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The Conflict of Laws with Respect to the Burden of Proving Contributory Negligence

Edward J. Donlon

life for the benefit of his *cestui que trust,* who is entitled to claim all of the insurance money.[29]

These considerations lead to the conclusion that the rule which allows the *cestui que trust* to claim the proceeds of the policy, regardless of the amount, is the result most consonant with the principles of the law of trusts and general equitable standards. Views of courts which have considered the result to be clothed with some doubt, or which have favored the opposite conclusion as the better rule, appear to be based on an apparent failure to appreciate the actual problem which the situation presents, together with a not unnatural leaning towards the aid of widows and children, which, though commendable for its humane spirit, forces the recognition as standards of conduct for a court of equity, principles for which we will search in vain both in the authoritative cases and in the books of those writers who command our respect. Undoubtedly the strongest consideration, both from the practical viewpoint and from the viewpoint of legalistic reasoning, is that a holding contrary to that which we have developed as the correct rule would put a premium on dishonesty and provide for the unscrupulous a method of protection for wives and dependents by wrongdoing which would have the sanction and approval of the law.

JAMES F. KELLY.

THE CONFLICT OF LAWS WITH RESPECT TO THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE.

As a general proposition, the laws created by one state cannot have any binding force beyond the confines of its jurisdiction.[1] While this principle is easily discerned, nevertheless, we see many instances where the courts of one state, under certain circumstances, give effect

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[29] It should be noted in this connection that the "insurable interest" which the Court considered in Holmes v. Gilman was not that of the insured in his own life, but that of his wife in her husband's life. However, the Court spoke of that insurable interest only because it was urged upon them by counsel as the "property" with which the trust funds had been mingled. As a practical matter it seems that to say the wife's insurable interest was involved is a gross fiction. She knew nothing of the insurance contract until after the death of insured and had no participation whatsoever in the transaction. At any time after the issuance of the policy she could have exercised her privilege to insure her husband's life, her insurable interest remaining unaffected. It seems a better view that the husband's insurable interest was present in the policy.

[1] Petersen v. Chemical Bank, 32 N. Y. 21, 42, 88 Am. Dec. 298 (1865); Pennoyer v. Neff, 95 U. S. 714, 720, 722, 731 (1877); Hervey *et al.* v. R. I. Locomotive Works, 93 U. S. 664, 671 (1876); Hubbard v. Hubbard, 228 N. Y. 81, 85, 126 N. E. 508 (1920); Marshall v. Sherman, 148 N. Y. 9, 24, 42 N. E. 419, 34 L. R. A. 757, 51 Am. S. R. 654 (1895); 2 Kent Comm. 457; Story, Conflict of Laws (7th Ed.), Secs. 7, 8, p. 7.

to foreign laws. This is not, however, because of any extra-territorial effect of such foreign laws, but rather is based upon sound principles of comity [2] and rules of Conflict of Laws.[3] It exists not strictly *ex jure gentium* but rests on the *comitas gentium*.[4]

Before a state will exercise jurisdiction over a cause of action arising in a foreign state, it must first be ascertained if the cause of action is transitory in its nature.[5] It is elementary that to determine this it is necessary to be guided by precedent.[6] It is universally established that penal laws [7] and real property causes of action [8] are, under no circumstances, transitory. However, generally speaking, all tort actions are of this nature.[9] Tort actions are transitory because the liability for such tort is said to be personal to the tort-feasor, which liability will follow him into any forum which can obtain jurisdiction of his person. As distinguished from a personal action for a tort is an action affecting the title to real property which is a real action, an action in *rem*. And, of course, in such a proceeding the tribunal must have jurisdiction of the *res*. Penal actions are held to be local and not transitory because a crime is an offense against the peace and dignity of the sovereignty within whose jurisdiction the offense is committed and therefore it must attend to the vindication of its own sovereignty.[10]

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[2] "Comity" has been defined by the U. S. Supreme Court as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and commerce, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U. S. 113, 164, 16 Sup. Ct. Rep. 139, 40 L. Ed. 95 (1894).

[3] Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837 (1916); Hutchinson v. Ward, 192 N. Y. 375, 85 N. E. 390 (1908); Flynn v. Central R. R. Co., 142 N. Y. 439, 37 N. E. 514 (1894); Merrick v. Van Santvoord, 34 N. Y. 208, 217 (1866); Petersen v. Chemical Bank, *supra* Note 1 at pp. 43, 44; Hilton v. Guyot, *supra* Note 2; Pennoyer v. Neff, *supra* Note 1; Story, *supra* Note 1.

[4] 2 Kent Comm. 454.

[5] Jacobus v. Colgate, *supra* Note 3; Hutchinson v. Ward, *supra* Note 3; Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918); Weaver v. Alabama Great So. R. Co., 200 Ala. 342, 76 So. 364, 365 (1917); 2 Wharton, Conflict of Laws, Sec. 475, p. 1091; Minor, Conflict of Laws, 475.

[6] Marshall v. Sherman, *supra* Note 1.

[7] Gregonis v. Philadelphia & R. Coal & Iron Co., 235 N. Y. 152, 139 N. E. 223 (1923); Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 1098 (1880), 2 Wharton, *supra*, Sec. 480, p. 1113; Story, *supra*, Sec. 620 (p. 767), *et seq.*; Minor, *supra*.

[8] Knox v. Jones, 47 N. Y. 389, 395 (1872); Rice v. Harbeson, 63 N. Y. 493, 502 (1875); Polson v. Stewart, 167 Mass. 211, 45 N. E. 737; Gregonis v. Philadelphia, etc., *supra* Note 7; Minor, *supra*, p. 28, *et seq.*

[9] Gregonis v. Philadelphia & R. Co. & Iron Co., *supra* Note 7; Dewitt v. Buchanan, 54 Barb. (N. Y.) 31 (1868); Crashley v. Press Publishing Co., 179 N. Y. 27, 32, 71 N. E. 258 (1904); Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. Rep. 105 (1897); Dennick v. Railroad Co., *supra* Note 7; Richter v. East St. Louis & S. Ry. Co., 20 Fed. (2nd) 220, 223 (1927).

[10] Minor, *supra* Note 5 at 21.

After it is determined that a cause of action is a transitory one it is next in order to decide whether if by applying the foreign laws as to the existence of a cause of action, our public policy [11] will forbid its adoption and if this question can be answered in the negative our courts will recognize the cause of action arising in and recognized by the foreign jurisdiction and grant the relief the circumstances require. This presupposes, of necessity, that jurisdiction of the parties has been obtained.[12]

Of the many rules of the subject of Conflict of Laws, none are more firmly established than: (1) The *lex loci* determines and governs the cause of action [13] and ordinarily the defenses thereto.[14] (2) The *lex fori* controls the remedial procedure.[15] However, it frequently happens that the line of demarcation cannot readily be drawn.[16] It has been aptly said that "these blend to some extent within a border-line zone." [17] It is this difficulty of distinction which presents many problems in the subject of Conflict of Laws and which in a limited way forms the subject matter of this discussion.

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[11] Loucks v. Standard, *supra* Note 6; Hutchinson v. Ward, *supra* Note 3; Hubbard v. Hubbard, *supra* Note 1; Edgerly v. Bush, 81 N. Y. 199 (1880); Marshall v. Sherman, *supra* Note 1; Bard v. Poole, 12 N. Y. 495, 505 (1855), and cases therein cited; Bank of Augusta v. Earle, 13 Pet. 519 (1839).

[12] Our courts will usually exercise jurisdiction where either the plaintiff or defendant is a resident. "On the other hand, by a long line of authorities, the courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state where both the plaintiff and the defendant were non-residents." Crane, *J.*, in Gregonis v. Philadelphia, *supra* Note 7.

[13] Johnson v. Phoenix Bridge Co., 197 N. Y. 316, 90 N. E. 953 (1910); Kiefer v. Grand Trunk R. Co., 12 App. Div. 28, *aff'd*, 153 N. Y. 688, 48 N. E. 1105 (1896); McDonald v. Mallory, 77 N. Y. 546, 33 Am. R. 664 (1879); Jones, *et al.* v. Louisiana Western Ry. Co., 243 S. W. 976 (1922); Caine v. St. Louis & S. F. R. Co., 209 Ala. 181, 95 So. 876 (1923).

[14] States v. Mexican Nat. R. Co., 194 U. S. 120, 126, 24 Sup. Ct. Rep. 581, 48 L. Ed. 900 (1903); Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. Rep. 978, 38 L. Ed. 917 (1894); Voshefshey v. Hillside Coal, etc. Co., 21 App. Div. 168, 47 N. Y. Supp. 386 (1897); Jones v. Louisiana, *supra* Note 13; 2 Wharton, *supra*, 478b, p. 1098.

[15] Sharrow v. Inland Lines, Ltd., 214 N. Y. 101, 108 N. E. 217 (1915); Johnson v. Phoenix Bridge, *supra* Note 13; Kiefer v. Grand Trunk R. Co., *supra* Note 13; Wooden v. Western N. Y., etc. R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. S. R. 803, 13 L. R. A. 458 (1891); McDonald v. Mallory, *supra* Note 13; Sturges v. Vanderbilt, 73 N. Y. 384 (1878); Dennick v. Central R. Co., *supra* Note 7; Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245 (1875); perhaps the earliest reported case on this point is Yates v. Thurman, 3 Cl. & F. 544, cited in 1 Wigmore on Evidence, Sec. 5, p. 70. See, also, Story, *supra*, Sec. 556, et seq.; 2 Kent Comm. 118; 2 Wharton, *supra*, Sec. 478 b, pp. 1098, 1107.

[16] Pritchard v. Norton, 106 U. S. 124, 129, 1 Sup. Ct. Rep. 102 (1882); Levy v. Steiger, 233 Mass. 600, 124 N. E. 477 (1919); Caine v. St. Louis, *supra* Note 13; Helton v. Alabama Midland R. Co., 97 Ala. 82, 12 So. 276, 285 (1893).

[17] Rastede v. Chicago, St. P. M. & O. R. Co., 203 Iowa 430, 212 N. W. 751, 754, 755 (1927).

Generally speaking we find that the Statute of Limitations,[18] the burden of proof and the quantum of evidence [19] requisite to a recovery are among some of the common problems of remedial procedure, which are governed by the law of the forum.[20] However, even as to these problems there are exceptions. The question when the burden of proof does not pertain to remedial procedure will be taken up later in detail. As to the Statute of Limitations it has been decided [21] that (1) it pertains to the remedy when it merely establishes a limit of time within which a cause of action may be prosecuted and (2) it pertains to the substance of the cause of action when it operates not only to bar an action based thereon but also to extinguish the debt or claim. Therefore in the first case the *lex fori* governs and in the latter case the *lex loci.*

With these fundamental principles in mind it will be interesting to review a recent decision [22] of our Court of Appeals, which bears out the statement that the distinction between the substance of a cause of action and remedial procedure is not always easy of ascertainment. In this case a citizen and resident of New York obtained temporary employment in Ontario, Canada, as an assistant conductor on a trailer of a surface trolley line operating on tracks owned and controlled by the defendant. While a car and its trailer were operating around a curve the conductor on the first car found it necessary to hold the trolley pole in place, by adjusting a cord connecting with the pole. To do so he had to lean out of the car sideways. At this point, the poles, carrying the wires supplying the electric power, in violation of local regulations were within dangerous proximity to the side of the trolley, as a result of which the conductor came in contact with one of them. Plaintiff directly behind, on the front platform of the trailer, instinctively attempted to rescue the conductor and, in so doing, both were thrown from the cars and badly injured.

Under the law of Ontario, Canada, plaintiff can recover for defendant's negligence even though he himself is contributorily negligent.[23] When a jury decides that a defendant is negligent and such negligence in whole or in part was the cause of the injuries complained of they must assess full damages. If it is established that plaintiff's

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[18] Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. Rep. 865 (1915); Pritchard v. Norton, *supra* Note 16; Sharrow v. Inland Lines, Ltd., *supra* Note 15; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177 (1839).

[19] Geoghegan v. Atlas S. S. Co., 3 Misc. 224, 22 N. Y. S. 749 (1893); Richmond & D. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290 (1893); Jones v. Louisiana, *supra* Note 13; 2 Wharton, *supra*, Sec. 478b, p. 1107.

[20] Governed by statute in New York. See, Civil Practice Act, Secs. 13, 19, 55.

[21] Phillips v. Grand Trunk Ry., 236 U. S. 662, 35 Sup. Ct. Rep. 444 (1915); Boyd v. Clark, 8 Fed. 849 (1881); Hollowell v. Horwick, 14 Mass. 188 (1878); Cooper v. Lyons, 77 Tenn. 597 (1892); Newcombe v. Steamboat Co., 3 Iowa 295; Pritchard v. Norton, *supra* Note 16.

[22] Fitzpatrick v. International Ry. Co., 252 N. Y. 127 (Nov. 1929).

[23] Contributory Negligence Act, Chap. 32, Laws of Ontario, 1924.

negligence also contributed to his injury the total assessment must be lessened in proportion to the degree of negligence attributable to him. In the instant case the trial Court held that the burden of proof as to plaintiff's negligence rested with the defendant. To this ruling defendant strongly objected and it was the chief grounds for its prayer for a reversal. It therefore was necessary for the Court of Appeals to determine whether the burden of proof as to plaintiff's contributory negligence, under the circumstances, was one of remedial procedure and hence subject to the law of the forum or one of the substance of the cause of action and therefore controlled by the law of the occasion.

The Court held that on reason and authority the latter was the applicable rule of law. Although the opinion is practically devoid of cited authority a review of the text writers and the opinions of courts indicates that the rule is well established. The Court pointed out that in this case the proof of contributory negligence was more than a mere problem of remedial procedure—it was of the substance of the cause of action, for under our law if plaintiff is contributorily negligent no matter how slight, he has no cause of action, and under the Ontario Act a cause of action, unknown to the common law, is given, that is, the right to recover even though contributorily negligent. Therefore, it was reasoned that the burden of proof more than touched on an order of proof as our rule could have no application under the circumstances, since a cause of action was being sued on, where such proof was not an element of plaintiff's case. In effect the Court said there would be no necessity for plaintiff to disprove his negligence as he would recover nevertheless, and if he attempted to disprove contributory negligence and also to prove defendant's negligence he would be attempting to proceed on the basis of the local cause of action.

It was early established, at common law, that contributory negligence was an affirmative defense to be alleged and proved like any other defense and therefore not a part of plaintiff's cause of action.[24] This rule obtains in a majority of the states of this country.[25] How-

[24] This is still the statutory rule under New York Labor Law (Sec. 202A, L. 1910, Ch. 352, Sec. 2) as well as in death actions (Decedent's Estate Law, Sec. 131, L. 1920, Ch. 919, Sec. 1; also C. P. A., Sec. 265).

[25] Some of the cases holding contributory negligence an affirmative defense: Texas & Pac. Ry. v. Volk, 151 U. S. 78 (1894); Inland Coasting Co. v. Tolson, 139 U. S. 551 (1891); Central V. Ry. v. White, *supra* Note 18; Texas R. Co. v. Orr, 46 Ark. 182 (1885); McDougall v. Central R. Co., 63 Cal. 431 (1883); Moore v. Lanier, 52 Fla. 353 (1906); City v. Hudson, 88 Ga. 599 (1891); Graves v. Northern Ry. Co., 30 Idaho 542, 166 Pac. 571 (1917); Jenkins v. Kansas City P. Service Co., 127 Kan. 821, 822, 275 Pac. 136 (1929); Hill v. Municipal St. R. Co., 112 Minn. 503 (1910); Briesching v. St. Louis Gaslight Co., 73 Mo. 219 (1880); Williams v. Hample, 62 Mont. 594, 205 Pac. 829 (1922); King v. Douglas County, 114 Neb. 477 (1926); New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434 (1867); Carr v. Minneapolis R. Co., 16 N. D. 217 (1907); Grant v. Baker, 12 Ore. 329 (1885); Beatley v. Gilmore, 16 Pa. St. 463 (1851); Smith v. So. Carolina & Ga. R. R., 62 S. C.

ever, a few states, including New York, early changed this rule, thereafter placing upon a plaintiff the burden of showing his freedom from negligence as a part of his own case.[26] Therefore in New York and other states, which have adopted the same rule, freedom from contributory negligence is a vital element of plaintiff's cause of action.

However, under the Ontario act, freedom from such negligence is not essential to the maintenance of the cause of action.[27] Therefore the actions are radically different. Nevertheless, the foreign cause of action not being contrary to our public policy, fundamental rules of Conflict of Laws dispose us to give effect to such foreign law.[28] This identical problem has been passed upon in other jurisdictions,[29] which, with but one exception [30] have all held that where such a conflict arises it is one of substantive law rather than one of remedial procedure.[31]

Whether the burden of proof as to such contributory negligence shall be borne by the defendant, according to the foreign law or by the plaintiff by virtue of the law of the forum, presents a more complicated problem.

It has been held [32] that where a question arises as to mere rules of evidence, such as the *burden of proof,* the law of the forum will displace the law of the occurrence because all rules of evidence, of necessity, partake of the remedy and hence are regulated by the law of the situs of the remedy. If this general statement is sound and without exception, then our principal case was incorrectly decided, since that question was defendant's main argument for reversal.

The case of Central Vermont Railway Company v. White,[33] cited by Judge Crane in the principal case but not in reference to the

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322 (1901); Houston R. Co. v. Couser, 57 Tex. 293 (1882); Morris & Co., Inc. v. Alvis, 138 Va. 149 (1924); Johnson v. Bellingham Imp. Co., 13 Wash. 455 (1896); Mullens v. Railway Co., 94 W. Va. 601 (1923); Pfeiffer v. Radke, 142 Wis. 512 (1910).

[26] For a general treatment of the subject, see 5 Wigmore on Evidence (2nd Ed.), Sec. 2507, p. 490.

[27] *Supra* Note 23, Sec. 2.

[28] *Supra* Note 3.

[29] Louisville & Nashville R. R. v. Whitlow, 105 Ky. 1, 45 S. W. 711, 41 L. R. A. 614 (1897); Illinois C. R. Co. v. Jordan, 117 Ky. 512, 78 S. W. 426 (1904); Morisette v. Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102 (1904); in this connection see, Clark v. Russell, 38 C. C. A. 541, 97 Fed. 900 (1899); Keane v. Wonder Mir. Co., 222 Fed. 821, 138 C. C. A. 247 (1915); Caine v. St. Louis, etc. R. Co., 209 Ala. 181, 95 So. 876, 32 A. L. R. 793 (1923).

[30] Johnson v. Chicago, etc. R. Co., 91 Iowa 248, 59 N. W. 66 (1894).

[31] *Cf.* Ardolina v. Reinhardt, 130 App. Div. 119, 114 N. Y. Supp. 508 (1st Dept. 1909).

[32] Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109 (1915); Van Raden v. N. Y., N. H. & H. Rr. Co., 56 Hun (N. Y.) 96, 8 N. Y. Supp. 914 (1890); Jones *et al.* v. Louisiana U. Ry. Co., *supra* Note 13; Helton v. Alabama, Midland Ry. Co., *supra* Note 16.

[33] *Supra* Note 18.

question under discussion, although not abrogating the above rule as a general proposition gives us an example of an important exception thereto and which, if it were necessary, furnished sufficient authority for our Court to rule as it did.

This case was brought to the United States Supreme Court on a writ of error to the Supreme Court of Vermont. The cause of action arose under the Federal Employer's Liability Act,[34] based on wrongful death caused by the alleged negligence of defendant. Under such act contributory negligence, unlike the law of Vermont, does not operate to bar a recovery but when such negligence is shown damages are diminished in proportion to that amount of negligence attributable to plaintiff.[35] During the course of the trial the defendant requested the Court to charge that the burden of proof as to contributory negligence was on the plaintiff, in accordance with the state law. The courts of Vermont held that since the case was brought upon an act of Congress its laws controlled as to the burden of proof, even though the opposite rule obtained in the state.

In affirming the rule laid down in the state courts, the United States Supreme Court, in part, said: "As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law. *But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure.*" [36] The Court concluded that in those states where plaintiff must not only prove defendant's negligence but also prove his own freedom from contributory negligence "it cannot be said the the burden is imposed by a rule of procedure, since it arises out of a general obligation imposed upon every plaintiff to establish all of the facts necessary to make out his cause of action." But in this case the question of contributory negligence was not an element of plaintiff's case; he would recover even though his negligence were established. The Court, therefore, held that there was no error in charging that the *onus probandi* as to this element must be borne by the defendant.

In Levy v. Steiger [37] plaintiff was suing in the Massachusetts courts for injuries sustained in Rhode Island. The trial Court ruled that the statutory law of Massachusetts was applicable to the case and that therefore the defendant had the burden of proving plaintiff's contributory negligence; to which defendant excepted. On appeal to the Supreme Judicial Court of Massachusetts the exceptions were overruled, the Court reaffirming the doctrine laid down in a prior

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[34] 3 Mason's, U. S. Code, Title 45, Chap. 2, p. 3064; April 22, 1908, Chap. 149, Sec. 1, 35 Stat. 65.

[35] *Supra* Note 33, Sec. 53, p. 3106.

[36] Italics ours.

[37] 223 Mass. 600, 124 N. E. 477 (1919).

case[38] that placing this burden of proof on defendant only affected a question of procedure and did not pertain to fundamental rights.

This, at first blush, appears to be at variance with the result reached in the principal case, but an analysis of the facts peculiar to each case proves that they are not in conflict. In this case both under the *lex loci* and the *lex fori* contributory negligence operated as a bar to recovery, the only difference being that, according to the law of the occasion, plaintiff had the burden of proof as to his contributory negligence, whereas under the law of the forum this burden must be borne by the defendant. Indeed, Judge Crane in the principal case,[39] by way of *obiter dictum*, said that if under the law of Ontario, as here, such contributory negligence would constitute a complete bar, then the question would be merely one of the order of proof; and since there would be the same substantial rights of the parties he ventured to say that our courts might, in such case, apply our own rule.

Weaver v. Alabama G. S. R. Co.[40] was an action brought by a domestic corporation in the state courts of Alabama in which complainant sought an injunction restraining defendant, a resident of the state, from prosecuting an action for damages against complainant in the state of Georgia, the accident having occurred in Alabama. It was complained that conduct of respondent which would *per se* amount to contributory negligence in Alabama and therefore be a bar to the action would not be negligence *per se* in Georgia, even though the act was committed in Alabama. Respondent contended that the difference was not one of substantive law but only one of procedure. The Court affirming the order granting the writ of injunction said that in Georgia, plaintiff's conduct would only invoke matter of evidence but in Alabama the conduct amounting to a complete bar to a recovery would be one of substance. It was said:[41] "When the law declares that such contributory conduct conclusively establishes the defense of contributory negligence, it withdraws the issue from the field of evidence and creates a rule of substantive law."

By analogy to the principal case, conceding that by the law of Ontario the burden of proving contributory negligence is on the defendant, in such jurisdiction it is purely a question of evidence.[42] However, where in the forum, contributory negligence not only reduces damages but operates as a bar to a recovery the issue with all its elements, is withdrawn from the field of evidence and a rule of substantive law is created. And the burden of proof as to such negligence is an element of the issue for, to repeat, it is an obligation on the part of a party to prove the elements of his case.[43] Clearly it

[38] Duggan v. Bay St. Ry. Co., 230 Mass. 370, 119 N. E. 757, L. R. A., 1918 E. 680 (1918).
[39] *Supra* Note 22 at 135.
[40] 200 Ala. 432, 76 So. 364 (1917).
[41] *Supra* Note 40 at 367.
[42] *Supra* Note 32.
[43] Central Vermont Ry. Co. v. White, *supra* Note 18.

may be said if plaintiff can recover, notwithstanding his negligence, it is not a part of his case, and, of course, if contributory negligence is not a part of his case the incidental burden of proof thereof, in the absence of statutory provisions to the contrary, cannot be considered a part.

It must be borne in mind that the burden of proof is not always a question of evidence. A learned commentator [44] on the law of evidence has said: "Burden of Proof, it may be said, shares with knowledge, judicial or common, the peculiar status, in relation to the law of evidence that while usually treated as part of that branch of law, it is, in reality, entirely outside its scope." As a general proposition we must concede that ordinarily the burden of proof is merely a branch of evidence but, nevertheless, at times it assumes greater dimensions. As Judge Crane said in the principal case, it was more than mere evidence; it was an essential part of the action.[45]

At this point it seems in order to refer to the rules given by the elementary writers for the identification of the party upon whom rests the burden of proof. Chamberlayne [46] says the burden of proof is on him who would lose his case if no further evidence were produced. Applying this rule to our principal case and using the word "case" in a restricted sense, it warrants no controversy to say that if no evidence of contributory negligence were adduced the defendant would lose that part of his case, to wit, the right to a reduction in damages because of plaintiff's negligence. Professor Wigmore [47] suggests that the burden is upon the party to whose case the fact is essential.[48] Now the fact of contributory negligence is not essential to the maintenance of plaintiff's case, for as we have already seen, according to the law which determines his cause of action, he might recover in spite of his own neglect. On the other hand the fact is extremely essential to defendant. Greenleaf in different words gives the same definition.[49] He says, in effect, that the characteristics of the burden of proof are the division and apportionment made upon the trial of an action between the parties of the specific facts which will in turn fall to them as the prerequisite of obtaining action in their favor by the tribunal.

Chief Judge Cardozo of our Court of Appeals advises us that "it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci* and vindicated here and in our tribunals upon principles of comity." [50] By that cause of action

[44] 2 Chamberlayne's, The Modern Law of Evidence, Sec. 930, p. 1092.

[45] *Supra* Note 22 at 134.

[46] Chamberlayne, *supra,* Sec. 937, p. 1100: So held in John Turl's Sons v. Williams Eng. & Contr. Co., 136 App. Div. 710, 121 N. Y. Supp. 478 (2nd Dept. 1910).

[47] Wigmore, *supra,* Sec. 2486, p. 441.

[48] To the same effect, Greenleaf, *supra,* p. 97. See also, 1 Starkie on Evidence (6th Am. Ed.) 363.

[49] 1 Greenleaf, *supra,* p. 96, Sec. 14w.

[50] Wooden v. Western N. Y. & Pa. R. R., *supra* Note 15.

plaintiff can recover though contributorily negligent, but of course in a lesser degree when the latter is established. It therefore really operates to reduce or mitigate damages. It has frequently been held [51] that when matter is set up as a partial defense in mitigation of damages the burden of proving the facts constituting the mitigation is upon the party held liable to respond in damages. Since in the principal case the defendant is the party liable to respond in damages, it is incumbent upon him to prove the mitigating circumstances, *i.e.*, plaintiff's contributory negligence.[52]

It therefore is apparent that whether we look at the problem from the standpoint of Conflict of Laws or from that of elementary principles of substantive law the result reached is sound beyond question, even though upon its face it may appear to be erroneous.

Therefore a result has been reached which has produced two effects. Correct rules of law have been strictly adhered to, the application of which commends itself from a layman's point of view as to the fair play of distributing a loss caused by wrongful conduct of two people rather than placing the entire loss upon the shoulders of one whose share of the loss, as estimated by a jury of twelve men, was only one-tenth. And in so doing we are applying a rule contrary to established precedent of the state, where the cause of action arises within the state. However, in due deference to our own courts these observations should not be made without finding fault with a rule which arbitrarily submits a question of comparative negligence to twelve men to be worked out by them with mathematical exactitude. This does not make for practicability [53] and therefore we cannot hope for a prevention of what apparently are occasional miscarriages of justice, in contributory negligence cases, by an adoption of the Canadian Rule.

EDWARD J. DONLON.

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[51] Costigan v. The Mohawk & H. R. Rr. Co., 2 Denio. (N. Y.) 609, cited with approval in Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330 (1863); McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696 (1857); Ramsey v. Perth Amboy Ship. & Eng. Co., 72 N. J. Eq. 165, 65 Atl. 461, decree *aff'd*, 73 N. J. Eq. 742, 70 Atl. 1101 (1908); Huntington Easy Pay't Co. v. Parsons, 62 W. Va. 26, 57 S. E. 253, 9 L. R. A. (N. S.) 1130, 125 Am. St. Rep. 954 (1907); International & G. N. R. Co. v. Sandlin, 57 Tex. Civ. App. 151, 122 S. W. 60 (1909); Campfield v. Sauer *et al.*, 189 Fed. 576 (1911), and cases therein cited; Cornwall *et al.* v. J. J. Moore & Co., 132 Fed. 868 (1904); Sackett v. Rose, 55 Okl. 398, 154 Pac. 1177, L. R. A. 1916 D. 820 (1916). *Cf.* Taylor v. Friedman, 214 App. Div. 198, 212 N. Y. Supp. 20 (1925).

[52] *Cf.* Civil Practice Act, Sec. 262.

[53] An early Connecticut Court held that a plaintiff guilty of contributory negligence could not recover, "because he is himself in fault, and because of the difficulty, if not impossibility, of ascertaining in what proportions the parties respectively, by their negligence, have contributed to the production of the injury * * *." Neal v. Gillet, 23 Conn. 437 (1855).