eral Assembly of the statute herein under discussion, under Iowa law an assignment of accounts was perfected as against subsequently levying creditors when made, without the necessity of recording, giving notice, or anything else. As it has also been stated, this Act makes no reference to the relative priorities of non-recording assignees and creditors of the assignor. Presumably, the prior law, to the effect that a creditor cannot defeat an assignment prior in time to his levy, is still in effect, and therefore the assignment is "perfected", within the meaning of Section 60(a)(2) of the Bankruptcy Act, when made.[16] Thus the question presented in *Corn Exchange Bank v. Klauder* cannot arise here, even though the Iowa statutes provide for the recording of notice of these assignments.

In conclusion, it can be said that the enactment of this legislation has been a long step forward in the matter of making more useful the practice of accounts receivable financing, in that: (1) it provides for giving notice of assignments, and protects the assignee who gives notice against prior unrecorded assignments; (2) it makes possible the assignment of future accounts; and (3) it removes any doubt which may have existed as to the validity of such assignments where the assigned accounts are left completely in the control of the assignor. However, the legislation fails to deal fully with the problem of unrecorded assignments and their effect upon subsequent assignees for value and without notice who do not record, and upon garnishing creditors of the assignor. This deficiency could be corrected by amending the present statute so as to substitute for the present section 3 a section providing that no unrecorded assignment shall be valid as against creditors or subsequent assignees for value without notice. An amendment of this sort would protect the assignee who records as against anyone asserting a subsequently acquired interest, would protect all assignees for value against prior unrecorded assignments of which they had no notice, and in addition would protect the creditors of the assignor, both in garnishment proceedings and in bankruptcy, against secret assignments of the debtor's accounts and against fraudulently pre-dated assignments, with the result that the full benefits of this type of legislation could more nearly be realized.

JAMES R. LOGAN, JR. (June 1956)

[16] The Bankruptcy Act, § 60(a)(8), states that if applicable law requires no recording of a transfer the transfer shall be deemed to have been made at the time of the transfer.

CONTRIBUTION BETWEEN JOINT TORTFEASORS AS AFFECTED BY THE YERKES CASE

In the recent case of *Best v. Yerkes,*[1] the Iowa Supreme Court has apparently served notice that it will recognize a right of contribution between joint tortfeasors where there is no showing of an intentional wrong, moral turpitude or any concerted action by the alleged tortfeasors. This situation will often arise in the case of negligent tortfeasors. It is the purpose of this article to discuss this recent opinion and the doctrine as set forth and to call attention to some of the problems which may be confronted in the application of this case in the State of Iowa.

The appeal in *Best v. Yerkes* was from the granting of a motion to set aside an order to bring in a third party defendant. The case originated from an automobile accident wherein the defendant pulled out to pass a truck which had slowed down or stopped ahead of him. In so doing, he collided head on with the plaintiff, who was coming from the other direction. The plaintiff brought an action against the defendant based on several specifications of negligence. The defendant denied any negligence and alleged that the sole proximate cause of the accident was the negligence of the truck driver who failed to give proper signal of his stop. The defendant then filed a motion to bring in the truck driver as a third party defendant under Rule 33(b) of the Iowa Rules of Civil Procedure.[2] The defendant also filed a cross-petition against the truck driver praying for: (1) judgment for damages to his own automobile and, (2) indemnity or, in the alternative, contribution as to any judgment the plaintiff might obtain against him.

The motion to bring in the truck driver as a third party defendant was granted *ex parte*. Thereupon the trucker moved to set aside that order bringing him into the case, stating three grounds for his motion.[3] The trial court set aside its order, on the theory that bringing in the trucker would confuse the jury and otherwise unduly complicate the trial, although this was not one of the three grounds stated by the trucker in support of his motion.

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[1] 77 N.W.2d 23 (Iowa 1956).

[2] Rule 33(b) states: "When a defendant to a petition, cross-petition or counterclaim will, if held liable thereon, thereby be entitled to a right of action against one not already a party, he may move to have such party brought in, to the end that the rights of all concerned may be determined in one action. Such motion must be supported by affidavit."

[3] The motion to set aside the order cited these grounds: (1) that said order was made ex parte and without notice to Cross; (2) that Rule 33(b) has no application to the facts in the case, there being no right of action over against Cross even if Best should recover a judgment against Yerkes; (3) there is no provision in law for the granting of the relief demanded in the cross-petition.

Defendant appealed from the ruling setting aside the order to bring in the third party defendant. On appeal, Cross, the third party defendant, relied heavily on the contention that he and the defendant could be no more than joint tortfeasors and that therefore neither could recover from the other.

At the outset it should be pointed out that the Court affirmed the holding of the lower court saying that that court had not abused its discretion to determine whether or not the third party defendant should be brought in. However, before considering this aspect of the case, the Court undertook a discussion of the problem of contribution between negligent joint tortfeasors and stated in no uncertain terms that in instances where there is no showing of an intentional wrong, or of moral turpitude or any concerted action by the alleged tortfeasors, a right of equitable contribution does exist between such joint tortfeasors. It is this phase of the decision which makes this a landmark case in Iowa.

Because this case presents a new basis for decisions in this phase of the Iowa law many new problems can be anticipated as the courts proceed to apply this doctrine to the variety of factual situations which can be expected.

Dictum or Decision?

The first question asked will probably be, "How much weight can be given this decision in determining what the future holdings of the Court will be on this question?"

As previously pointed out, the Court actually decided the case on another issue, that of the court's discretion under Rule 33(b).[4] In fact, the consideration of the question of contribution between joint tortfeasors was not necessary to the final holding of the Court. However, it is pointed out that the question was argued by counsel and the holding of the Court was in very strong and definite language as follows:

> " . . . we are of the opinion that appellee Cross' attempt to uphold the ruling of the trial court on the theory that in no event could there be a recovery over by Yerkes must fail. There is here no claim or showing of an intentional wrong, or of moral turpitude or any concerted action by the alleged tortfeasors. We hold the true rule to be that under such circumstances there is at least a right of equitable contribution between them."[5]

The Iowa Court in *Perfection Tire and Rubber Co. v. Kellogg Mackay Equipment Company*[6] held that the binding force of a decision is co-extensive with the facts upon which it is founded, and if correlated subject-matter is under discussion and decided, such decision is not mere *obiter dictum*. It is at least a judicial dictum. Such dictum following argument by counsel as in this case, while

[4] See note 2 *supra*.
[5] 77 N.W.2d at 29.
[6] 194 Iowa 523, 187 N.W. 32 (1932).

not as binding on a court as a decision, is entitled to much greater weight than *obiter dictum*, and should not be lightly disregarded. In the *Perfection Tire and Rubber* case the Court based its decision on such judicial dictum.

It is further pointed out that in the present case the Court went to great lengths to express its opinion on this subject when it could have easily avoided the issue. Most certainly such action expresses the deep convictions of the present Court on the matter. It would appear that the present Court has served notice as to how it will hold if this precise question is presented squarely and it is submitted that the strength of the language in the opinion will certainly carry great weight with any court in the future. As such, it would appear that the action of the Court might well have the same effect as a square decision on the matter.

Background and Development

For analysis and evaluation of this decision one must consider the historical background and case precedent for the Court's action. As is pointed out in the opinion in the *Yerkes* case, the origin of the rule against contribution between joint tortfeasors is found in the English case of *Merryweather v. Nixon.*[8] That case involved concerted action by two intentional tortfeasors. The court would not consent to equalize the burden of damages between these wrongdoers because of the intentional and wilful nature of their acts. This reasoning appears sound and was accepted by virtually all courts as it applied to intentional torts. Thus evolved the rule—no contribution between joint tortfeasors. Sometime later the courts relaxed the rules as to joinder. As a result unintentional wrongdoers whose acts concurred to cause damage were then often joined in the same action and soon came to be considered joint tortfeasors.[9] At this point the origin and reason for the rule apparently became obscured, for courts applied the rule against contribution to negligent tortfeasors and wilful wrongdoers in the same manner.[10] It would seem that where no intent to commit a wrong is involved, such harsh treatment is unjustified.

Recognizing this defect in the underlying reasoning, some states have now refused to apply the rule against contribution to those joint tortfeasors who were merely negligent.[11] In addition, some jurisdictions have established contribution between joint

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[7] Crescent Ring Co. v. Travelers Indemnity Co., 102 N.J.L. 85, 132 Atl. 106 (1926).

[8] 3 T.R. 186 (K.B. 1799).

[9] PROSSER, TORTS, § 46 (2d ed. 1955).

[10] Union Stock Yards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217 (1905).

[11] Prosser lists Pennsylvania, Wisconsin, Minnesota, Louisiana, Tennessee, District of Columbia, and perhaps Maine. See note 9 *supra.*

tortfeasors by statutory enactment.[12] Seven of these states[13] and Hawaii have adopted the Uniform Contribution Among Tortfeasors Act.[14] It is interesting to note that the problems involved proved so complex that after extensive amendment by the jurisdictions in which it had been adopted, the Commissioners on Uniform State Laws withdrew the Act for further study and revision.

As can be seen, the application of the rule against contribution between joint tortfeasors has been steadily restricted by statute and case decisions, and the rule allowing contribution between joint tortfeasors who are merely negligent is steadily gaining strength throughout the United States.

We now turn to the development of this theory in the case law of Iowa. As stated in *Best v. Yerkes,* the Court has probably never rendered a decision squarely on this matter. It has, however, made passing comment with reference to some type of exception to the "no contribution" rule. In a 1924 case,[15] a contractor had been forced to pay damages for trespass when he built an approach to a bridge over land owned by the plaintiff. The contractor was building the bridge for the City of Des Moines which had the duty of obtaining the right of way. The Court stated that where two parties commit an unlawful act involving moral turpitude or delinquency, to the injury of another, they are equally guilty and the law will not inquire into their relative delinquency or compel contribution at the instance of the one who has paid the damages. But if their act is merely *malum prohibitum* and is in no respect immoral, and if one has paid the damages, the law will not refuse, as between the wrongdoers, to determine their relative guilt and administer justice between them. The Court also suggested that one test to determine if contribution will be allowed is whether the tortfeasor has knowledge that what he is doing is wrongful. The Court thus recognized the possibility of contribution in a proper case. However, it based its decision on principles of indemnity.

Therefore, the *Yerkes* case, although apparently coming as a surprise to many, may not have been an entirely new concept in Iowa law. The failure of many to foresee this development might be traced to the unfortunate generalities in which the rule against contribution has been stated. It has been suggested that better understanding might have been promoted had the general rule been stated to the effect that there is contribution between joint obligors with an exception which would prohibit contribution

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12 13 Am. Jur., Contribution, § 49.

13 Arkansas, Delaware, Maryland, New Mexico, Pennsylvania, Rhode Island, and South Dakota.

14 § 1, 9 U.L.A. 156.

15 Horrabin v. City of Des Moines, 198 Iowa 549, 199 N.W. 988 (1924); *but see* Pfarr v. Standard Oil Co., 165 Iowa 657, 146 N.W. 851 (1914) (dictum).

in the case of intentional torts.[16] At any rate, the Iowa Court in *Best v. Yerkes* has clearly expressed itself as favoring contribution between joint tortfeasors where there is no claim or showing of an intentional wrong, or of moral turpitude or any concerted action by the alleged tortfeasors. Thus, Iowa appears to join the growing list of states which have adopted this position.

Potential Problem Areas

Best v. Yerkes will, in all probability, bring before courts issues which have in the past been of little importance, but which now become relevant to the application of the doctrine set forth in that case. Mr. E. Eugene Davis, in an excellent article in the Iowa Law Review[17] deals extensively with many of the problems that arise as to indemnity between negligent tortfeasors. More recently Mr. Davis has also prepared a comprehensive brief devoted primarily to the subject of contribution.[18] These publications are recommended as additional sources of information in these areas.

The remainder of this article is devoted to pointing out some of the problems which it is felt will come to the front as a result of *Best v. Yerkes.*

Before attempting to apply the doctrine set forth in this case one must consider the question of who is a joint tortfeasor. Some early Iowa cases required concerted action on the part of wrongdoers before they could be considered joint tortfeasors.[19] However, later cases appear to hold that the term includes negligent wrongdoers whose acts merely concur in contributing to and causing an accident, if but for such concurrence the accident would not have happened.[20] It is implicit in the language used by the court in *Best v. Yerkes* that the term "joint tortfeasors" as used therein does not require concerted action for the court clearly refers to persons who are joint tortfeasors as a result of negligent acts, and such acts would seldom involve concerted action.

As previously pointed out, the court in refering to negligent joint tortfeasors has stated that the acts must be concurring.[21] This apparently refers to concurrence in point of time or place. No attempt is made at this time to resolve this question but many factual situations may be expected to occur which will present

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[16] Reath, *Contribution Between Persons Jointly Charged For Negligence—Merryweather v. Nixon,* 12 HARV. L. REV. 176 (1898).

[17] Davis, *Indemnity Between Negligent Tortfeasors,* 37 IOWA L. REV. 517 (1952).

[18] This brief was prepared by Mr. Davis and mimeographed by the Iowa Bar Association for presentation and distribution at several legal institutes.

[19] Dicksen v. Yates, 194 Iowa 910, 188 N.W. 948 (1922); Henry v. Henry, 192 Iowa 1346, 186 N.W. 639 (1922); Bowman v. Humphrey, 132 Iowa 234, 109 N.W. 714 (1906).

[20] McDonald v. Robinson, 207 Iowa 1293, 224 N.W. 820 (1929) (an automobile negligence case); Producers' Livestock Marketing Ass'n v. Livingston, 216 Iowa 1257, 250 N.W. 602 (1933) (conversion action).

[21] *Ibid.*

the issue of just how close in time and place the acts must occur in order for the actors to be considered joint torfeasors.[22]

Another problem area in conjunction with the *Yerkes* case may be that of defenses by tortfeasors and the effect of these on the right of contribution. These could include defenses such as the guest statute,[23] assumption of risk, husband-wife immunity, and others. The court in *Best v. Yerkes* says: "The right of indemnity, or contribution, presupposes actionable negligence of both parties, toward a third party." This wording appears to support a general rule to the effect that a person who has a valid defense against an action by the injured party is not liable for contribution. The cases of other jurisdictions appear generally to support such a rule, at least in so far as defenses which existed at the time the cause of action arose are concerned.[24] However, as to defenses which arise later, such as the statute of limitations, the rule is probably otherwise. Even though the statute has barred an action by the injured party, one joint tortfeasor is probably subject to an action by another for contribution.[24½]

It might be noted that the court in its opinion in *Best v. Yerkes* cited and relied upon several cases from Wisconsin which is considered the leader in the interpretation of this doctrine. Therefore, it may be profitable in some cases to look to the decisions of that state in attempting to forecast the status of the Iowa law on the subject in the future.

Another problem arises when the Workmen's Compensation Act applies as between one tortfeasor and the injured party. The law in this area is in a state of confusion and it is not clear what the court will do if presented with this problem.[25]

The situation relating to releases and covenants not to sue as affecting contribution should also be noted. Generally speaking, it appears that a covenant not to sue taken in a settlement with one tortfeasor will not protect that tortfeasor from an action for contribution.[26]

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[22] Wm. Tackaberry Co. v. Sioux City Service Co., 154 Iowa 358, 132 N.W. 945 (1912) *(semble)*.

[23] IOWA CODE § 321.494 (1954).

[24] Lutz v. Boltz, 48 Del. 197, 100 A.2d 647 (1953) (guest case); Shrof v. Rural Mut. Cas. Ins. Co., 258 Wis. 128, 45 N.W.2d 76 (1950) (assumption of risk); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934) (assumption of risk); Zutter v. O'Connell et. al., 200 Wis. 601, 229 N.W. 74 (1930) (family relationship between driver and passenger barred contribution of driver to another joint tortfeasor). *Contra,* Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945) (husband-wife immunity).

[24½] *cf.* Ainsworth v. Berg, 253 Wis. 438, 34 N.W.2d 790 (1948); Merton v. Puffen, 157 Wis. 576, 147 N.W. 993 (1914).

[25] American Dist. Telegraph Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950); *Recent Developments In The Iowa Workmen's Compensation Law Where Negligent Third Parties Are Involved,* 37 Iowa L. Rev. 84 (1951).

[26] State Farm Auto Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d 425 (1953); Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 50 N.W.2d 689 (1951).

Is the amount or percentage of contribution to be determined by the proportionate degree of fault of each tortfeasor or is it simply determined by the number of tortfeasors? Further, if it is the latter, does the so-called "equitable rule" which considers only those who are available for contribution (present in the jurisdiction and solvent) apply, or is it determined by the actual number of tortfeasors regardless of their availability? The court in the *Yerkes* case refers to "a right of equitable contribution." Whether that reference pertains to this problem so that the "equity rule" applies is not clear. The Uniform Contribution Among Tortfeasors Act[27] provides for pro rata shares according to the degree of fault.

The procedural aspects of the decision are perhaps of the most immediate importance. As was pointed out early in this article, the Court in this case held that Rule 33(b) is available for bringing in a third party defendant. The language of the opinion would appear to encourage the use of the rule whenever possible, but the actual decision is within the discretion of the trial court.

In summary, it appears that the Supreme Court of Iowa will allow contribution between negligent joint tortfeasors when the issue is presented in subsequent cases. It is hoped that this article will in some measure help the reader understand the nature and impact of this decision and suggest potential problem areas so that they will be recognized when encountered.

ELWOOD L. THOMAS (June 1957)

[27] See note 14 *supra*.