELSON Y. DUNGAN,
Circuit Court Judge.

Service of three
briefs in Shelby
of May 1928.

35

New Jersey Court

PUBLIC SERVICE R
COMPANY, a corpo
Plain

vs.

JOSEPH MATTEUCC
Defenda

BRIEF OF JOHN E.
DEFENDA

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This is an appeal fro
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5. That the payment by the said Public Service Railway Company was involuntary.

6. That the plaintiff Public Service Railway Company is entitled to contribution from the defendant, Joseph Matteucci, in the sum of $7,500.00 with lawful interest from February 11, 1927.

7. The Court finds for the Plaintiff and against the Defendant.

8. The damages of the Plaintiff are assessed at Seven Thousand Nine Hundred One Dollars and Twenty-five Cents ($7,901.25).

NELSON Y. DUNGAN,
Circuit Court Judge.

Service of three copies of the within briefs is hereby acknowledged this 14th day of May 1928.

/Henry N Bayliss
Attorney for Plaintiff-Appellee

35

New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY, a corporation, Plaintiff-Appellee, vs. JOSEPH MATTEUCCI, Defendant-Appellant.	ACTION AT LAW On Appeal from Supreme Court Sat Below Dungan, J.

BRIEF OF JOHN E. TOOLAN, ATTORNEY FOR DEFENDANT-APPELLANT.

STATEMENT

This is an appeal from a decision of Judge Dungan in the Essex Circuit of the New Jersey Supreme Court, (State of the Case, p. 27) on an agreed statement of facts (p. 14). Before the case had been submitted as above, motions had been made by the defendant to strike out the complaint filed by the plaintiff, and by the plaintiff to strike out the answer filed by the defendant, respectively, both of which motions had been denied by Chief Justice Gummere, (p. 32). In a letter to the attorney for the defendant, the Chief Justice indicated the advisability of leaving the matter until final determination, in view of the novel point involved. The pertinent part of the letter in question (p. 26) follows herewith.

"Although I have very grave doubts as to whether the complaint in the present case sets out a valid cause of action, I have concluded to deny the application to strike it out. The question involved is one of novel impression, so far as the courts of this state are concerned. Instead of attempting to determine it upon this application I have decided that the wiser course is to leave it undetermined for the present, and to refuse the application for the reason indicated, in the latter part of the opinion filed in the case of Young v. Sterling Leather Works, 96 Atl. Rep., p. 1016."

FACTS

The facts are very brief. (p. 14 et seq.) They are excellently summed up by Judge Dungan in his opinion. To quote from it at page 27.

"one Julia Alexander recovered a verdict in the Supreme Court, Middlesex County Circuit, New Jersey, for $35,000.00 against the Public Service Railway Company and Joseph Matteucci, the plaintiff and defendant herein, for physical injuries received by her by reason of the negligence of a servant of the plaintiff in the operation of a trolley car, and of a servant of the defendant in the operation of a jitney bus; that the defendant Matteucci was insured against loss to him by reason of the said injury in the sum of $10,000.00; that the said Julia Alexander caused a writ of execution to be issued on the judgment to the Sheriff of the County of Essex commanding him to make the amount of said judgment of the property of both defendants in her action against them, but which execution was never actually delivered to the Sheriff nor any levy made, but that prior thereto the defendants contributed to the payment of said judgment by the payment

by Matteucci of the sum of $10,000, and by the payment by the Public Service Railway Company of the sum of $25,000.00.

The Public Service Railway Company thereupon brings this suit against Joseph Matteucci claiming that by reason of the payment of said sum of money the Public Service Railway Company, the plaintiff herein is entitled to contribution from the defendant, Joseph Matteucci, in the sum of $7,500.00 with interest from February 11, 1927, the date of the payment by the plaintiff herein to the said Julia Alexander, the plaintiff in the original action of the said sum of $25,000.00. The defendant claims that, as a matter of law, the plaintiff is not entitled to any contribution from the defendant by reason of the excess amount paid by the plaintiff on account of the satisfaction of said judgment, and that as a matter of fact the amount paid by the plaintiff was a voluntary payment."

Judge Dungan then considered the law involved and concluded that the instant case was within the exception to the general rule that there is no right of contribution between joint tort-feasors, and that the payment made by the Public Service Company was involuntary. The defendant agrees with the lower court that the payment was involuntary but contends that the case is not within any exception to the general rule, and contends that the plaintiff has no right of contribution under the facts of the case at bar.

ANALYSIS OF JUDGE DUNGAN'S OPINION

The decision of Judge Dungan is mainly based on the case of Hobbs v. Hurley, (104 At. R. 815, Me.). There one Pease was injured as a result of the negligent driving of one Herrick, an agent of both Hobbs and Hurley. Judgment was obtained against Hobbs and Hurley, and the former after paying the judg-

ment in full, sued Hurley for contribution, and obtained a verdict in his favor, mainly on the ground that the tort had been committed "not willfully, but by inference of law." (p. 817). Judge Dungan assumed the decision applicable to the facts in the instant case, and followed it with approval. But the facts in that case are not the same as the facts in the instant case. There the parties had sole "possession, control, and management of the car." (p. 816) and "the engagement and operation of the car was a joint enterprise on their part." (p. 816). Therefore, to rule that both had to contribute equally to the payment of the judgment was doing no more than stating a rule of partnership. But the instant case is entirely different. The plaintiff and defendant were not engaged in a common enterprise. They were each engaged in a respective enterprise of their own, but through the concurring negligence of their respective servants injured a third person

THE INSTANT CASE IS NOT WITHIN ANY EXCEPTION TO THE GENERAL RULE

That the facts in the instant case do not come within any exception to the general rule may be seen from the following cases where the general rule was not followed.

Jacobs v. Pollard (10 Cush. 287) referred to by Judge Dungan in his opinion is not in favor of plaintiff's contention. There A in good faith took up B's cattle damage feasant, and C a field driver, at A's request sold them at autcion, and received the money. The proceedings were later found to have been irregular, with the result that A and C were in fact joint trespassers. Nevertheless the court held that A could recover of C the money received for the sale of the cattle.

The court after stating the general rule against the right of contribution goes on to give its reason for

allowing contribution in the case before it, saying at page 288.

> "But justice and sound policy, upon which this salutary rule is founded, alike require, that it should not be extended to cases, where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution."

In the instant case, the parties were certainly presumed to know that their respective acts of negligence were unlawful. It cannot be said that when a person runs a vehicle into another and a jury holds him liable for negligent driving that he might have done it in good faith, similarly to an irregular taking of cattle damage feasant.

And in Nickerson v. Wheeles, 118 Mass. 295, where an exception to the general rule was made, the reason for it was the existence of a joint enterprise, a situation entirely different from the case at bar. This is made more clear by the following excerpt from the opinion of the court at p. 298 where illustrations of the principle contended for are given.

> Thus where one of two coach proprietors had been made liable in tort to a party who was injured by the negligence of a servant employed by himself and another he was entitled to contribution from his co-proprietor. Wooley v. Batte, 2 C. and P. 417. Both were engaged together in lawful business, and the negligence of which they were guilty, in employing a servant from whose misconduct injury resulted, did not place them in

such position that they were treated as wrongdoers, whose action against each other could only be founded in their community of wrong;"

That is, where an employee of two partners commits a tort for which one is held liable, the other partner may have contribution. This is altogether different from saying that where two different companies or individuals are held liable through the negligence of their respective servants, and one pays the whole or part of the judgment, that there too contribution may be had.

And in a later case in the same state Boot Mills v. Boston & Maine R. R. 218 Mass. 582, the court in upholding the general rule makes the following statement at the bottom of page 592.

"The general principle of law is too well settled to require an extensive citation of authorities, that one of several wrongdoers cannot recover either proportionally or wholly from another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.

Union Stock Yards Co. v. Chicago, Burlington & Quincy Railroad, 196 U. S. 217, 224.

Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 217.

Old Colony Street Railway vs. Brockton & Plymouth Street Railway, ante, 84.

"The exception to this rule established by Lowell v. Boston & Lowell Railroad, 23 Pick. 24, Gray v. Boston Gas Light Co. 114 Mass. 149, and Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, permits recovery over where the tort feasor seeking contribution from another tort

feasor as between the two is free from moral delinquency, and where damages have been assessed with reference to the injuries done to the original plaintiff by the wrong to which all the joint wrongdoers have contributed. That is a plain and simple exception to a general rule. It is easily understood and applied."

In the instant case there is no difference in culpability as between the plaintiff and defendant.

Nor can the English case of Merryweather v. Nixan, 8 T. R. 186, be of assistance to plaintiff's contention. There (p. 186) "One Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill; and having recovered 840 1, he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use." The plaintiff was non-suited and the Chief Justice upheld the non-suit, saying that (p. 186)

"there could be no doubt that the non-suit was proper; that he had never before heard of such an action having been brought, where the former recovery was for a tort; that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit; and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

There is nothing in the instant case to bring it within the last part of the opinion since neither the plaintiff nor defendant were at the time of the commission of the negligent acts in question asserting rights mistakenly, but on the contrary, were committing acts

which they are presumed to have known to be unlawful.

And in Bailey v. Busing 28 Conn. 453, a

> "judgment was recovered in tort against the defendants, jointly interested in the running of a stage, for an injury caused to a traveler upon the road by the negligence of one of the defendants, who was driving. One of the other defendants was compelled to pay the whole amount of the judgment, and brought an action against the defendant whose negligence had caused the injury, for a contribution."

Recovery was allowed, but only because the plaintiff had in fact been found guilty by implication, or legal inference, and not because of actual wrong doing. In the case at bar, however, the plaintiff, Public Service Railway Company, was an actual wrong doer equally with the defendant, Joseph Matteucci. True the plaintiff acted by its agents, but how else can a corporation act? To say that an act of an agent is not an act of the corporation would by one sweep be absolving corporations from all liability whatsoever.

Gray v. Boston Gas Light Co. 114 Mass. 149, shows quite conclusively that the exception to the general rule will only be applied where the plaintiff is held liable by inference of law—and not by reason of active participation. In that case, the defendant had so affixed a wire to the plaintiff's chimney as to render same unsafe and ultimately cause its fall upon a passerby, causing damageable injury. Upon a suit for indemnity, the court allowed recovery, stating at page 154:

> "The ground of the action is that the defendant has, by his own unauthorized act, exposed the plaintiff to a liability, and it is immaterial whether the liability is imposed by force of a statute or

> by the rules of the common law. In either case the plaintiff is held liable by inference of law, and not by reason of his active participation in the act which was the occasion of the injury."

Pearson v. Shelton, 1 M. & W. 504.

See also

Chicago City v. Robbins, 2 Black, 418.

Bailey v. Bassing, 28 Conn. 455.

And in Fidely & Gas Co. v. N. W. Tel. Exch. Co. 167 N. W. 800 (Minn.)

where an exception to the general rule was made the reason for it may be gathered from the following at p. 801.

> "Generally, one of two joint tort feasors cannot have contribution from the other. But there are exceptions to this rule. One exception arises where although both parties are at fault, and both liable to the person injured, yet, they are not in pair delicto as to each other, as where the injury results from a violation by one of a duty which he owes to the other, so that as between themselves, the act or omission of the one from whom indemnity is sought is the primary cause of the injury. This exception is reasonable and well recognized. (citation of cases). This case comes within the principle. The primary duty of securing the wires and cables was upon the defendant. Its neglect was the primary cause of the injury. The neglect of the electric company was, as between the parties, secondary."

And in City of Ft. Scott v. Kansas City, Ft. S. & M. R. Co. (72 Pac. Rep. 238) where contribution was al-

lowed, it was authorized by statute (Section 480 of the Code of Civil Procedure, Section 4926, Gen. St. 1901).

The general rule that there is no right of contribution between joint tort-feasors is applicable to the facts of this case.

In the case of Newman vs. Fowler, 37 L. 89, Chief Justice Beasley speaking for the Supreme Court said:

> "There can be no doubt that when two or more persons occasion, proximately, an injury, though not acting in conert, they are severally liable for the consequences. In this respect there is no difference between wrongs the result of force and such as proceed from ignorance or carelessness. **Whenever the damage is the product of the contributory misfeasances the action will lie against each of the wrong-doers,** and the person thus sued will be held responsible for the entire detriment. It is the familiar rule of practice that all or any of the joint trespassers may be prosecuted, and that such as are thus sued must answer for all the consequences of the wrong done. Nor can they claim contribution, the one from the other, so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjust the burthens of misconduct. This principle is a general one, applicable to every case of a tort."

That the damage in the case upon which the original judgment in the instant case was entered, was the product of the contributory misfeasances of both plaintiff and defendant can hardly be questioned. Unless of course, it be denied on the ground that plaintiff and defendant respectively acted through their agents. But the mere statement that the plaintiff is a corporation and can act, if at all, only by its agents, is sufficient answer to that.

In Boyer v. Botenan, 129 Pa. St. 324, where one of several directors of an insurance company had paid off a judgment recovered against them, jointly, for the fraudulent appropriation of company funds, contribution was disallowed, the court saying at p. 328.

> "to state the case briefly, it was an attempt on the part of one wrong doer to enforce contribution from the others who participated in the wrong. This, under all the authorities, cannot be done."

And in John Griffiths & Son Co. v. Natl. Fireproofing Co. (141 N. E. 739) Ill., the general rule and its exception was stated as follows. (p. 742):

> The general rule is that, where the parties acting together commit an illegal or wrongful act, the party injured may hold both responsible for the damages resulting from their joint act, and neither can recover from the other the damages he may have paid, or any part of them. The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage the latter may recover against the principle delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury.

Lowell & Boston & Lowell Railroad Corp., supra. Gray v. Boston Gas Light Co., 114 Mass. 149, 19 Am. Rep. 324; Washington Gas Light Co. v. District of Columbia, supra; Union Stock Yards Co. v. Chicago, Burlington & Quincy Railroad Co., supra.

The Court then gives cases: that of a retailer compelled to pay damages to a customer for selling kerosene below the statutory test, who recovered against the manufacturer. Pfarr v. Standard Oil Co. 146 N. W. 851 (Ia.); that of an owner paying damages because of an injury sustained on an elevator, against the manufacturer of the elevator. Wanamaker v. Otis Elevator Co. 126 N. E. 718 (N. Y.), and others there cited.

In City of Louisville v. Louisville R. Co. (160 S. W. 771) Ky. where contribution was disallowed the city from the defendant though the latter was equally guilty of negligence with the defendant, the court states the justice of the rule as follows (p. 775).

> "The machinery of the courts will not be put in motion to relieve one wrong doer from the consequences of his wrongful act against another wrong doer, equally guilty. No citizen has a right to invoke the aid of the courts for redress when it is necessary for him in stating his complaint to say that he and another, by reason of a breach of public duty upon the part of each of them, have caused injury or death to another citizen; and it matters not that their several breaches were separate and distinct from each other and that neither participated in or was connected with the breach of the other, if the two breaches, concurred to bring about the result. The right of contribution between tort-feasors, when allowed at all, grows out of equity, although enforced at law. What chancellor would listen with favor to the claim of a plaintiff for contribution or indemnity, who, admits in his pleading that but for his failure to perform a public duty, the injury for which he has been held liable would not have occurred? Would he not promptly say to him: 'The courts are not here for the purpose of settling claims as between confessed wrongdoers. Settle it among yourselves.'"

Contribution was disallowed in Doles v. Seaboard Air Line Ry. Co. 75 S. E. 722 (N. Cal.), where the negligence of an express company and a railroad company concurred in causing the death of a passenger, the court saying at p. 723:

> "They are both wrongdoers, whose unlawful acts contribute to produce the injury. They are in pari delicto, and therefore neither can recover indemnity or contribution of the other."

The court distinguished (p. 724) the case before it from a case where one does the act or creates the nuisance, and the other, while not joining therein, is thereby—nevertheless, exposed to liability. "But that," says the court, "is not our case." And the same remark applies to the instant case. And so does the following statement at p. 724.

> "The two acts concurred in producing the injury, and, upon the assumption that the express company was negligent, it and the railroad company were joint tort-feasors as to the plaintiff, and as between themselves, there is no right of indemnity or contribution."

In the City of Tacoma v. Bonnell (118 Pas. Rep. 642) Wash., the city and defendant concurred in an act of negligence causing the death of a third party. Suit had been brought against the city, and judgment recovered. The city then sought to recover over against the defendant. The suit was disallowed, the court concluding its opinion in these words (p. 645):

> "The answer in this case shows that the city was guilty of negligence in maintaining its primary and secondary wires in a dangerous condition, when they might readily have made them safe so that injury would not result if the wires should come in contact. If the city had not been

negligent in this respect, the accident could not have occurred, even though the defendant in this action was negligent in causing the wires to come in contact. The concurring negligence of both parties therefore caused the injury. Under the authorities above cited, the parties were in pari delicto, and neither may recover against the other."

So it may be said that the concurring negligence of both parties in the instant suit was the cause of the accident and consequently they are in pari delicto, and not entitled to contribution one from the other.

See also Rucker v. Allendorph (172 Pac. Rep. 524) Kan., where the principle contended for and acted upon is stated as follows (p. 525).

"Where one of several wrongdoers has been compelled to pay damages for a wrong committed, the general rule is that he cannot compel contribution from the others who participated in the commission of the wrong, 9 Cyc. 804; 6, R. C. L. 1054-1056."

And in Company v. Railroad, 62 N. H. 159, which was on a demurrer to the declaration, the court laid down some interesting propositions (p. 165.)

"If, at the time of the injury, each of the parties, or in the absence of antecedent negligence, if neither of them, could prevent it by ordinary care, there can be no recovery. The comparatively rare cases of simultaneous negligence will ordinarily fall under one or the other of these heads. If the accident results from the combined effects of the negligence of both parties, that of neither being sufficient to produce it, proof by the plaintiff that due care on the part of the defendant would have prevented it will not entitle

him to recover, because like care on his own part would have had the same effect. If the misconduct of each party is an adequate cause of the injury, so that it would have occurred by reason of either's negligence without the co-operating fault of the other, proof by the plaintiff that by due care he could not have prevented it will not entitle him to recover, because no more could the defendant have prevented it by like care. Murphy v. Deane, 101 Mass. 464, 465; Churchill v. Holt, 131 Mass. 67. In each case alike they are equally in fault. To warrant a recovery, the plaintiff must establish both propositions, namely that by ordinary care he could not, and the defendant could have prevented the injury," citing cases.

Under none of the foregoing can the plaintiff recover, since the decision of the jury has already determined the culpability of the plaintiff to be equal with that of the defendant.

Another case on the same point is City of Astoria v. Astoria, etc. R. R. (136 Pac. R. 645) Oregon, where the court states at p. 648:

"The paramount question here involved is whether plaintiff and defendant stand as tortfeasors in an equal degree with respect to the wrong which caused the injury to Annie Anderson. If so, confessedly, plaintiff cannot maintain this action, as the rule is almost universal that joint wrongdoers standing in pari delicto cannot compel contribution."

A case in the United States Supreme Court which shows clearly that the exception to the general rule, contended for by appellees, is not applicable to a situation where both parties are equally at fault is Union Stock Yards Co. v. Chicago, etc. R. R. Co. (196 U. S.

217). There Justice Day summed up the opinion as follows (p. 227):

"The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, the case is thereby brought within the class which holds the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principle and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

"In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed by proper inspection to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in

damages to recover indemnity or contribution from another."

Another case in point is Missouri, K. & T. Ry. Co. v. Vance (41 S. W. 167) Tex., where the court disallowed contribution to one railroad against another both of which were guilty of negligence in a collision causing injury to a passenger of one of them. Said the court at p. 171:

"There was no concert of action agreed upon by the defendants in making the crossing, but they each acted independent of direction from the other. Nor did either have the authority to control the conduct of the other. They were independent agencies, whose concurrent conduct brought about the result that culminated in the disaster. The liability of each rests upon the negligence of each independent of whatever may have been their intention not to commit a wrong. The negligence which makes either or both liable grows out of their acts in failing to perform their duties, and observe the rules of caution and care that should have governed their conduct in the particulars wherein they were remiss. So that, if both were guilty of negligence which proximately contributed to the disaster, the partcipation by each in the negligence would preclude either from recovering against the other, except in those jurisdictions where the doctrine of comparative negligence prevails. If the contributive negligence of both would preclude a recovery by either in a suit directly between them when one was seeking to hold the other liable for the disaster, and the damages that it sustained thereby, what principle exists that would allow one to recover from the other when each is guilty in a suit by a plaintiff who was injured in the disaster and recovers against both?"

In N. Y., etc. vs. Bonding & Ins. Co. (184 N. Y. S. 243) the court says at p. 246:

> "The general rule is that in the case of joint tort-feasors there is no contribution. Merryweather v. Nixon, 3 Smith's Leading Cases (9th Ed.) 1798. That doctrine does not apply to this case. Here there is no question of contribution, but of indemnity. The rule that there is no contribution obtains only when they are joint tort-feasors in the same act of negligence. But where one of the two parties is guilty of the original affirmative act of negligence which caused the injury, and the other is held liable for a failure in some subsequent and different duty, then such other may have an action for indemnity against the one whose original negligent act caused the injury."

But where both are joint tort-feasors in the same act of negligence the general rule applies.

In City of White Plains v. Ellis, 184 N. Y. S. 444, where a property owner and a city participated in maintaining ice on a sidewalk, causing personal injury, the court, in an action to determine the equities between the parties, and to restrain the collection of the judgments from the plaintiff, said at p. 446:

> "The plaintiff and the defendant Ellis were joint tort-feasors. They are in pari delicto; neither is entitled to recover over or to contribution," citing case.

That the general rule against contribution among joint tort-feasors is followed in most jurisdictions, and that the facts of the instant case are not within any of the recognized exceptions to the general rule is clearly apparent from an examination of the foregoing. To the same effect are the following cases in the states named:

California—Forsythe v. Los Angeles R. Co. 149 Cal. 569.

Illinois—Nelson v. Cook 17 Ill. 443.

Indiana—Silvers v. Nerdlinger 30 Ind. 53.

Maryland—Persy v. Clary 32 Md. 245.

New Hampshire—Nashua I. & Co. v. Worcester 62 N. H. 159.

District of Columbia—Herr v. Barber 2 Mackey 545.

Louisiana—Sincer v. Bell 47 La. Ann. 1548.

Ohio—Acheson v. Miller 18 Ohio 1.

Tennessee—Rhea v. White 40 Tenn. 121.

Vermont—Atkins v. Johnson 43 Vt. 78.

Virginia—Thweatt v. Jones 1 Rand 328.

Connecticut—Sparrow v. Bromage 74 A. 1070, 83 Conn. 27.

See also for a general discussion of the subject 13 Corpus Juris 828, section 18D et seq; 6 R. C. L. 1056.

No exception to the general rule should be admitted into the law of this state.

Since the point involved is one of novel impression, and since some scattered authority may exist in favor of plaintiff's contention that an exception to the general rule should be made under the facts in the instant case, the attention of the court is respectfully

called in conclusion, to the following reasons against plaintiff's contention.

1. It is against the great weight of authority.

2. It would be an unfair principle to adopt, since under the doctrine of contribution by virtue of an exception to the general rule, the parties would be compelled to contribute equally, whereas their relative fault might be disproportionate.

3. It is a legislative rather than judicial question.

Respectfully submitted,

JOHN E. TOOLAN,

Attorney for and of Counsel
with Defendant-Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* JOSEPH MATTEUCCI, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.* *Sat Below:* DUNGAN, *C. C. J.*

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE.

A suggestion having been made during the oral argument of this cause that it was one which because of its novelty and importance, and what counsel conceived to be the insufficient and unsatisfactory state of the original brief, should receive a fuller written treatment, and a request having been proferred to the Court that counsel on both sides should be permitted to introduce supplementary briefs, which request was granted by the Court—this supplemental brief is accordingly submitted by the appellee.

Counsel for appellant on the oral argument criticized appellee's brief on the ground that some of the cases cited therein were inaccurately set forth and that the statement of the facts thereof was inaccurate. This criticism was a just and proper one, but it does not in the slightest degree derogate from the authority of the legal principles therein stated and their application to the case in hand. The citations gave the proper name and correct reference, and the cases thus cited do contain a statement of principles

which support and vindicate appellee's contentions herein. An instance of the kind of inaccuracy which was criticized is found on page 23 of the brief of plaintiff-appellee. The case cited is *Nickerson* v. *Wheeler,* 118 Mass. 295. It is said that this was a case in which a trolley car and a train were in collision, and that the negligence of both companies concurred and was the proximate cause of the collision and injury. That the trolley car had been going at an excessive rate of speed and the train did not have any flagman. The excessive speed was a technical violation of the law, but the records show that there was no wilful or intentional, conscious, wrongdoing. The fact is that *Nickerson* v. *Wheeler* was not a case of collision at all, but one which arose out of a claim for contribution made by a president and director of a manufacturing company who had been obliged to pay a judgment in favor of a creditor of that company who had sued under a statute which made the directors who had failed to file a statement responsible to creditors, and who sought to recover from his co-directors under the doctrine of contribution. The discussion of the matter by the Court is pertinent to the case *sub judice,* and completely supports the doctrine contended for by me in this brief. I state, therefore, without hesitation that there is no citation of authority in the original brief of plaintiff-appellee which I wish to withdraw or qualify, but reaffirm those citations and request the consideration of them by the Court.

I proceed now to a discussion of the proposition that the whole sweep and trend of modern text-book and judicial authority is in favor of the doctrine that there can be contribution between so-called joint tort feasors where there was no wilful or conscious wrong; or, to state

the doctrine from another angle, where the parties were guilty of mere negligence; or, to state it in a still different form, where the parties were guiltless of anything involving turpitude, and were simply made liable jointly to third persons by intendment, inference, or imputation of law under the doctrine of *respondeat superior,* or some similar principle.

In considering the question it must be borne in mind that there is a distinct difference between the liability of two or more tort feasors to third persons and the right of tort feasors to contribution among themselves. This distinction has been clearly stated in *Paddock-Hawley Iron Co.* v. *Rice, et al.,* 179 Mo. 480, 78 S. W. 634. "There is a well-defined difference between the liability of two or more tort feasors to third persons, and the right of tort feasors to contribution among themselves. As to third persons, 'tort feasors are jointly and separately liable, whether they acted in concert or independently.' And this is so because, where the acts of two or more persons combine to produce injury to third innocent parties, the law will not attempt to ascertain how much injury the act of each produced, and to hold each responsible only for his own wrong, but will hold all whose acts contribute in whatever degree to the injury for the whole injury, whether they acted independently or in concert. But among tort feasors themselves the right to contribution depends upon totally different considerations. The general rule has long been that contribution is not allowed among tort feasors. To this, exceptions have grown up, the principle of which is that when there was no guilty intent in the tortious act, and there was concert of action, contribution is allowed. A failure to differentiate between the liability of

tort feasors to third persons, and for contribution among themselves, has occasioned much of the confusion that appears in some of the adjudicated cases.''

Text-book Authorities.

Jaggard on Torts, Vol. 1 (1895 Ed.) 215, and Hale on Torts (1896), 124, lay down the doctrine in these words: ''In cases where the wrongdoers actually intend to do an unlawful act, or where they are presumed to know that they were doing an unlawful act, there is neither indemnity nor contribution between them. * * * Where, however, joint tort feasors in committing the tort do what is apparently lawful, in the belief that they are pursuing a lawful course, and the wrong inflicted upon another arises out of this conduct by construction or inference of the law, and is not the foreseen result of a wrongful act, the law will allow contribution between them. * * * In many instances several parties may be liable in law to the person injured, while as between themselves some of them are not wrongdoers at all; and the equity of the guiltless to require the actual wrongdoer to respond to all damages, and the equally innocent to contribute his portion is complete. Indeed, the rule as to no contribution has so many exceptions that it can hardly with propriety be called a general rule.''

Kinkead in his Commentaries on Torts, Vol. 1, page 161, says: ''It is said that there are so many exceptions to it (the general rule denying contribution) in the case of master and servant, principal and agent, partners, joint operators, carriers and the like, it can hardly be called, with propriety, a 'rule of law.' '' On page 164, under the title ''Contribution When Wrong Due to

Negligence,'' he says: ''There is no intention in negligence. In some instances courts have been inclined to designate a high degree of negligence as gross and tantamount to wilful or intentional. But the element of negligence which distinguishes it from other wrongs is the absence of intention to produce injury. This being so, it relieves parties jointly responsible from the rule that wrongdoers cannot have contribution among themselves. A negligent person is a wrongdoer, but not an intentional one. It may be that it is so wanton as to be wilful, and then the parties are, as between themselves, wrongdoers so as to estop them from claiming contribution from each other. In nearly all, if not in fact all, the cases where the question of contribution has arisen under this head, the various participants in the negligent act have performed different parts, and they have not acted directly in concert. Their negligence may directly concur to produce the injury, but one may perform one part and another a different part. Either may be guilty of negligence in the performance of his part, the rule being that, although their part may be apportioned between them, the negligence of two or more persons created a joint liability where they act together to accomplish a common purpose.'' And on page 165, the learned author says: ''The ordinary rules of joint liability apply to joint tort feasors in negligence, excepting as to their right of contribution.''

In Sherman and Redfield on the Law of Negligence, Vol. 1, 1913 Ed., section 24-B, the authors say: ''The general rule of the common law that there can be no contribution between tort feasors rests upon the maxim *ex turpi causa non oritur actio*. But to deny the right of recovery over, the situation must be such that the party seeking

redress knew, or is presumed to have known, that he was engaged in a wrongful act. One of several wrongdoers who has been compelled to pay damage caused by the wrong has in general no remedy against the others. He cannot make his own misconduct the ground of an action in his favor. To this proposition there are so many exceptions that it can hardly with propriety be called a general rule. Its application is restricted to cases where the party seeking redress knew, or is presumed to know, that the act for which he was mulct in damages was unlawful. It is a sound and generally approved rule that one liable only on account of a duty of care owing to the plaintiff, but without active participation in a tort committed by another, may, whether in the original suit or by an independent action, recover over against the active perpetrator. Where the master is liable by the operation of the doctrine of *respondeat superior* the servant is liable also, and they may be sued jointly or severally as the plaintiff elect. * * * But when the master's responsibility exists from the doctrine of *respondeat superior* and the wrong is without his own participation, direction or approval, it may confidently be stated that he is entitled to his action over, and the general rule forbidding contribution between wrongdoers is qualified to this extent."

The latest treatise on torts is by professor George L. Clark, published in 1926. On page 336, section 207, under the title "Contribution and reimbursment between tort-feasors" the learned author says: "Where two or more who are legally responsible are liable in tort to a plaintiff and the plaintiff obtains judgment and satisfaction against one of them, it is the better view and the present trend of authority that the one thus compelled to pay may, *if morally innocent,* force the other or others to contribute his or their share of such payment; and if the latter are not morally innocent—*i. e.,* are conscious wrongdoers—to pay the whole amount by way of reimbursement. Where the one compelled to pay is himself a conscious wrongdoer, he is not entitled to any relief." The learned author then cites the cases in support of the doctrines thus stated by him which completely support the text.

In order to keep this supplementary brief within reasonable bounds, I will not cite any other text writers further than to say that the doctrine hereinbefore set forth finds confirmation, where the subject is dealt with, in the other standard text writers.

I may also say, in passing, that it seems quite clear that under circumstances such as existed in the case *sub judice* Matteucci and the Public Service Railway Company cannot be accurately and scientifically designated as "joint tort feasors." In *Betcher* v. *McChesney,* 100 Atl. Rep. 124, this expression is defined as follows: "Joint tort-feasorship can only be affirmed when the parties charged have a community of interest in and an equal right to direct the movements of each other in an undertaking; and master and servant cannot be engaged in common undertaking, as when they do so they cease to stand in that relation." Judge Stewart states the situation with great clearness in the opinion in this case.

The Ground upon Which the Doctrine Rests.

In the quotation, *supra,* from Sherman and Redfield the learned authors said: "The general rule of the common law that there can be no con-

tribution between tort feasors rests upon the maxim *ex turpi causa non oritur actio.''* On the oral argument of this cause before this Honorable Court one of the Justices recalled my attention to the case of *Tricoli* v. *Centalanza,* 100 N. J. L. 231. I am very grateful for having this case directed to my attention, for it also states the ground upon which the doctrine rests. There Mr. Justice Minturn, with his accustomed niceness and accuracy in the use of language, in passing upon the contention that insuperable difficulty would arise in the endeavor in an action of trespass *vi et armis* for an assault and battery to so admeasure the damages to an injured party, where two distinct encounters had taken place, as to impose upon each of the defendants his fair share of compensation for his physical contribution to the melee, used the following language: ''The inquiry possesses its latent difficulties, but since it is an admitted rule of law that the Court will not distribute the damages between tort feasors, upon any theory of equitable admeasurement, the house of Centalanza obviously must bear the entire loss without seeking a partition thereof. *Ex turpi causa oritur non actio.''* He also said that in the situation presented by that case the Court was ''not inclined to impose this extraordinary and novel field of jurisdiction upon our inferior courts.''

It being settled, then, that the basis of the doctrine is ''*ex turpi causa oritur non actio,*'' it remains to consider whether this reason upon which the rule is founded can with any propriety be said to exist in those cases where there has been no wilful and conscious wrong or wrong involving moral turpitude, or where the liability of the defendants amongst whom contribution is sought has arisen solely by inference or imputation of law from the doctrine of *respondeat superior,* for if it does not, *cessante ratione legis lex ipsa cessat.*

I would first point out to the Court that the form in which the doctrine is generally stated, *i. e.,* in 13 Corpus Juris, is: ''Where one of several wrongdoers has been compelled to pay the damages for the wrong committed, the general rule is that he cannot compel contribution from the others who participated in the commission of the wrong.'' Or as it is stated in some of the cases, *i. e., Sutton* v. *Morris,* 44 S. W. 127, ''It is the general rule that the right of contribution does not exist between wrongdoers,'' or in *In re Ryan,* 147 N. W. 993, ''The principle that there can be no contribution between wrongdoers is very familiar and very frequently applied,'' or in *Detroit etc.* v. *Boomer,* 160 N. W. 542, ''As between actual joint tort feasors the law will not enforce contribution.'' These show that it is only those who actively participate in the wrong, or commit it by concert of action, who are intended to be included within the rule. This will appear from the fact that the word used is either *wrongdoers* or *tort-feasors,* and that generally these words are followed by the expression that contribution cannot be obtained from others who *participated* in the *commission* of the wrong. These words all imply active connection with the wrong and not liability imposed by inference or imputation of law.

Before dealing with the main ground of my argument on this point, I wish also to point out that the suggestion in *Tricoli* v. *Centalanza* that the Court was not inclined to impose an extraordinary and novel field upon the inferior courts, to wit, the field of endeavoring to admeasure the exact extent of the physical contribution of those

who participated in a melee, has no bearing whatever upon the question now under consideration. This is not an effort to force the adoption in New Jersey of the doctrine of comparative negligence which has found lodgment in other states, nor is it an effort to bring about an enlargement of the jurisdiction of the Court so as to attempt to determine in each case of assault and battery or other wrong the exact amount of the physical contribution of the participants, and then to adjust the damages in proportion thereto. This is simply an effort to have the Court apply the doctrine that is consonant with reason, has been generally accepted elsewhere, and is not in any way opposed to the recognized principle of law which has found expression in the maxim *ex turpi causa non oritur actio.* In such an action no difficulty has been experienced in applying the doctrine that where there has been equality of burden there should be equality of contribution thereto.

I now proceed to the consideration of the reasons upon which the rule contended for rests, and purpose showing that neither logically nor historically are they opposed to the doctrine contended for herein.

It will be remembered that the reason for the doctrine is *ex turpi causa non oritur actio.* This maxim is of broad application in the law, and the principle was adopted into our jurisprudence from the civil law. Sometimes, and especially in cases of contract, the doctrine is stated in another maxim, *ex dolo malo non oritur actio.* The etymology of the various words used in these maxims throws a strong light upon their meaning. In Latin, the word *dolus* means a device, a crafty purpose or fetch, a wile, a trick: it is guile, deceit, treachery, cunning, fraud, collusion

or falsehood. The adjective *malus* means sinful, evil, ill-meaning or designing, unjust, fraudulent. And the adjective *turpis* means nasty, filthy, unclean, foul, shameful, base, dishonorable, disgraceful. The manner in which the doctrine was treated in the civil law is most illuminating. The maxim *ex dolo malo non oritur actio* furnishes a most interesting light upon the subject now being considered.

In the first place, then, we may observe that the word *dolus,* when used in its more comprehensive sense, was held to include every intentional misrepresentation of the truth made to induce another to perform an act which he would not else have undertaken; and a marked distinction accordingly existed between *dolus bonus* and *dolus malus,* the former signifying that degree of artifice or dexterity which a person might lawfully employ in self defense against an enemy or for some other justifiable purpose, and the latter including every kind of craft, guile or machination intentionally employed for the purpose of deception, cheating or circumvention. It is, moreover, a general proposition that an agreement to do an unlawful act cannot be supported at law—that no right of action can spring out of an illegal contract, and this rule, which applies not only where the contract is expressly illegal, but whenever it is opposed to public policy, or founded upon an immoral consideration, is expressed by the well-known maxim *ex turpi causa non oritur actio,* and is in accordance with the civil law doctrine, *Pacta quae turpem causam continent non sunt observanda,* whenever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration, is unlawful, the whole contract is void. The above matters will be found

in MacKeld Civ. Law, 165, and in Broom's Legal Maxims, 732-3.

It will thus be seen that having regard to its origin and function in the civil law, from which it was imported into our own jurisprudence, the maxim *ex turpi causa non oritur actio* necessarily involves the notion of fraud, dishonesty, immorality, or what we term, in a word derived from the same root, "turpitude," and that unless the transaction is permeated with such intention or vice, the maxim will not operate as a barrier to the prosecution of the remedy of contribution.

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On the oral argument a question was asked by one of the Justices as to whether or not, if Public Service Railway Company had sued Matteucci, assuming both him and it to have been responsible to a third party for negligence concurring to produce the injury to such party, Public Service could have recovered. Of course, the answer to such question is that Public Service could not have recovered in such an action. From this conclusion, however, it does not follow that Public Service cannot recover in an action for contribution against Matteucci, if Public Service was not guilty of wilful or wanton conduct or intentional wrong, or an act involving turpitude or immorality. The two actions are so utterly different, both in the issues involved and in their consequences, that no inference can be drawn from the fact that no recovery could be had in the former that none should be permitted in the latter. In the former the issue would be whether or not Public Service could recover its entire damage from Matteucci because of Matteucci's negligence in the transaction. The character of the damage which, if Public Service should be entitled to prevail, it could recover would be compensation for all the injury to its property which would have resulted to it from the negligence complained of. In such an action it is perfectly settled that where the negligence of both parties concurs in proximately bringing about an injury, neither can recover for such negligence from the other: in other words, that contributory negligence is a defense in such an action.

But in an action of contribution the action is not in tort as is a suit for negligence, but the action is one in *assumpsit* to recover not for the damage done to the property or person of the plaintiff, but one rested upon an equity that where there is equality of obligation there should be equality of burden. The recovery in such an action is not for the damage suffered by the party seeking contribution either in his person or in his property, but to recover compensation for his proportion thereof from one who was jointly concerned with the plaintiff in bringing about the injury complained of, where the plaintiff has made the injured party whole for such injury. This distinction and its grounds are fully supported in the citations in the original brief and in those which will be set out hereinafter.

Strictly, the action for contribution is not founded either upon a tort or upon a contract: it rests upon an equity. In *Vandiver* v. *Pollak, infra,* the Court said: "Contribution, it is true, is not contractual; it is an equity founded in acknowledged principles of natural justice." Originally this remedy was administered solely in courts of equity. Later it was adopted by the law courts and a recovery was permitted through the instrumentality of an action on contract. It will thus be seen that it is not necessary in an action for contribution to come into collision with the maxim *ex turpi causa non oritur actio,*

since the cause of action arises out of a payment made by the contributor in settlement of a claim against him and those who were jointly responsible with him for an injury to a third party which was brought about without conscious or wilful wrong or turpitude. There is a considerable amount of loose expression in the article on contribution in Corpus Juris. The author of the article states that the action is founded on a contract. This is obviously inaccurate. As it is stated in 13 C. J., at page 832, "The right of contribution rests on principles of equity and natural justice, and was first recognized and enforced in courts of equity, no action at law for contribution being maintainable at one time, subsequently the courts of law took, and still exercise, jurisdiction on the ground of an implied contract arising from the equitable obligation. Thus the right to contribution may be enforced in an action of assumpsit, debt, or covenant." As was said in *Barry* v. *Ransom,* 12 N. Y. 462, and *Durbin* v. *Kinney,* 23 Pacific 661: "It is clear, of course, that the theory of an implied assumpsit is assumed for the purpose of enforcing the equitable principle of contribution, and not on the idea that any such contract actually exists." The learned author seems to confuse implied contracts with contracts which are called constructive or quasi-contracts.

In *Herzog* v. *Herzog,* 29 Pa. St. 465, it is said: "We have in law three classes of relation called contracts: (1) Constructive contracts, which are fictions of law adopted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. (2) Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. (3) Express contracts, where the terms of the agreement are openly uttered and avowed at the time of the making."

It is obvious, therefore, that the doctrine of contribution, being the enforcement in a law court of an equity, is founded neither upon a contract nor upon a tort, but is one where the remedy by contract is given to enforce such equity where no contract either express or implied exists. In other words, it is merely a contract raised by construction of law for the purpose of applying a remedy on contract, and is what is known in the text-books on the subject as a quasi-contract.

Cases.

I purpose setting down a few of the many cases which have been decided favorably to the contention made in this brief, and would first direct attention to the case of *Vandiver* v. *Pollak.*

In *Vandiver* v. *Pollak,* 107 Ala. 547, also reported under two different phases (1) in 12 Southern Reporter, 473, and (2) in 19 Southern Reporter, 180, two creditors, acting together, attached and sold goods sold by their debtor to a third party, honestly believing that the sale was fraudulent and void, and one of them, after paying a judgment recovered against him by the debtor's vendee for wrongful seizure and sale of the goods, was held entitled to enforce contribution from the other. The creditors acted separately and without concert, though simultaneously, in suing out the attachment. In both reports is to be found a very illuminating discussion of the principle involved and a considerable citation of authorities in support of the position contended for in this brief.

In the report in 12 So. it was held that if joint tort-feasors in doing the act do what is apparently lawful, honestly believing they are pursuing a lawful course, and the wrong inflicted upon another arises out of their conduct by construction or inference of law and is not the foreseen result of the wrongful act, the law will allow contribution between them. In the report in 19 So. a philosophic discussion of the whole subject is made by Brickell, *C. J.*, and I include herein a considerable portion thereof, since it so clearly states the basis upon which the doctrine contended for rests.

> "The insistence is that he does not come into court with clean hands; that he is a tort feasor, as were the appellants tort feasors in their participation in the taking and sale of the merchandise, and as between them, the court will not intervene for the relief of the one or the other. As a general principle of the common law it is often stated that indemnity or contribution will not be enforced as between joint wrongdoers. The reason underlying the principle is that courts will not lend assistance to him who founds his cause of action on an immoral or illegal act—'*Ex turpi causa oritur non actio*' A trespasser, confessing that he has injured or taken the property of another, is not entitled to the assistance of courts, instituted as well for the protection of property as for the protection of persons, to recover indemnity or contribution from his associates in the trespass. The principle has its limitations and exceptions, and must be applied according to its true sense and meaning. A well-recognized limitation or exception, observed by the most approved text writers, and declared in well-considered judicial decisions, some of which were referred to when this case was formerly before the court, is that, if there is not a known, meditated wrong; if the parties act bona fide, under the supposition of the entire innocence and

propriety of the act—there is not room or reason for the application of the principle. Story, Ag. §339; Story, Partn. §220; Cooley, Torts, 147; Pol. Torts, 171; Bish. Cont. §216; 4 Am. & En. Enc. Law, 12. And this limitation or exception prevails whether it is indemnity or contribution which is sought. There can be no distinction drawn between the one and the other. Indemnity springs from contract, express or implied, and in a general way may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. Contribution, it is true, is not contractual; it is an equity founded in acknowledged principles of natural justice. Whenever indemnity is free from the taint of illegality, in the absence of contract, under a corresponding state of facts, the equity of contribution may arise; the taint of illegality cannot be imputed.

"The general principle of the common law and its limitation or exception is thus expressed by Judge Story: 'It may be stated as a general principle of law that an agent who commits a trespass or other wrong to the property of a third person by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts bona fide, will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby; for, although the general doctrine of the common law is that there can be no reimbursement or contribution among wrongdoers, whether they are principals or are agents, yet that doctrine is to be received with the qualification that the parties know at the time that it is a wrong. And in all these cases there is no difference whether there be a promise of indemnity or not, for the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently, and without notice of

> the wrong, the law will imply a promise on the part of the principal to indemnify him.' Story, Ag. §339. In Coventry *v.* Barton, 17 Johns. 142, Spencer, *C. J.*, said: 'I have no hesitation in saying that it is a true and just distinction between promises of indemnity which are and those which are not void; that, if the act directed or agreed to be done is known at the time to be a trespass, an express promise to indemnify would be illegal and void; but, if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise.' ''

Farwell v. *Becker,* 21 N. E. 792, contains a very intelligent discussion of the doctrine and the principles upon which it rests. In the course of his opinion, *C. J.* Craig, after considering the cases, many of which are cited on the brief of appellant herein, proceeds as follows:

> ''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. Armstrong Co. *v.* Clarion Co., 66 Pa. St. 218, sanctions the rule announced in Story, and, after reviewing the authorities on the question, holds that, where the tort is a known, meditated wrong, contribution cannot be had, but, where the party is acting under the supposition of the entire innocence and propriety of the act, contribution may be awarded. In Bailey *v.* Bussing, 28 Conn. 455, a leading case on the subject, it was held: 'The rule that there can be no contribution among wrong-doers 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 wrong-doer is to be presumed to have known that the act was unlawful.' In Jacobs *v.* Pollard, 10 Cush. 287, the supreme

> court of Massachusetts state the law as follows: 'No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed; but justice and sound policy, upon which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know, that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a wilful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases.' Acheson *v.* Miller, 2 Ohio St. 203, is a case in its facts quite similar to the present case. In the discussion on the right of contribution, the supreme court of Ohio said: 'The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party who may have a right to an action of tort against them. In such case, if one of the parties who have done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion?' After reviewing the authorities, the court holds that the legal rule is that where parties think they are doing a legal and proper act contribution will be had, but

where the parties are conscious of doing a wrong courts will not interfere."

Eaton & Prince Co. v. *Mississippi Valley Tr. Co.,* 100 S. W. 550, contains a very full and interesting discussion of the topic, and cites *Horbach's Adm'rs* v. *Elder,* 18 Pa. 33, "wherein one of several proprietors of a stage coach had been made to pay damages caused by the carelessness of a driver, and was given contribution against his co-owners. In instances of trespass, and possibly in other kinds of torts, contribution has been enforced, although all the parties were in fault, but without moral turpitude or an intention to violate the law." It goes on to say, "The tone of the decisions supports the doctrine that in the instance of a negligent tort, when there was no intentional wrong or moral guilt, but two or more tort-feasors were actually to blame in fact as well as in law, there can be contribution." Citing cases.

Without extending this brief by quotations to any greater length, I would cite as cases favorable to the doctrine contended for by me in this brief the following:

Armstrong Co. v. *Clarion Co.,* 66 Pa. St. 218;

Acheson v. *Miller,* 2 Ohio St. 203, 59 Am. Dec. 663;

Ankeny v. *Moffett,* 37 Minn. 109, 33 N. W. 109;

Bailey v. *Bussing,* 28 Conn. 455;

Betts v. *Gibbon,* 2 Ad. & E. 174;

Brown v. *Southern Ry. Co., et al.* (So. Car.), 96 S. E. 701. No contribution, but each deft. to pay one-half of judgment;

Buskirk v. *Sanders, et al.* (W. Va.), 73 S. E. 937;

Campbell v. *Meiser,* 4 Johns. Ch. 335, 8 Am. Dec. 570;

Culmer v. *Wilson,* 44 Pac. 1896 (Utah);

Ellis v. *Chicago & N. W. Ry. Co.* (Wisc.), 167 N. W. 1048;

Eaton, &c., Co. v. *Miss. Valley Tr. Co.,* 123 Mo. App. 117, 100 S. W. 551;

Furbeck v. *Gevurtz & Son* (Oregon), 143 Pac. 655;

Fakes v. *Price* (Okl.), 89 Pac. 1123;

Farwell v. *Becker* (Ill.), 21 N. E. 792;

Hobbs v. *Hurley* (Me.), 104 Atl. 815;

Horbach v. *Elder,* 18 Pa. 33;

Horrabin v. *City of Des Moines,* 199 N. W. 988;

Jacobs v. *Pollard,* 10 Cush. (Mass.) 287, 57 Am. Dec. 105;

Johnson v. *Torpy,* 35 Neb. 604, 53 N. W. 575;

Moore v. *Appleton,* 26 Ala. 633;

Mayberry v. *No. Pac. R. Co.,* 100 Minn. 79, 110 N. W. 356;

Mitchell v. *Raymond* (Wis.), 195 N. W. 855;

Nickerson v. *Wheeler,* 118 Mass. 295;

Paddock-Hawley Iron Co. v. *Rice,* 179 Mo. 480, 78 S. W. 634;

Smith v. *Ayrault* (Mich.), 71 Mich. 475, 39 N. W. 724;

Thweat v. *Jones* (Va.), 1 Rand. 328, 10 Am. Dec. 538;

Torpy v. *Johnson* (Neb.), 62 N. W. 253;

The Hudson, 15 Fed. 162;

Underwriters v. *Smith* (Minn.), 208 N. W. 13;

Vandiver v. *Pollak* (Ala.), 107 Ala. 547, 12 So. 473, 19 So. 180;

N. I. & S. Co. v. *W. & N. R. Co.,* 62 N. H. 159;

First Natl. Bank of Pawnee City v. *Avery Planter Co.*, 99 N. W. 622.

In conclusion, I might state that while in the text-books and in some of the cases the doctrine of contribution between so-called tort-feasors, where there is no conscious or intentional wrong, or the defendants have been made responsible through the principle of imputed negligence, are treated as exceptions to the general rule that there cannot be contribution between joint tort-feasors, yet in strictness it would perhaps be more accurate to say that they are not exceptions to the rule but simply do not fall within it. In this connection it is well said in *N. I. & S. Co.* v. *W. & N. R. Co.*, 62 N. H. 159, that instead of constituting exceptions to the rule against contribution between tort-feasors, the cases of constructive negligence or derivative liability do not fall within it. In illustration the Court states that where two guiltless persons are held liable for the actual wrong of one for whose acts they are responsible, and one of them pays the obligation, the latter may have contribution from the one equally guiltless with himself, because he has removed a burden common to both, and that he may recover full indemnity from the actual wrongdoer.

I conclude this brief, therefore, with the conclusion of the original brief: "As Judge Dungan said in his opinion 'the undertaking of both defendants was entirely lawful.' 'No element of wrongdoing attached to it.' 'There was no community of wrong and there could have been none.' And further, '(2) in this state we are free to adopt the principle which appears to be more logical—more just. The weight of authority seems to favor the right to contribution.' "

It is respectfully urged that the judgment in favor of the appellee be affirmed.

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New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* JOSEPH MATTEUCCI, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.* *Sat Below:* DUNGAN, *C. C. J.*

REPLY BRIEF OF JOHN E. TOOLAN (SAMUEL G. MEISTERMAN WITH HIM ON THE BRIEF), Attorney for Defendant-Appellant.

Statement.

This Court on the oral argument gave both parties in the cause permission to file supplemental briefs. Upon a re-examination of his brief, counsel for appellant did not deem it necessary to supplement the original brief, as to do so would only be duplicating the arguments and citations listed therein. Upon an examination, however, of the supplemental brief of plaintiff-appellee, which was received on June 2, 1928, it was deemed advisable that a short reply brief be filed. It is hoped that the Court will not consider this brief out of time inasmuch as it was prepared as reasonably soon as possible after the receipt of plaintiff-appellee's supplemental brief.

ARGUMENT.

At the outset, it is desired to state that counsel for appellant does not take the stand that the brief of plaintiff-appellee is insufficient or unsatisfactory, but, on the contrary, is of the opinion that both the original and supplemental briefs of plaintiff-appellee are carefully and well considered and, indeed, especially in the case of the supplemental brief, scholarly statements of the propositions involved. It should, however, be pointed out that the original brief contains some errors in the statement of the cases. At the bottom of page 23, a state of facts is given for *Nickerson* v. *Wheeler,* which are not the facts in that case. Our treatment of *Nickerson* v. *Wheeler* is contained at the bottom of page 5 of our brief, and an excerpt from the case is there given showing that the decision favors our contention. It may be supplemented by stating that the case was one where one officer of a corporation paid a decree which went against all the officers and thereafter, after paying the judgment, sought recovery from the other officers. Contribution was allowed in that case, but mainly on the ground that all were engaged in one enterprise, and when one of the group had to pay a judgment originally against all of them in the same capacity, the one who paid it was entitled to contribution from the others. Another error in the original brief is found on the top of page 26, where a wrong state of facts is given for the case of *Paddock-Hawley Iron Co.* v. *Rice.* The facts in that case were that the plaintiff and others had issued a defective attachment. Subsequently a judgment was recovered against the plaintiff and he sought contribution from the others, which was allowed. That, too, is a situation where a group were all interested together

in a joint wrongful act. They were all to benefit equally from the wrong; consequently, when only one was mulcted in damages, the others were compelled to contribute. A third error in the original brief is contained in the last sentence of the first paragraph on page 30, where it is stated that in the case under consideration, the city was attempting to recover full indemnity from the railway company where, as a matter of fact, the case was one of contribution, for at the very beginning of the case it is clearly stated that the case is an "action against the railway company, asking judgment in contribution for one-half of the amount so paid by it."

Without going into an extensive examination of the cases contained in either the original or supplemental brief of plaintiff-appellee, it may be stated that the facts in the instant case are not such as come within any of the exceptions to the general rule that there is no contribution between joint tort-feasors. Those exceptions may be briefly grouped as follows:

1. Where a judgment is obtained against one of a group engaged in a joint venture and the others of the group are held to be liable to contribute their proportionate share. *Hobbs* v. *Hurley,* 104 At. Rep. 815 (Me.); *Jacobs* v. *Pollard,* 10 Cush. 287; *Nickerson* v. *Wheeler,* 118 Mass. 295; *Bailey* v. *Busing,* 28 Conn. 453.

2. Where a statute gives the right of contribution. *City of Fort Scott* v. *Kansas City, Ft. S. & M. R. Co.,* 72 Pac. Rep. 238.

3. Where an individual or corporation is held liable, not because of an active participation in the wrong but because of liability by inference of law. That situation, however, is not applicable to a case where a corporation acts by one of its

officers or agents, but where the corporation does not act at all but is held liable merely because of some rule of law, as will be be brought out more fully later on. *Gray* v. *Boston Gas Light Co.,* 114 Mass. 149; *Union Stock Yords Co.* v. *Chicago, Burlington & Quincy Railroad,* 196 U. S. 217.

4. Where the jurisdictions recognize comparative liability and proportion the amount of damages between the parties, which is not the case in our State, as was brought out in the oral argument and in the brief of counsel for plaintiff-appellee.

It is not intended to give a long list of cases favoring the contention of defendant-appellant. That would serve no more fruitful purpose than would the citation of a list of excerpts from text-books, inasmuch as an examination of each text-book quotation or case cited for one side or the other will readily dislose that in every well-considered case the above principles must of necessity be carefully considered before a decision can be reached under any particular set of facts. It may be noted that in Volume 6 of the Third Decennial Digest covering the American Digest System from 1916 to 1926, at page 1565, *et seq.,* some thirty-five cases from nineteen jurisdictions favoring the contention of defendant-appellant in principle are listed.

A case that may be considered somewhat at length is *Norfolk Southern R. Co.* v. *Beskin,* 125 S. E. R. 678. There, too, an interurban railroad sought contribution against an automobile driver. Contribution was denied, the Court saying at page 678:

> "The sole question to be decided by this court is: Can there be contribution among or between persons where concurrent negil-

> gence was the proximate cause of an injury, for which one of them has been compelled to respond in damages?"

The Court then states that the doctrine had been settled in its jurisdiction by their Supreme Court of Appeals, and quotes from the decision in *Virginia Railway & Power Co.* v. *Hill,* 120 Va. 397, 91 S. E. 194:

> "'If the plaintiff had asked for an instruction defining the taxi company's duty and it had been refused, he would have had the right to except; but not with the co-defendant railway company, the rule being, as held in Walton, Witten & Graham *v.* Miller, 109 Va. 210, 220, 63 S. E. 458, 152 Am. St. Rep. 908, that all persons whose negligence contributed proximately to a tort are jointly and severally liable *with no right of contribution among them or remedy over by one against the other* (italics ours), and that consequently the party injured may bring his action in the outset against either or all.'"

The Court further states (p. 678):

> "The same doctrine is announced by the United States Supreme Court in Union Stock Yards Co. *v.* Chicago, etc. Ry. Co., 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525, wherein the following language is approved:
>
> 'When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, etc.'"

Those cases are undeniably applicable to the case at bar.

A very well considered case on negligence by inference of law, or passive negligence, or as it is there referred to "negative tort" is *Village of Portland* v. *Citizens' Telephone Co.,* 173 N. W.

383 (Mich.). There contribution was denied on the ground that both parties were guilty of active negligence, in that the defective condition which caused the accident was known to both. But in reaching its decision the Court makes a clear distinction between that class of cases where one party owes a certain duty to another, and because of a failure in that duty, an accident results for which the first party is compelled to respond in damages, and that class of cases where the parties owe no duty to each other, but through their concurrent negligence commit a tort for which one of them is compelled to pay damages. In the first class of cases, contribution is allowed; not so in the second class.

The Court sums of its decision in the following words (p. 386):

> "We are clearly of the opinion that this case falls within the class of cases, and is controlled by Detroit, etc. R. Co. *v.* Boomer, *supra,* and kindred cases. The parties to this case were joint tort-feasors; both were guilty of active negligence which concurred in producing the death of the Sykes boy; neither is entitled as against the other to contribution or indemnity; they are in *pari delicto,* and the law cannot afford relief to either."

Another case where active negligence was held to be the criterion for denying contribution is *Central of Georgia Ry.* v. *Swift & Co.* (98 S. E. 256) Ga. It is there indicated that an exception to the general rule would exist (p. 267, head note).

> "if the liability of the tort-feasor in the original suit arises merely from negative acts of omission on his part, such as a failure in his duty to inspect, and the proximate cause of the injury, so far as the joint tort-feasors are concerned, lay in active, positive acts of negligence on the part of the other tort-feasor, in which the original defendant did not in any way participate."

And in *John Griffith & Sons Company* v. *National Fireproofing Company* (141 N. E. 739, 38 A. L. R. 559), it was said at page 564:

> "The general rule is that where two parties acting together commit an illegal or wrongful act, the party injured may hold both responsible for the damages resulting from their joint act, and neither can recover from the other the damages he may have paid, or any part of them. The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury. Lowell *v.* Boston & L. R. Corp., *supra;* Gray *v.* Boston Gaslight Co., 114 Mass. 149."

The last few citations were given to point out clearly that the contention of the plaintiff-appellee that the exception to the rule should prevail in the instant case, because if liable, it was only liable by inference of law, is not well taken. All the cases show that liability by inference of law is equivalent to committing a passive wrong, as, for instance, where one company makes an agreement with another company for that other company to keep certain roadways free of defects and then when that other fails in its duty and the first company because of that failure is obliged to pay a judgment, then the first company may claim contribution from the second because its wrong was not an active one, but one by inference of law. In all of those cases it will be seen that there is a duty owing from one company to the other and a failure of that duty. Situations where con-

tribution would be allowed under that principle are where a city recovers against one whose original wrongful act had resulted in a judgment against the city or where a principal recovers against an agent for a wrongful act in which the principal had no active part; but not in a situation where the company is held in law to be the actual wrongdoer, the mere fact that the company had been acting through one of its arms, that is, through one of its agents, being immaterial. The act of the agent is the act of the company. Indeed, it has even been held that the malicious acts of an agent are the acts of the company so as to justify a verdict for punitive damages against the company if the act of the agent or officer had been one performed in the course of his employment. *Wendelken* v. *N. Y., S. & W. R. R. Co.,* 88 N. J. L. 270. In the present state of business affairs where corporations are engaged in all manner of enterprises, it could hardly be seriously contended that the activities of a corporation are distinguishable from the acts of its agents in the course of their employment and that such acts of its agents are not acts of the corporation. Another point that is contended for by the plaintiff-appellee and denied by the defendant-appellant is that the exception should prevail because the Public Service Railway Company was not conscious of any wrongdoing but innocently committed the wrong. But, the cases further hold that the exception to the rule will not be applied if the plaintiff may be *presumed to know* that he was doing an unlawful act.

To quote:

> "Contribution is bottomed and fixed on general principles of natural justice, and does not spring from contract. Dering *v.* Earl of Winchelsea, 1 Cox 318. Where a traveler, in passing over a bridge which was

> maintainable by two counties, was injured by its breaking down, and recovered damages in an action for negligence against one of the counties, the other county was liable for contribution. *The rule that there cannot be contribution between wrongdoers is confined to cases where the plaintiff must be presumed to know that he was doing an unlawful act.*" *Armstrong County* v. *Clarion County,* 66 Pa. (16 P. F. Smith), 218 at 222; 5 Am. Rep. 368. (Italics ours.)

To advert to the facts of the instant case, it cannot be said that the Public Service Company was innocent of wrongdoing. True, the operation of the street car was a lawful act, but the operation of the street car in a negligent manner was an unlawful act, and of the unlawfulness of that act the Public Service Railway Company was certainly presumed to be aware. Consequently, it cannot be said that the situation is one of that class of cases where a person innocently does an act which subsequently through some rule of law turns out to be unlawful. The act in question was unlawful from its inception. Under no circumstances could it have been said that the negligent acts both of the Public Service and Joseph Matteucci were lawful, even though the operation of their respective vehicles was lawful.

It is contended by defendant-appellant that a careful examination of all the cases cited by both sides with the exception of one or two in the Western States, clearly bring out the principles above set forth and lead to the conclusion contended for by defendant-appellant.

Another reason why it is believed that the decision of Judge Dungan in favor of the plaintiff-appellee should be reversed is that a dictum of Chief Justice Beasley in an older case clearly

points in that direction. The case in point is *Newman* v. *Fowler,* 37 N. J. L. 89. There the plaintiff, who was the owner of the building, sought damages from the architect for defects arising out of the construction of the building. The architect sought to defend on the ground that a suit could not lie against the architect alone but that the contractor should have been joined. But the Court held to the contrary, stating that when two or more persons, though not acting in concert, occasion an injury they are severally liable for the consequences. The Court stated at the bottom of page 89:

> "There can be no doubt that when two or more persons occasion, proximately, an injury, though not acting in concert, they are severally liable for the consequences. In this respect there is no difference between wrongs the result of force and such as proceed from ignorance or carelessness. Whenever the damage is the product of the contributory misfeasances the action will lie against each of the wrong-doers, and the person thus sued will be held responsible for the entire detriment. It is the familiar rule of practice that all or any of joint trespassers may be prosecuted, and that such as are thus sued must answer for all the consequences of the wrong done. *Nor can they claim contribution, the one from the other, so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjust the burthens of misconduct.* This principle is a general one, applicable in every case of a tort." (Italics ours.)

Even though this case may not be exactly in point, nevertheless the dictum is clearly in favor of our contention, and in view of a dictum of so great a judge as Chief Justice Beasley and the

principles inherent in most of the cases cited by both sides favoring the contention of plaintiff-appellee, it is seriously urged that the decision of Judge Dungan be reversed.

Respectfully submitted,

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