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AN EQUITABLE REMEDY TO COMBAT GAMBLING IN ILLINOIS

Russell Baker*

ONE OF THE largest, certainly one of the most lucrative, enterprises operating in this country today is the illegal syndicated gambling racket. Information uncovered by the Kefauver Committee¹ makes it apparent that big-time gambling is responsible for much of the crime, great and small, that is committed in the country from day to day. Yet, by and large, efforts directed at the suppression of this organized racket have been pitiful in terms of results that have been accomplished. The fault probably does not lie in the state of the law. The laws of Illinois, for example, are complete and abundant on the subject of gambling as a crime and are amply fortified with provisions for punishment.² Enforcement of these plain, simple strictures, however, has become a farce.

The experience of one Illinois county alone will demonstrate the truth of this last statement. In the Municipal Court of Chicago, as well as in certain of the Justice of the Peace courts

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¹ U. S. Senate Committee Investigating Organized Crime in the United States.

² See Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, §§ 324-48.

in the outlying county areas, judges have ordered evidence of gambling suppressed because of an improper observance of requirements pertaining to search and seizure.³ In the Criminal Court of Cook County, as well as in other state tribunals of equal rank, convictions for the violation of gambling laws have been, to say the least, infrequent.⁴

Police officers charged with the duty of enforcing law, likewise have seldom been convicted for their failure to perform their bounden duty in relation to the suppression of gambling. One illustration should suffice. An acting chief of police for Calumet City was indicted in 1949 by the grand jury of Cook County for misconduct as a municipal officer.⁵ At the ensuing trial, an assistant state's attorney testified that he had been studying the existence of wide-open gambling in that city for the preceding year. The state's attorney himself also testified that he had warned the acting chief of police that "if it [gambling] wasn't stopped, he [the defendant] would face the grand jury."⁶ The defendant claimed that there were "not enough officers to handle the job," as he had only thirteen policemen to watch over some 152 taverns in the city.⁷ A trial jury acquitted the defendant after seventy-five minutes of deliberation.⁸

Even where convictions are obtained, the fact is that the pen-

³ The general doctrines relating to search and seizure are set forth in *People v. Dent*, 371 Ill. 33, 19 N. E. (2d) 1020 (1939), and *Early v. People*, 117 Ill. 608 (1904). In particular, see *People v. Two Roulette Wheels and Tables*, 326 Ill. App. 143, 61 N. E. (2d) 277 (1945).

⁴ The Chicago Police Department Report, 1949, shows that 8,649 arrested persons were charged with gambling, but only 665 of them were found guilty.

⁵ See *People v. Wleklinski*, Docket No. 49-2401, Criminal Court of Cook County, Illinois.

⁶ See Chicago Sun-Times under date of March 23, 1950; Chicago Tribune, December 1, 1949.

⁷ *Ibid.*, March 25, 1950.

⁸ *Ibid.*, March 28, 1950. A similar result may be observed in *People v. Flynn*, 375 Ill. 366, 31 N. E. (2d) 591 (1941). The mayor of Champaign had there been indicted for failure to close gambling houses but was ordered acquitted because of a lack of sufficient proof that he knew where the gambling houses were located. In *People v. Wigglesworth*, Docket No. 49-1089, Criminal Court of Cook County, Illinois, the defendant, police chief for Melrose Park, was acquitted on charges of misfeasance and nonfeasance for allowing gambling to flourish in his community. The jury indicated that it believed that the "higher-ups," instead of the defendant, should have been called on to explain the presence of gambling: Chicago Sun-Times, October 2, 1949.

alties imposed in gambling cases offer little or no discouragement so long as the gambling house proprietor or operator is able to avoid imprisonment.⁹ The records are replete with instances where the same gambling house, located on the same piece of real estate, has been successfully raided on numerous occasions with successive convictions for gambling entered against the same or different keepers.¹⁰ A strong example of this is to be found in the record relating to one "bookie" located in Chicago Heights. It was raided a total of eighteen times from January, 1947, to October, 1949, or at the rate of a little better than one raid every two months. Thirteen different keepers were arrested in these eighteen raids. Two of them were convicted and fined three times each. One keeper was convicted twice. The total realized from fines imposed during this period was \$1,882, equal to about \$55.00 for each month of operation. Anyone with experience would realize these levies amounted to only a minor portion of the gambler's "take," and apparently had no more deterrent effect than any other item of "overhead."

Still more rarely invoked is that provision of the Criminal Code which makes it a crime to knowingly rent property for gambling purposes or to allow premises to be used in that connection.¹¹ It has been a characteristic of those law enforcement methods currently in use in Cook County to pass up the responsibility of the owner, lessee, or operator of real estate who permits his premises to be used for illegal gambling purposes. He is seldom arrested and punished for his violation of the law, although he is as guilty

⁹ Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 325, purports to require a minimum fine for the first conviction, a minimum fine and imprisonment in the county jail for the second, while the third conviction is supposed to produce a minimum fine and also a minimum term in the penitentiary. See also Ch. 38, §§ 326, 341 and 343.

¹⁰ The Sheriff of Cook County, under date of November 3, 1950, has supplied a report to the Chicago Crime Commission covering the preceding four years. It lists, among other things, twenty-eight different places where handbooks were found in operation. These places were raided a total of 201 times, for an average of seven raids on each. The average fine for the 201 raids was \$86.71. The report further indicates that a total of 127 different keepers were arrested in 178 of these raids. The rapidity of change in keepers would appear to be indicative of a desire to avoid a prison penalty.

¹¹ Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 325.

of a crime as is the operator of the gambling establishment,¹² perhaps because of difficulty experienced in producing evidence of the kind or sufficiency required by the statute.¹³

This brief review of the realities of the problem makes it apparent that there is fault somewhere, if not in existing law, then in its enforcement. Regardless where the fault lies, good government suffers, and will continue to suffer, unless some new, additional, and more effective weapon is made available. It is submitted that if the criminal tribunals cannot meet the rude challenge offered by organized gambling to the rule of law, peace, and order, then a court of equity, one already armed with an adequate supply of equitable remedies, can furnish the needed protection. The weapon which such a court could wield to attain that end is the familiar, but powerful, equitable injunction against the maintenance of a nuisance.

Three general classifications of public or common nuisance were known to the common law. Certain acts were there declared to be nuisances because they outraged public decency;¹⁴ others, because they injuriously affected public health.¹⁵ In the third

¹² Convictions have been sustained in *People v. Viskniskki*, 155 Ill. App. 292 (1910), affirmed in 255 Ill. 384, 99 N. E. 621 (1912); *People v. Leach*, 143 Ill. App. 442 (1908); *People v. Brewer*, 142 Ill. App. 610 (1908); *People v. Ward*, 23 Ill. App. 510 (1887). Reversal of conviction was ordered in *People v. O'Connor*, 334 Ill. App. 27, 78 N. E. (2d) 323 (1948); *People v. Brickey*, 332 Ill. App. 370, 75 N. E. (2d) 534 (1947), cause transferred 396 Ill. 140, 71 N. E. (2d) 157 (1947); *People v. Flynn*, 123 Ill. App. 591 (1905).

¹³ In *People v. Viskniskki*, 155 Ill. App. 292 at 297 (1910), the court said: "To constitute the offense charged in said count, it must be proved beyond a reasonable doubt that the house or room was knowingly leased for the purposes of keeping a gaming house." In *People v. Flynn*, 123 Ill. App. 591 at 593 (1905), the court declared: "It is manifest that before conviction could be had under said count [one charging defendant with knowingly renting for a gaming house], it was necessary for the prosecution to prove beyond a reasonable doubt that at the time of the execution of the lease to Reisch [the lessee], the defendant had actual knowledge that the premises leased were to be used for gambling purposes." Proof of actual knowledge at the time of leasing might be difficult to establish. But permitting a gambler to remain in possession after a known conviction would seem sufficient. The haste with which some landlords act to regain possession may be indicative of a fear of punishment. See *Bogden v. Laswell*, 331 Ill. App. 395, 73 N. E. (2d) 441 (1947); *Harris v. McDonald*, 79 Ill. App. 638 (1898), affirmed in 194 Ill. 75, 62 N. E. 310 (1901); *Ryan v. Potwin*, 60 Ill. App. 637 (1895).

¹⁴ Bl. Comm., Book IV, Ch. 13, *167-8; Wharton, *Criminal Law*, 12th Ed., Vol. 2, § 1703. An illustrative case may be found in *Gilmore v. State*, 118 Ga. 299, 45 S. E. 226 (1903).

¹⁵ Wharton, *op. cit.*, Vol. 2, § 1706.

class, designated a nuisances *per se*, were those acts which disturbed or injured public peace and morals by causing the congregation of large numbers of idle and dissolute persons in one place for vicious purposes. Of such, were the maintenance of common gaming houses.¹⁶ Records abound with evidence of the treacherous nature of the evil of gambling. No proof is needed as to the way it acts to attract its victims and bring them to disgrace and ruin.¹⁷ When gambling is conducted on the plane of "big business," especially by those who make of it an organized profession, it, as well as the place in which it is conducted, becomes a common and public nuisance calling for the application of extreme measures. Not only punishment but suppression is needed.

If there should be doubt on the point, let the words of an Illinois court set that doubt at rest. Within the last year, one such court has said:

A gaming house is a house kept for the purpose of permitting persons to resort to it and gamble therein and the keeping of a gaming house is indictable at common law as a common or public nuisance because it offers great temptation to idleness and tends to draw together disorderly persons to the encouragement of immorality and breaches of the peace.¹⁸

It is clear, therefore, that the maintenance of a gambling house was, and still is, an indictable offense under the common law on the basis of it being a public or common nuisance. That result has been attained regardless of any statute and independent therefrom.¹⁹

The common law definition of a gaming house, however, has been expanded, in Illinois, by a statute which provides that all places where slot machines and other gambling devices are held

¹⁶ *King v. Roger*, 1 B. & C. 272, 8 Eng. Rep. 117 (1823); *Lane v. Springfield*, 120 Ill. App. 5 (1905); *People v. Sergeant*, 8 Cowen 139 (N. Y., 1823). See also *Hawkins, Pleas of the Crown*, Book 1, Ch. 32, § 6; *Russell, Crimes*, p. 741.

¹⁷ *Lane v. Springfield*, 120 Ill. App. 5 (1905).

¹⁸ *City of Sterling v. Speroni*, 336 Ill. App. 590 at 597, 84 N. E. (2d) 667 at 671 (1949).

¹⁹ See *Vanderworker v. State*, 13 Ark. 700 (1850).

or operated shall be taken and declared to be common and public nuisances.²⁰ In addition thereto, cities and villages, generally, have been authorized to declare and to abate nuisances,²¹ while the City of Chicago, in particular, has been specifically granted express authority on the point.²² That city, at least, has implemented the authority so conferred by the adoption of ordinances on the subject,²³ so there is ample basis in law, statutory as well as common law, for the view that the maintenance of gambling dens amounts to a form of common or public nuisance sufficient to support criminal prosecution.

With that fact established, it now becomes possible to consider the part which a court of equity could play in the suppression of the evil of organized or syndicated gambling. It is unquestionable that a court of equity has jurisdiction to enjoin the commission of a nuisance, both public and private, a jurisdiction which it has enjoyed from the earliest of times.²⁴ The Illinois Supreme Court itself once said, in *People v. Huls*,²⁵ that the jurisdiction of courts of equity to restrain the maintenance of public nuisances "is of ancient origin and has been traced back as far as the reign of Queen Elizabeth."²⁶ Certainly that jurisdiction has been recognized in Illinois at least since the decision in *People v. City of St. Louis*,²⁷ and probably has always been the rule in this state,²⁸ for one of the most useful functions performed by a court of equity is that of giving complete and adequate relief against acts which amount to a nuisance.²⁹

²⁰ Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 348.

²¹ *Ibid.*, Vol. 1, Ch. 24, § 23—61.

²² *Ibid.*, Vol. 1, Ch. 24, § 21—20.

²³ Mun. Code Chicago 1939, Ch. 191.

²⁴ *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912), affirming 171 Ill. App. 161 (1912).

²⁵ 355 Ill. 412, 189 N. E. 346 (1934).

²⁶ 355 Ill. 412 at 416, 189 N. E. 346 at 349.

²⁷ 10 Ill. (5 Gilm.) 351, 48 Am. Dec. 339 (1848).

²⁸ See *Barrett v. Mount Greenwood Cemetery Ass'n*, 159 Ill. 385, 42 N. E. 891 (1896). See also *Pomeroy*, *Equity Jurisprudence*, 4th Ed., Vol. 5, § 1893; *Joyce*, *The Law of Nuisances*, § 81; 46 C. J., *Nuisances*, § 365, p. 759; *Eng. & Am. Encyc. of Law*, Vol. 21, *Nuisances*, p. 705.

²⁹ *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912), affirming 171 Ill. App. 161 (1912).

In addition thereto, one of the most widely known principles affecting proceedings in chancery is that equity is entitled to, and will, take jurisdiction over a matter when the common law, at best, offers only an inadequate form of relief. Endless cases could be cited to support this last statement, but to do so would be belaboring the obvious. It is worthwhile, however, to quote again from the decision of *People v. Huls*.³⁰ It was there said that the ground of the jurisdiction of courts of equity in cases of public nuisances "is their ability to give more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief and also to suppress oppressive and vexatious litigation."³¹

There can be little doubt, after what has already been said, that legal remedies against those who maintain gambling houses are inadequate. Fines which have been imposed in cases where convictions have been obtained act merely as a form of fee for a license to carry on an illegal business. Repeated raids on the same property,³² multiple fines imposed on the same keeper,³³ together with the failure to prosecute, convict and punish the property owner,³⁴ clearly serve to show an inadequacy in legal measures aimed at the abatement or suppression of these public nuisances.

Other reasons exist, if they be needed, to show why a court of equity can offer a greater degree of relief than can a court of law. One of these lies in the flexibility which may be attained in an equitable decree.³⁵ Although fundamentally designed to act *in personam*,³⁶ an equitable decree can be so worded as to restrain not only the owner but all who claim under him from

³⁰ 355 Ill. 412, 189 N. E. 346 (1934).

³¹ 355 Ill. 412 at 416, 189 N. E. 346 at 349. The same general rule is expressed in *People v. Fritz*, 316 Ill. App. 217, 45 N. E. (2d) 48 (1942); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912), affirming 171 Ill. App. 161 (1912); *Town of Manteno v. Suprenant*, 277 Ill. 181, 115 N. E. 180 (1917), affirming 210 Ill. App. 438 (1918).

³² See note 10, ante.

³³ See note 10, ante, and text following that note.

³⁴ See note 12, ante.

³⁵ *Cherry v. Insull Utility Investment Co.*, 58 F. (2d) 1022 (1932).

³⁶ *Dunham v. Dunham*, 57 Ill. App. 475 (1895), affirmed in 162 Ill. 589, 44 N. E. 841 (1896).

using a parcel of property in such a way as to amount to a public nuisance. In addition, equity is in a position to take jurisdiction over a subject in order to avoid a multiplicity of suits.³⁷ There can be little doubt that, in most instances, a gambling house does not close after an initial raid or the imposition of a first fine on the keeper. It has already been pointed out how the same premises have been subjected to raid after raid, how keepers have been fined time and time again, yet the nuisance continues to operate. A better illustration of vexatious multiplicity would be hard to find. Clearly, then, equity could act to prevent such an utter waste of judicial time.

If the proposition be accepted that a court of equity could exercise jurisdiction in matters of this character, the next question raised is one concerning the proper person to apply for equitable relief. In this state, as in many others, the law is clear that the Attorney General, in his official capacity, is unquestionably entitled to apply for the abatement of a nuisance.³⁸ It does not appear, however, that the choice of suitor is limited to that official. It has been held in the case of *City of Pana v. Central Washed Coal Company*,³⁹ for example, that a municipal corporation, under its authority to abate public nuisances, may also call upon a court of equity for assistance. The view there expressed has been followed in the later case of *City of Sterling v. Speroni*,⁴⁰ so there is no reason to believe that difficulty should be present on the point as to the selection of an appropriate plaintiff.

One possible stumbling block may exist growing out of the alleged view that equity lacks jurisdiction to suppress common nuisances unless demonstrable damage has been done to property. That attitude was once taken in the Appellate Court holding in

³⁷ *Snyder v. Aetna Construction Co.*, 272 Ill. App. 591 (1933).

³⁸ *Thrasher v. Smith*, 275 Ill. 256, 114 N. E. 31, L. R. A. 1917B 1075 (1916); *People v. Clark*, 187 Ill. App. 613 (1914); *Stead v. Fortner*, 171 Ill. App. 161 (1912), affirmed in 255 Ill. 468, 99 N. E. 680 (1912).

³⁹ 260 Ill. 111, 102 N. E. 992, 48 L. R. A. (N. S.) 244 (1913).

⁴⁰ 336 Ill. App. 590, 84 N. E. (2d) 667 (1949).

the case of *People v. Condon*,⁴¹ a suit begun by the state. It was there announced that either some property right or some public right had to be violated before equity would act to restrain a common nuisance. The case was one in which the local state's attorney had sued to enjoin the maintenance of a gambling house at a race track on the basis that the presence of the gambling ring caused great annoyance to the public, disturbed the peace of the town, and debased public morals. Injunction was denied under an opinion which cited from parts of decisions in other cases to sustain the view that, because no specific property right was involved, equity could not take jurisdiction even though the suit be one brought on behalf of the people of the state. The decision, however, completely overlooks a basic difference existing between public and private nuisances. As to the first, the act which constitutes the nuisance strikes at the public right to protect the morals, decency, or health of all of the people in the community. In the second, by contrast, only one or a few may be specially and distinctly injured by the nuisance, so it is there proper to require proof of the particular injury.

Aside from principle, it should be pointed out that the holding in the Condon case has, in effect been emphatically nullified by subsequent Illinois decisions.⁴² In the case of *Stead v. Fortner*,⁴³ for example, the Supreme Court ruled that no question of property right is involved in a proceeding brought by the public to abate a public nuisance, the question being one as to whether or not there has been an invasion of public right, and that irrespective of the presence or absence of pecuniary damage. There is added significance in the fact that the Supreme Court, when deciding the Fortner case, some ten years after the holding in the Condon case, saw fit to make no mention of the principle

⁴¹ 102 Ill. App. 449 (1902). The holding therein was distinguished in the later case of *People v. Cello*, 112 Ill. App. 376 (1902), where an injunction was granted, and was further distinguished in the Appellate Court holding in *Stead v. Fortner*, 171 Ill. App. 161 at 170 (1912).

⁴² See *People v. Huls*, 355 Ill. 412, 189 N. E. 346 (1934); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912); *City of Sterling v. Speroni*, 336 Ill. App. 590, 84 N. E. (2d) 667 (1949).

⁴³ 255 Ill. 468, 99 N. E. 680 (1912).

there purported to be laid down, apparently refusing to dignify it by attempting either to distinguish that case or to overrule it directly.

Equity also permits a private individual to maintain an action for the abatement of a public, as well as a purely private, nuisance provided such individual can show that he has been specially injured in a manner distinct from that suffered in common with other members of the public at large.⁴⁴ It is at this point that a need arises for some evidence of property damage in order to establish the special injury. In that regard, it would be worth while to consider the situation in some detail for if proper public authorities refuse to bring an action to abate a nuisance, those individuals specially injured would be left without a remedy unless they, too, could sue. The case of *Kuhn v. Illinois Central Railroad Company*⁴⁵ clearly indicates that the same pattern of offensive conduct may simultaneously be both a public and a private nuisance, leading to either a public or a private suit.⁴⁶

But even more to the point is the decision in *Hoyt v. McLaughlin*.⁴⁷ The plaintiff there, as a private person, sued in equity to enjoin the defendant from operating a dram shop, one declared by statute to be a public nuisance. The plaintiff set out that he suffered special injury from the operation of the dram shop in the form of a loss of the full rental value of property which he owned, property located in the same block as the dram shop. The court, there, upholding the plaintiff's right to maintain the action, quoted from the Massachusetts case of *Wesson v. Washburn Iron Company*⁴⁸ to the effect that

The real distinction would seem to be this: That when the

⁴⁴ *Klumpp v. Rhoads*, 362 Ill. 412, 200 N. E. 153 (1936); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912); *McEniry v. Tri-City Rail Co.*, 254 Ill. 99, 98 N. E. 227 (1912); *Vail v. Mix*, 74 Ill. 127 (1874); *Koch v. McClugage*, 276 Ill. App. 512 (1934).

⁴⁵ 111 Ill. App. 323 (1903).

⁴⁶ The court, in 111 Ill. App. 323 at 328, stated: "An individual, who receives actual damage from a nuisance, may maintain a private suit for his own injury, although there may be many others in the same situation. The doctrine now is, that a nuisance may be at the same time both public and private."

⁴⁷ 250 Ill. 442, 95 N. E. 464 (1911).

⁴⁸ 95 Mass. 95 (1866).

wrongful act is, of itself, a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health or creating personal inconvenience and annoyance for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance.⁴⁹

Other cases could be cited which sustain the argument presented in the two cases last mentioned,⁵⁰ but enough has been said to show that the maintenance of a gambling house could have an effect on the private rights of private parties in the immediate vicinity thereof, causing injury to property values by diminishing either the rental income or the selling price. Individuals so injured, therefore, specially and distinctly from the public at large, may maintain suits to restrain the continued operation of a gambling house without regard to the fact that such a house may also be a common public nuisance. The only essential distinction, then, is that the Attorney General may sue, in the name of the public, to abate the common public nuisance without having to show the existence of any property or pecuniary damage, while a private individual must, if he would sue, show some property or pecuniary damage personal to himself and apart from the harm inflicted on the general public.

An argument which may be offered against suits of this character rests upon the foundation that, as the operation of a gaming house is a crime,⁵¹ equity should not take jurisdiction because of a rule that equity has no jurisdiction to prohibit the commission

⁴⁹ See 95 Mass. 95 at 103, quoted in 250 Ill. 442 at 447, 95 N. E. 464 at 466.

⁵⁰ *Dumme v. County of Rock Island*, 283 Ill. 628, 119 N. E. 591 (1918); *Joos v. Illinois National Guard*, 257 Ill. 138, 100 N. E. 505 (1912); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912).

⁵¹ Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 325.

of a crime.⁵² Acceptable as that rule may be in its proper setting, it leaves unaffected the additional fact that, while gambling is a crime, the use of a parcel of real estate as a place for gaming also constitutes a public nuisance. The court, in *Stead v. Fortner*,⁵³ when confronted with a similar situation, pointed out that "the law has a double purpose,—to punish the persons committing an illegal act and to prohibit the use of the property for illegal purposes,—and these are separate and distinct."⁵⁴ Other cases have likewise held that equity has jurisdiction to abate the nuisance notwithstanding the fact that the act complained of may also be a crime.⁵⁵ A given set of facts may often set in motion not one but several remedies, remedies favoring distinct authorities or persons and proceeding on different theories. One nuisance may involve not only a violation of a criminal statute but infringe upon a municipal ordinance as well. It may, at the same time, amount to a public nuisance, yet affect an individual in so distinctive a fashion as to be a private nuisance to him.⁵⁶ It is no argument, therefore, to say that because one is entitled to complain on one theory, he and others are barred from presenting other claims based on other theories, even if arising from the same facts, provided other and different forms of relief are desired.

Two Illinois cases will probably be cited in support of the argument that equity should not take jurisdiction in situations like the one under discussion. Superficially considered, they

⁵² *State v. Brush*, 318 Ill. 307, 149 N. E. 262 (1925), reversing 236 Ill. App. 655 (1924); *People v. Trouty*, 262 Ill. 218, 104 N. E. 387 (1914); *People v. Mussatto*, 216 Ill. App. 519 (1920); *People v. Condon*, 102 Ill. App. 449 (1902). But see *Smith v. Illinois Adjustment Finance Co.*, 326 Ill. App. 654, 63 N. E. (2d) 264 (1945), where a complaint to restrain a corporation from engaging in the practice of law was upheld despite the objection that an adequate legal remedy existed in the form of a criminal proceeding based on Ill. Rev. Stat. 1949, Vol. 1, Ch. 32, § 411.

⁵³ 255 Ill. 468, 99 N. E. 680 (1912).

⁵⁴ 255 Ill. 468 at 474, 99 N. E. 680 at 686.

⁵⁵ *City of Sterling v. Speroni*, 336 Ill. App. 590, 84 N. E. (2d) 667 (1949); *People v. Billburg*, 175 Ill. App. 136 (1912).

⁵⁶ *Hoyt v. McLaughlin*, 250 Ill. 442, 95 N. E. 464 (1911), indicates that the operation of a dram shop without a license may be considered to be both a public and a private nuisance, exposing the violator to prosecution under both statute and ordinance.

would appear to support that argument. When thoroughly analyzed, they do no such thing. In the first of these cases, that of *People v. KUCA*,⁵⁷ a suit was brought to restrain a man and his wife from selling liquor in a building owned by them. The sale was charged to be a violation of the then Illinois prohibition act.⁵⁸ After a temporary injunction had been issued restraining the defendants from selling or keeping liquor on the premises in question, the state moved to have the injunction made permanent. The defendants consented thereto. The permanent injunction was worded so as to restrain the defendants "perpetually from unlawfully keeping or possessing intoxicating liquor in any place in the State of Illinois." The defendants were later sentenced for their contempt growing out of an alleged violation of the injunction. On appeal, the judgment of conviction was properly reversed, not because an injunction would not lie under the statute against the public nuisance of selling or keeping intoxicating liquor on a specific piece of property but because the injunction was too broad in that it forbade the selling or possession of such liquor anywhere in the state. Such an injunction would, of course, amount to an attempt to enjoin against the commission of crime rather than serve to abate a specific public nuisance. A much different result would, in all probability, have been attained had the scope of the injunction been suitably limited.

The second case, that of *People v. Fritz*,⁵⁹ reflects the outcome of an attempt by the Attorney General to obtain a single injunction restraining some fourteen hundred defendants from operating gambling establishments anywhere within the state. An injunction granted by the trial court was reversed on appeal. The higher court pointed out that while equity had power to abate a public or private nuisance by injunctive measures despite the fact that the persons responsible therefor could have been prosecuted criminally, the injunction had to be directed against the

⁵⁷ 245 Ill. App. 202 (1924).

⁵⁸ Laws 1921, p. 681; Cahill Ill. Rev. Stat. 1923, Ch. 43, § 1 et seq., particularly § 21. The act was repealed in 1933: Laws 1933, p. 518.

⁵⁹ 316 Ill. App. 217, 45 N. E. (2d) 48 (1942).

use of premises and not merely against the commission of criminal acts. The complaint there had failed to disclose, by suitable allegation of fact, that criminal prosecution of the many persons involved would not offer an adequate remedy. As a matter of fact, there was no allegation that any attempt had been made, by either the Attorney General or the several local state's attorneys, to enforce the criminal laws against the defendants. These two defects were underscored by the reviewing court when it stated:

Under the authorities, one principle requisite for injunctive relief of this kind, where criminal acts are involved, is that equity does not have jurisdiction to enforce criminal law. To state a cause of action, the complaint must state facts, among other things, to show that adequate relief cannot be obtained at law in the criminal courts. It is noted in the cases cited and referred to that where injunctive relief has been granted, that the criminal charges are incidental only and that the complaint has alleged facts and not conclusions alone, showing why relief cannot be obtained at law. For this reason we think the complaint herein is fatally defective in that particular.⁶⁰

There is no denial, in either of these two cases of the existence of an equitable power capable of serving to abate a common public nuisance in a proper situation. The most they stand for is that it is proper to refuse to apply that power under facts such as were there presented.

Another argument likely to be offered by persons confronted with equitable suits designed to enjoin them from conducting their nefarious activities at specifically designated places, one closely connected with the contention that equity lacks the power to prevent the commission of a crime, is that the use of such an equitable remedy would amount to a denial of the constitutional right to trial by jury.⁶¹ The argument, if proposed, would be equally without merit. The constitutional guarantee is one de-

⁶⁰ 316 Ill. App. 217 at 231, 45 N. E. (2d) 48 at 55.

⁶¹ Ill. Const. 1870, Art. II, § 5.

signed to protect a right to trial by jury "as heretofore enjoyed." It refers, and has been held to refer, to trial by jury according to the light of history and usage at common law.⁶² Equity, historically, did not grant trial by jury, nor does it do so today,⁶³ unless specifically commanded to do so by some express statute.⁶⁴ The chancellor might, in his discretion, require the taking of an advisory verdict,⁶⁵ but he is not bound thereby and certainly is not obliged, as of right, to grant a request for a jury trial. No violation of constitutional right, therefore, would be involved in an abatement proceeding, so this contention should fall under its own weight.⁶⁶

Any hesitancy to adopt the proposal here offered, on the ground of lack of a specific supporting precedent authorizing such action, should be resolved on the basis of the outcome of the recent case of *City of Sterling v. Speroni*.⁶⁷ That was a suit begun by a municipal corporation to enjoin the two defendants from maintaining a "bookie" joint, operated by one of the defendants in buildings located on designated premises owned by the other. The complaint alleged that the gambling house was a public nuisance and charged an inadequacy in available legal remedies in that the defendants, after conviction, paid their fines but continued to use the property as they had done before. Evidence at the trial disclosed that the defendant who operated the gambling house had been arrested and fined on two separate occasions but that the gambling house continued to operate. An injunction to abate the nuisance was affirmed by the Appellate Court for the Second District. It upheld the contention of the city that the establishment in question was a common public

⁶² *People v. Niesman*, 356 Ill. 322, 190 N. E. 668 (1934).

⁶³ *McCowan v. McCowan*, 324 Ill. App. 520, 58 N. E. (2d) 338 (1944); *Williams v. Northern Trust Co.*, 316 Ill. App. 148, 44 N. E. (2d) 333 (1942).

⁶⁴ See, for example, Ill. Rev. Stat. 1949, Vol. 1, Ch. 40, § 8, for the right to trial by jury in divorce cases, and *ibid.*, Ch. 3, § 244, as to will contest proceedings.

⁶⁵ *DeGraff v. Manz*, 251 Ill. 531, 96 N. E. 516 (1911). See also *Puterbaugh*, *Chancery Pleading and Practice* (Callaghan & Co., Chicago, 1916), 6th Ed., pp. 242-7.

⁶⁶ *People v. Fritz*, 316 Ill. App. 217, 45 N. E. (2d) 48 (1942).

⁶⁷ 336 Ill. App. 590, 84 N. E. (2d) 667 (1949).

nuisance, one properly abatable in equity, upon the showing which had there been made that the legal remedy had failed to provide adequate relief. In the words of the Appellate Court, the only effective means for abating nuisances of the character there shown to exist was "by the strong and far reaching use of the equitable powers of the trial court."⁶⁸

That decision follows closely along lines which had been laid down in *Stead v. Fortner*,⁶⁹ in *People v. Huls*,⁷⁰ and in *People v. Clark*.⁷¹ In the last of these cases, it had been pointed out that while equity did not have jurisdiction to punish crime, it did have jurisdiction to abate a public nuisance, particularly where prosecutions had been had without resulting in the closing of the disorderly place.⁷² The Speroni case now becomes a specific precedent, to be used in gambling cases, for the view that, if repeated arrests and fines fail to destroy the nuisance, not only is a lack of an adequate remedy at law made apparent but the basis has thereby been prepared for proper equitable intervention.

No new weapon is called for in the war against the big-time, syndicated gambling racket operating in Illinois. All that is required is to shake the dust of non-use from a weapon which has existed as long as there has been a court of equity. It may, without waiting for legislative authority,⁷³ reach the owners of prop-

⁶⁸ 336 Ill. App. 590 at 600, 84 N. E. (2d) 667 at 672.

⁶⁹ 255 Ill. 468, 99 N. E. 680 (1912), affirming 171 Ill. App. 161 (1912).

⁷⁰ 355 Ill. 412, 189 N. E. 346 (1934).

⁷¹ 187 Ill. App. 613 (1914), affirmed in 268 Ill. 156, 108 N. E. 994, 1 Ann. Cas. 1916D 785 (1915).

⁷² See 187 Ill. App. 613 at 618.

⁷³ The legislature could act, if it wished, to enlarge the statutory remedy provided for the closing of houses of prostitution so as to make the same reach gambling dens. See Ill. Rev. Stat. 1949, Vol. 2, Ch. 100½, § 1 et seq., applied in *People ex rel. Crowe v. Marshall*, 262 Ill. App. 123 (1931), and in *People ex rel. Crowe v. Ludwig*, 258 Ill. App. 268 (1930). In *State ex rel. Robertson v. New England Furniture & Carpet Co.*, 126 Minn. 7, 147 N. W. 951, 52 L. R. A. (N. S.) 932 (1914), an injunction based on a statute similar to the one in Illinois was upheld against constitutional objections. The court there said that, even in the absence of a statute, equity had the power to deal with property in any way reasonable necessary to produce an abatement of the nuisance in which such property was employed. In *State ex rel. McCurdy v. Bennett*, 37 N. D. 465, 163 N. W. 1063, L. R. A. 1917 p. 1076 (1917), however, it was said that equity had no inherent power to order a destruction of property when acting to abate a nuisance.

erty who permit their premises to be used to maintain this gambling nuisance. Through injunctive measures directed at the source, equity can abate conditions which have defied law courts and law enforcement officers for years. Public officials who actually desire to suppress the gambling evil may now act if they wish. The weapon has been brought to light. It awaits only the proper hand to put it in motion.

COMPARATIVE NEGLIGENCE ON THE MARCH

E. A. Turk

Part II*

ACCEPTANCE of the doctrine of comparative negligence in the greater part of the world having been noted, it is now proper to turn to the American scene for the purpose of observing the extent of the reception of that doctrine in this country in areas outside the scope of admiralty law.¹

III. THE DOCTRINE IN AMERICAN CASE LAW

It has already been pointed out that the contributory negligence doctrine of *Butterfield v. Forrester*² received a willing acceptance in the American law courts shortly after its formulation.³ The first two reported American cases dealing with mutual fault came from Massachusetts and Vermont in 1824. Not only did the courts there involve cite the English case, they both followed its reasoning.⁴ From then on, the spread of the contributory negligence doctrine was such that, by the middle of the nineteenth century,⁵ its victory in the common law courts over other possible doctrines was virtually completed.⁶ Very little has occurred since

* Part I hereof appeared in 28 CHICAGO-KENT LAW REVIEW 189-245.

¹ A discussion of the admiralty aspects of the subject appears above, pp. 231-8.

² 11 East 60, 103 Eng. Rep. 926 (1809).

³ See Part I above, pp. 198-9.

⁴ *Smith v. Smith*, 19 Mass. (2 Pick.) 621, 13 Am. Dec. 464 (1824); *Washburn v. Tracy*, 2 D. Chipman 128, 15 Am. Dec. 661 (Vt., 1824).

⁵ Details of its progress are given in Malone, "The Formative Era of Contributory Negligence," 41 Ill. L. Rev. 151 (1946).

⁶ Even in the early days, something like the silver line of comparative negligence occasionally appears. In *Noyes v. Town of Morristown*, 1 Vt. 353 (1828), the plaintiff tried to cross the defendant's bridge with his horse and buggy. Defects in the bridge caused the horse to shy away and jump over a defective rail into the water, where it was destroyed. The defense rested on the theory that the loss resulted entirely from plaintiff's fault. The trial judge charged the jury that plaintiff should recover in full if the damage was caused, either wholly or in part, by defects in the bridge. The reviewing court held the charge erroneous, as plaintiff would not be entitled to recover fully if his own negligence had con-

then to unsettle the hold thus obtained, if statutory abolition or modification of the doctrine, to be discussed later, is disregarded. The state of the law in five American jurisdictions, to-wit: Georgia, Illinois, Kansas, Louisiana and Tennessee, does, however, call for special consideration.

A. ILLINOIS DEVELOPMENTS

Starting with Illinois, it may be said that its Supreme Court, apparently under the leadership of Justice Breese, undertook a gallant attempt about the middle of the nineteenth century to mitigate the harshness of the contributory negligence doctrine by arranging for a comparison of a sort between the amounts of negligence committed by the parties. In the case of *The Aurora Branch Railroad Company v. Grimes*,⁷ decided in 1852, the Illinois court had professed adherence to the contributory negligence doctrine, had even cited the Butterfield case with approval, by stating that if the plaintiff alone was in fault, or if both parties were equally in fault, the plaintiff could not recover. Again, two years later, in *Chicago & Mississippi Railroad Company v. Patchin*,⁸ it summed up the state of the law by saying: "While the courts will . . . apply the enforcement of the strictest diligence, skill and care, and for want of them, measure the liability for slight negligence, yet the injured party must be free from such negligence as contributes to the injury complained of."⁹ But the Grimes case may really have been the forerunner of a later development. One statement in the opinion attracts attention. Said the court: "The degree of care which the plaintiff is bound to exercise . . . will depend upon the relative rights or position of the parties."¹⁰

tributed to the damage. It said it was not then necessary to decide whether "the damages may not be divisible, if the jury find the loss to be occasioned partly by [plaintiff's] own fault and partly by the deficiency of the bridge." But the possibility of arranging for some distribution of the damage in case the fault was mutual was at least thought of.

⁷ 13 Ill. 585 (1852).

⁸ 16 Ill. 198 (1854).

⁹ 16 Ill. 198 at 202.

¹⁰ 13 Ill. 585 at 587.

The picture definitely changes, in 1858, with the carefully reasoned opinion of Justice Breese in the case of *Galena & Chicago Union Railroad Company v. Jacobs*.¹¹ True, the court still cited the Butterfield case with approval, even to the point of quoting Lord Ellenborough's off-hand remark that "two things must concur to support this action, to-wit: fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff." But after a thorough examination of the English cases, it reached the result that "the degrees of negligence must be measured, and wherever it shall appear that the plaintiff's negligence is *comparatively slight*, and *that of the defendant gross*, he shall not be deprived of his action."¹² As the basis for reaching that result, the opinion added:

It will be seen [from the English cases discussed] that the question of liability does not depend absolutely on the absence of *all* negligence on the part of the plaintiff, but upon the *relative* degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that *in proportion* to the negligence of the defendant, should be measured the degree of care required of the plaintiff—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it very perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault.¹³

¹¹ 20 Ill. 478 (1858).

¹² 20 Ill. 478 at 497. Italics added.

¹³ 20 Ill. 478 at 492, 494 and 496. Justice Breese appears to have placed main reliance on two English cases. In one of them, that of *Raisin v. Mitchell*, 9 Carr. & Payne 613, 173 Eng. Rep. 979 (1839), the action was brought by the owner of one vessel against the owner of another for an injury arising from a collision. There was fault on both sides. Notwithstanding this, the plaintiff was held entitled to

The worst aspect of the contributory negligence doctrine, one which requires total absence of fault on plaintiff's part, was there rejected. In the later case of *St. Louis, Alton & Terre Haute Railroad Company v. Todd*,¹⁴ the court moved still farther away, saying: "the rule of this court is, that negligence is relative, and that a plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable, if he has been guilty of a higher degree of negligence. . . ."¹⁵

In the three decades that followed Justice Breese's opinion aforementioned, a long line of cases was built up around the nucleus that, in situations of mutual fault, a plaintiff had to show that he had taken ordinary care for his own safety. If he had done so, but was guilty of some slight negligence in comparison with the grosser negligence of the defendant, he was nevertheless entitled to recover. A part of these decisions do not expressly state the first element of the rule, to-wit: that the plaintiff must have exercised ordinary care. They place more stress upon the second element, *i. e.*, the plaintiff was to be entitled to recover if his negligence was slight as compared with the defendant's gross negligence.¹⁶ Other decisions, however, clearly state that the plaintiff cannot recover if there was want of ordinary care on

the verdict on the ground that there might be fault in the plaintiff "to a certain extent" without preventing his recovery. In the other, that of *Lynch v. Nurdin*, 1 Q. B. 29, 41 Eng. C. L. 422, 113 Eng. Rep. 1041 (1841), the defendant had negligently left his cart and horse unattended in a thronged street. The plaintiff, a child of seven years, got upon the cart in play. Another child incautiously led the horse forward and plaintiff was thrown down and hurt. The defendant was held liable, although the plaintiff had contributed to his mischief, since "his, the child's misconduct *bears no proportion* to that of the defendant." See 1 Q. B. 29 at 39, 113 Eng. Rep. 1041 at 1044. *Italics added.*

¹⁴ 36 Ill. 409 (1865).

¹⁵ 36 Ill. 409 at 414. The quoted sentence ended with the words "amounting to willful injury." The force of this additional language was nullified by further discussion of the problem in which the court compared degrees of negligence only.

¹⁶ *Wabash R. R. Co. v. Henks*, 91 Ill. 406 (1879); *I. C. R. R. Co. v. Hammer*, 85 Ill. 526 (1877); *Quinn v. Donovan*, 85 Ill. 194 (1877); *Schmidt v. C. & N. W. Ry. Co.*, 83 Ill. 405 (1876); *R., R. I. & St. L. R. R. Co. v. Delaney*, 82 Ill. 198 (1876); *I. C. R. R. Co. v. Goddard*, 72 Ill. 567 (1874); *I. C. R. R. Co. v. Hammer*, 72 Ill. 347 (1874); *I. C. R. R. Co. v. Cragin*, 71 Ill. 177 (1873); *C. W. D. R. R. Co. v. Bert*, 69 Ill. 388 (1873); *C., B. & Q. R. R. Co. v. Payne*, 59 Ill. 534 (1871); *St. L., A. & T. H. R. R. Co. v. Todd*, 36 Ill. 409 (1865). See also *Chicago, Burlington & Quincy R. R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374 (1861).

his part.¹⁷ Comparatively slight negligence, that is a want of the highest grade of care, might be condoned; want of ordinary care, never. The "slight negligence" contemplated by the rule, as one reviewing court once put it, had to be "a degree of negligence less than a failure to exercise ordinary care, and is a degree of which the plaintiff may be guilty, even though in the exercise of ordinary care."¹⁸ Recovery was denied under this rule if the defendant's carelessness simply exceeded that of the plaintiff¹⁹ or if the negligence of both stood equal.²⁰

The Illinois doctrine thus formulated was not what is now generally understood as the doctrine relating to comparative negligence. True, under the Illinois version, the negligence of plaintiff and defendant was compared, but the end result was that the plaintiff either recovered in full or got nothing at all. The element providing for the apportionment of the damages, according to the relative amounts of negligence displayed, was missing. The lack of this element, one essential to a true comparative negligence doctrine, may have been one of the reasons why the Illinois rule failed to gain sufficient support and approval to keep it in force. It may have been an unheard of thing, in those days, that a negligent plaintiff should be permitted to recover in full and many an adherent of the "old" contributory negligence doctrine must have felt that one hardship had been substituted for another.²¹ At any rate, the doctrine appears to have worked quite satisfactorily for three decades and then it disappeared.

Professor Green has pointed out other and further reasons

¹⁷ *City of Chicago v. Stearns*, 105 Ill. 554 (1883); *I. & St. L. R. R. Co. v. Evans*, 88 Ill. 63 (1878); *Schmidt v. C. & N. W. Ry. Co.*, 83 Ill. 405 (1876); *Hund v. Geyer*, 72 Ill. 393 (1874); *Grand Tower M. & T. Co. v. Hawkins*, 72 Ill. 386 (1874); *St. Louis & S. E. Ry. Co. v. Britz*, 72 Ill. 256 (1874); *R., R. I. & St. L. R. R. Co. v. Hillmer*, 72 Ill. 235 (1874); *I. C. R. R. Co. v. Hall*, 72 Ill. 222 (1874); *C. & A. R. R. Co. v. Mock*, 72 Ill. 141 (1874).

¹⁸ *Wabash, St. Louis & Pac. Ry. Co. v. Moran*, 13 Ill. App. 72 at 76 (1883).

¹⁹ *Schmidt v. C. & N. W. Ry. Co.*, 83 Ill. 405 (1876); *I. C. R. R. Co. v. Goddard*, 72 Ill. 567 (1874); *C. & A. R. R. Co. v. Mock*, 72 Ill. 141 (1874).

²⁰ *I. & St. L. R. R. Co. v. Evans*, 88 Ill. 63 (1878).

²¹ See Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 604 (1932), particularly pp. 634-5; Whelan, "Comparative Negligence," 1938 *Wis. L. Rev.* 465 at 467.

for that disappearance.²² He assigns, as one of them, that the rule required the courts to attempt to operate a comparative negligence doctrine along with a contributory negligence doctrine. In that connection, it will be recalled that, before the comparison of both negligences was allowed, the plaintiff first had to show that he had exercised ordinary care.²³ This, as Green says, reduced the area of comparative negligence to a minimum.²⁴ Again, the courts became burdened with the job of applying the treble degrees of negligence which had been developed to fit bailment problems. The difficulties arising from an attempt to handle the different degrees of slight, ordinary, and gross negligence could well serve to discredit the doctrine.²⁵ Actually, this was all unnecessary, because two unrelated concepts were being improperly intermingled. Neither Justice Breese, in the Jacobs case, nor the judges concerned with the bulk of the later cases,²⁶ had asked for a determination of slight or gross negligence *per se*, a problem always productive of difficulty. The decision they wished made was, rather, one of relativity, to-wit: whether plaintiff's negligence was slight when compared with defendant's gross negligence.

A further reason for abandoning the doctrine may rest in the fact that an increase in the number of master and servant negligence cases which occurred in the '80's would have forced a heavier burden on employers, if the doctrine remained in effect, than the courts may have thought it advisable for them to bear at that time.²⁷ There may have been some apprehension that the center of gravity in such proceedings would slip from the higher courts to the trial courts, from whence it might slip still farther so as to end in the hands of the jury.²⁸ Elliott adds, as still another reason, that this so-called comparative negligence

²² Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944), at p. 50 et seq.

²³ *Ibid.*, p. 50, citing numerous cases.

²⁴ *Ibid.*, p. 51.

²⁵ *Ibid.*, p. 51 et seq. See also *C. B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512 (1882), particularly pp. 522 and 527.

²⁶ See cases cited in notes 16 and 17, ante.

²⁷ Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944), at p. 51.

²⁸ *Ibid.*, pp. 47 and 51.

doctrine, during its probationary status in Illinois, was looked at, both by courts in most other jurisdictions and by text writers, with a degree of displeasure extending even unto hostility.²⁹

Whatever the reason or reasons, that which had been termed a comparative negligence doctrine in Illinois gradually began to disappear. The trend started with the case of *Calumet Iron and Steel Company v. Martin*,³⁰ decided in 1884. The jury had there been instructed that the plaintiff might recover only if he exercised "reasonable care and caution," that is, if he exercised "due care." The defendant complained that the jury, instead, should have been told that "plaintiff could recover only if [his] negligence was slight and that of the defendant gross, in comparison with each other." The court held that the instruction, as given, was sufficient. Speaking through Judge Scholfield, it said:

The court has not understood that the rule of comparative negligence changed or modified the general rule requiring that the injured party, in order to recover . . . must have observed due or ordinary care for his personal safety . . . it was not intended by the judges who decided the Jacobs case, and the earlier cases following the ruling in that case, that the rule of comparative negligence, as then announced, was to have that effect. . . . No previous decision of this court was assumed to be overruled. No new doctrine was claimed to be announced.³¹

After reviewing a series of cases ranging from *Chicago, Burlington & Quincy Railroad Company v. Hazzard*³² to the holding in *Chicago & Northwestern Railway Company v. Ryan*,³³ the opinion

²⁹ See Elliott, "Degrees of Negligence," 6 So. Cal. L. Rev. 91 (1933), at p. 136. He quotes from *O'Keefe v. Chicago, Rock Island & Pac. R. R. Co.*, 32 Iowa 476 (1871); *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430 (1862); *Barrows*, Handbook on the Law of Negligence (1900), p. 79; *Cooley on Torts* (Throckmorton's Ed., 1930), Vol. 2, p. 645; *Shearman & Redfield, Law of Negligence*, 2d Ed., p. 42; *Street, Foundations of Legal Liability* (1906), Vol. 1, p. 147; and *Thompson, Commentaries on the Law of Negligence* (1901), Vol. 1, p. 243.

³⁰ 115 Ill. 358, 3 N. E. 456 (1885).

³¹ 115 Ill. 358 at 370, 372, 3 N. E. 456 at 461-2 and 463.

³² 26 Ill. 373 (1861).

³³ 70 Ill. 211 (1873).

quoted with approval from the last mentioned case to the effect that the rule of comparative negligence was "a modification of the language of the earlier decisions of this court, although not in fact a material modification of the common law principle."³⁴

The decision therein, while minimizing the Illinois doctrine of comparative negligence which had been established approximately thirty years earlier by Justice Breese, did not operate to abolish it. In fact, the court went on to say:

Without impropriety, an additional instruction could have been given that "ordinary care does not exclude the idea of all negligence, however slight, but that the plaintiff was entitled to recover, notwithstanding [he] might have been slightly negligent, provided the defendant was guilty of negligence which, in comparison with it, was gross."³⁵

When, however, it concluded with the remark that the giving of such an additional instruction was "not indispensable," it opened the door for the return of older views.

The prevailing attitude of that period was well stated in the case of *Willard v. Swanson*,³⁶ decided in 1888. It was there said:

expressions may be found in several cases . . . that an injured party guilty of slight negligence may recover, where the negligence of the defendant was gross, and the negligence of the plaintiff slight in comparison with the negligence of the defendant; but it has always been understood . . . that in no case can a recovery be had unless the person injured has exercised ordinary care for his safety.³⁷

Even up to the year 1896, instructions were still being tolerated which stated the rule of comparative negligence in terms that the plaintiff would not be prevented from recovering on account of his own negligence, if such negligence was slight as compared

³⁴ C. & N. W. Ry. Co. v. Ryan, 70 Ill. 211 at 213 (1873).

³⁵ Calumet Iron and Steel Co. v. Martin, 115 Ill. 358 at 374, 3 N. E. 456 at 464.

³⁶ 126 Ill. 381, 18 N. E. 548 (1888).

³⁷ 126 Ill. 381 at 385, 18 N. E. 548 at 550.

with that of the defendant, so long as the defendant's negligence was gross.³⁸ But the courts were also saying that an instruction on the law of comparative negligence could be dispensed with³⁹ and that it was sufficient and proper to instruct the jury that the plaintiff might recover provided he had observed ordinary care for his own safety and had been injured as a consequence of the defendant's negligence.⁴⁰ The exercise of such ordinary care was held not to be inconsistent with the possible presence of some slight negligence, for a plaintiff might have been slightly negligent and yet have observed ordinary care.⁴¹

By the year 1892, however, the Illinois Supreme Court began to display signs of doubt over the point as to whether or not the doctrine of comparative negligence had any further place in the local system of jurisprudence. Three times the court raised the question but, like Julius Caesar, put it aside, undecided.⁴² Finally, in 1894, through the medium of the decision in *Lake Shore and Michigan Southern Railway Company v. Hessions*,⁴³ the court made it clear that it had repeatedly held, in effect, beginning with the decision in the case of *Calumet Iron and Steel Company v. Martin*,⁴⁴ that the doctrine of comparative negligence was no

³⁸ See, for example, *C., B. & Q. R. R. Co. v. Levy*, 160 Ill. 385, 43 N. E. 357 (1896); *Willard v. Swanson*, 126 Ill. 381, 18 N. E. 548 (1888); *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263 (1887); *C. & A. R. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381 (1886).

³⁹ *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263 (1887); *Calumet Iron and Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456 (1885). See also *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246 (1888).

⁴⁰ *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946 (1894); *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246 (1888); *C., St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855 (1888); *C. & E. I. R. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263 (1887).

⁴¹ *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905 (1894); *City of Beardstown v. Smith*, 150 Ill. 169, 37 N. E. 211 (1894); *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246 (1888); *C., B. & Q. R. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. 206 (1887). Later cases to the same effect are *C. & E. I. R. R. Co. v. Randolph*, 199 Ill. 126, 65 N. E. 142 (1902); *Chicago City Ry. Co. v. Dinsmore*, 162 Ill. 658, 44 N. E. 887 (1896).

⁴² The three cases, in chronological sequence, are *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285 (1892); *A., T. & S. F. R. R. Co. v. Freehan*, 149 Ill. 202, 36 N. E. 1036 (1893); *C., C., C. & St. L. Ry. Co. v. Baddeley*, 150 Ill. 328, 36 N. E. 965 (1894).

⁴³ 150 Ill. 546, 37 N. E. 905 (1894).

⁴⁴ 115 Ill. 358, 3 N. E. 456 (1885).

longer the law of this state.⁴⁵ It used that opportunity to restate what it considered to be the true doctrine applicable to cases within this class. It required, as a condition to recovery by the plaintiff, that he "be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant."⁴⁶

This statement, regarded as the abolition of a comparative negligence doctrine in Illinois, has not only been honored by its frequent repetition but has been strengthened by added comment that instructions are sufficient without calling the attention of the jury to any nice distinctions between different degrees of care or negligence,⁴⁷ especially since all the puzzling refinements as to degrees of care have been done away with.⁴⁸ If the defendant's conduct is willful or intentional, the case assumes an entirely different character,⁴⁹ but in comparative negligence situations the law of Illinois has remained without change ever since.⁵⁰

B. THE TENNESSEE VERSION

Tennessee has gone her own way. The doctrine applied there may be stated to be one under which the negligent plaintiff may recover, provided he only remotely contributed to his own injury, but proof of his contributory negligence may go in to mitigate the amount of the damages. It was one time said in that state, in the case of *Whirley v. Whiteman*,⁵¹ that if a party by his own negligence contributed to his injury he could not recover

⁴⁵ Later cases to that effect may be observed in *C., R. I. & P. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705 (1905); *City of Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79 (1903); *Cicero Street Ry. Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823 (1896); *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892 (1894).

⁴⁶ 150 Ill. 546 at 556, 37 N. E. 905 at 907.

⁴⁷ See *City of Lanark v. Dougherty*, 153 Ill. 163 at 166, 38 N. E. 892 at 893 (1894).

⁴⁸ *Krieger v. A., E. & C. R. R. Co.*, 242 Ill. 544, 90 N. E. 266 (1909); *C., R. I. & R. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705 (1905).

⁴⁹ On that point see, for example, *Prater v. Buell*, 336 Ill. App. 533, 84 N. E. (2d) 676 (1949).

⁵⁰ The case of *Little v. Illinois Terminal R. Co.*, 320 Ill. App. 163 at 168, 50 N. E. (2d) 123 at 126 (1943), appears to be the last case in which any reference to comparative negligence has been made.

⁵¹ 38 Tenn. (1 Head) 609 (1858).

for if, by the exercise of ordinary care, he might have avoided the resultant harm, he was to be regarded as the author of his own misfortune. Had the court stopped there, it would have enunciated the familiar contributory negligence doctrine. It added, in that case, however, that the mere want of a superior degree of care could not be set up as a bar to plaintiff's claim; so there is much in the case to remind one of the former Illinois rule noted above. The Tennessee court, in fact, relied on the same English cases as did Justice Breese⁵² and strengthened the impression of similarity in viewpoint by finishing up with the words: "he shall be considered the author of the mischief by whose first or more gross negligence it has been effected."⁵³

But when, in *East Tennessee, Virginia & Georgia Railway Company v. Hull*,⁵⁴ a jury was instructed substantially to the effect that, if the injury resulted from the greater or grosser negligence of the defendant, plaintiff could recover, but if, on the other hand, the plaintiff's negligence contributed to the injury, that fact should be considered in mitigation of damages, so that the greater the contributory negligence the smaller the amount of damages to which he should be entitled, such instruction was held to be erroneous.⁵⁵ The Tennessee Supreme Court there said it was unnecessary to discuss the doctrine of comparative negligence, as that doctrine existed in Illinois, in Kansas, and to some extent in Georgia, since it had been expressly repudiated in Tennessee.⁵⁶ The court explained that if, in former cases,⁵⁷ it had permitted use of the term "more gross" negligence, or other language which might ordinarily imply comparison, in a charge to a jury, it should have been manifest from the

⁵² See note 13, ante.

⁵³ 38 Tenn. (1 Head) 609 at 623. Similar language appears in *East Tenn. R. R. Co. v. Gurley*, 80 Tenn. (12 Lea) 46 at 55 (1883), and in *East Tenn. R. R. Co. v. Fain*, 80 Tenn. (12 Lea) 35 at 40 (1883).

⁵⁴ 88 Tenn. (4 Pickle) 33, 12 S. W. 419 (1889).

⁵⁵ 88 Tenn. (4 Pickle) 33 at 35, 12 S. W. 419. See also *East Tenn. R. R. Co. v. Aiken*, 89 Tenn. (5 Pickle) 246 at 248, 14 S. W. 1082 (1890).

⁵⁶ *East Tenn. R. R. Co. v. Gurley*, 80 Tenn. (12 Lea) 46 (1883).

⁵⁷ See cases cited in note 53, ante, except for *Whirley v. Whiteman*, 38 Tenn. (1 Head) 609.

context that such terms signified the "prime, principal and proximate cause of the injury," as distinguished from a remote cause.

By so declaring, the court adhered to a doctrine announced in 1879, through the medium of the case of *Dush v. Fitzhugh*,⁵⁸ where it had been said:

That any negligence . . . that remotely contributed to the . . . injury will preclude a recovery, we do not think sustainable on principle . . . the sounder inquiry is, whose neglect more immediately produced the wrong . . . done. If the injury was . . . the immediate result of the conduct of the plaintiff to which the wrong of the defendant did not contribute as an immediate cause, the plaintiff should not recover . . . [but] if defendant was guilty of a wrong by which the plaintiff is injured, and plaintiff also in some degree was negligent or contributed to the injury, it should go in mitigation of damages.⁵⁹

The strength of that adherence is exemplified by further language to be found in another case. The court there said:

although guilty of negligence, yet if [plaintiff] cannot, by ordinary care, avoid the consequence of defendant's negligence, he will be entitled to recover. He is considered the author of the injury by whose first or more gross negligence, *in the sense of proximate negligence*, it has been effected.⁶⁰

Thus, while a development was stopped which could have resulted in a pattern similar to the former Illinois rule, Tennessee took an important step ahead on the road to the genuine doctrine of comparative negligence. True, where plaintiff's negligence, in cases of mutual fault, is of proximate character, Tennessee does not allow any recovery either. But such negligence, if of remote character only, is to be considered in mitigation of

⁵⁸ 70 Tenn. (2 Lea) 307 (1879).

⁵⁹ 70 Tenn. (2 Lea) 307 at 309.

⁶⁰ East Tenn. R. R. Co. v. Fain, 80 Tenn. (12 Lea) 35 at 40 (1883). Italics added. See also *Nashville & Chattanooga Railroad Co. v. Carroll*, 53 Tenn. (6 Heiskell) 347 (1871); *Whirley v. Whiteman*, 38 Tenn. (1 Head) 609 (1858).

damages.⁶¹ The rule as developed by judicial authority in Tennessee, therefore, came to be one as follows: The negligence of a plaintiff which contributes proximately or directly to the injury will serve to bar a recovery,⁶² notwithstanding the presence of admitted proximate negligence on the part of a defendant;⁶³ but evidence of remote contributory negligence by plaintiff, although insufficient to defeat recovery, is admissible for the purpose of mitigating damages.⁶⁴ It follows, from such rule, that where both plaintiff and defendant are guilty of acts of concurrent negligence, so that both acts constitute the proximate cause, then the plaintiff's negligence, however slight in relation to the defendant's conduct, is enough to bar a recovery.⁶⁵ Where the negligence of each comes within the realm of proximity,⁶⁶ there is no room, in Tennessee, for a rule as to comparative negligence, but it applies where the fault on the plaintiff's part is, at best, only a remote cause.

One special situation in Tennessee requires separate notice. A statute of that state, part of which had been enacted as early as 1855, makes every railroad operating therein, for failure to observe certain designated precautions, responsible for all damage done to person or property occasioned by any accident that may occur.⁶⁷ Extensive construction of that statute has led to the formation of a special comparative negligence doctrine applicable to railroads. Pursuant to decisions interpreting that statute, the mere negligence of the victim will not defeat his action.⁶⁸ This is true even though the plaintiff's negligence be the

⁶¹ *East Tenn. R. R. Co. v. Pugh*, 97 Tenn. (13 Pickle) 624, 37 S. W. 555 (1896).

⁶² *Bejach v. Colby*, 141 Tenn. 686, 214 S. W. 869 (1919); *Anderson v. Carter*, 22 Tenn. App. 118, 118 S. W. (2d) 891 (1938).

⁶³ *Anderson v. Carter*, 22 Tenn. App. 118 at 121, 118 S. W. (2d) 891 at 893 (1938).

⁶⁴ See cases cited in note 62, ante.

⁶⁵ *Grigsby & Co. v. Bratton*, 128 Tenn. 597, 163 S. W. 804 (1913); *Memphis Street Ry. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (1904); *Hansard v. Ferguson*, 23 Tenn. App. 306, 132 S. W. (2d) 221 (1939).

⁶⁶ *Denton v. Watson*, 16 Tenn. App. 451, 65 S. W. (2d) 196 (1932).

⁶⁷ *Williams' Tenn. Code Ann.* 1934, §§ 2628-30.

⁶⁸ *Southern Ry. Co. v. Koger*, 219 F. 702 (1915); *Rogers v. Cincinnati, N. O. & T. P. Ry. Co.*, 136 F. 573 (1905); *Louisville & N. R. Co. v. Truett*, 111 F. 876 (1901); *N. & C. Railroad Co. v. Nowlin*, 69 Tenn. (1 Lea) 523 (1878); *Railroad v. Walker*, 58 Tenn. (11 Heiskell) 383 (1872).

direct and proximate cause of the injury.⁶⁹ Not even gross negligence on plaintiff's part, directly and proximately contributing to the accident, will defeat an action based on the statute.⁷⁰ In all of these situations, however, the contributory negligence of the plaintiff must be considered in mitigation of damages.⁷¹

C. THE ERSTWHILE KANSAS VIEW

Kansas, at least for a while, recognized the triple distinction, in degree, of slight, ordinary, and gross negligence. If, for example, the defendant's negligence was gross, plaintiff's lack of ordinary care would serve to defeat his recovery.⁷² If, however, plaintiff's negligence was slight and that of the defendant gross, or if plaintiff's was remote while that of the defendant was the proximate cause of the injury, a recovery was permitted notwithstanding plaintiff's own slight or remote neglect.⁷³ Here, again, is evidence of the influence of the former Illinois doctrine, with its modified form of the comparative negligence principle. But, in 1883, after a trial court had instructed the jury that they should decide for the plaintiff if his negligence was only slight when compared with that of the defendant, the Kansas Supreme Court declared the instruction to be erroneous and refused to "endorse the doctrine of comparative negligence."⁷⁴

Later decisions to be found in that state also expressed dis-

⁶⁹ *Illinois Cent. R. Co. v. Sigler*, 122 F. (2d) 279 (1941); *Tennessee Cent. Ry. Co. v. Page*, 153 Tenn. 84, 282 S. W. 376 (1926).

⁷⁰ *Railroad v. Binkley*, 127 Tenn. 77, 153 S. W. 59 (1912). See also the numerous citations in *Williams' Tenn. Code Ann. 1934 (1942 Replacement)*, Vol. 3, p. 42.

⁷¹ *Tennessee Cent. Ry. Co. v. Page*, 153 Tenn. 84, 282 S. W. 376 (1926); *Railway Company v. Howard*, 90 Tenn. (6 Pickle) 144, 19 S. W. 116 (1891); *Patton v. Railway Company*, 89 Tenn. (6 Pickle) 370, 15 S. W. 919, 12 L. R. A. 184 (1890); *N. & C. Railroad Co. v. Nowlin*, 69 Tenn. (1 Lea) 523 (1878). The foregoing rules have been made applicable in cases where the fault of the railroad lies in the violation of a city ordinance regulating the rate of speed within city limits: *Louisville & N. R. R. v. Martin*, 113 Tenn. 266, 87 S. W. 418 (1904).

⁷² *Koster v. Matson*, 139 Kan. 124, 30 P. (2d) 107 (1934); *U. P. Ry. Co. v. Adams*, 33 Kan. 427, 6 P. 529 (1885); *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 37 (1874).

⁷³ *W. & W. R. Co. v. Davis*, 37 Kan. 743, 16 P. 78, 1 Am. St. Rep. 275 (1887); *U. P. Ry. Co. v. Henry*, 36 Kan. 565, 14 P. 1 (1883); *Pacific R. Co. v. Houts*, 12 Kan. 328 (1873); *Sawyer v. Sauer*, 10 Kan. 466 (1872).

⁷⁴ *A. T. & S. F. R. Co. v. Morgan*, 31 Kan. 77 at 80, 1 P. 298 at 300 (1883).

approval of similar instructions⁷⁵ and refused to make an appraisal of the different degrees of negligence perpetrated by the opposing parties.⁷⁶ The full doctrine of comparative negligence never obtained in Kansas, and any attempt to apportion loss, or to mitigate damage, proportionately to the amount of fault displayed by the respective parties, made as little progress in Kansas as it did in Illinois.

D. THE LOUISIANA ATTITUDE

The contributory negligence doctrine proved its attractiveness to an unparalleled extent in the state of Louisiana, so much so, in fact, that it resulted in the practical nullification of an old provision of the Louisiana code which had, at least in part, established a doctrine of comparative negligence. Article 2323 of the present code of that state, reiterating a provision first enacted in 1825, declares: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."⁷⁷

By providing that the damage might be reduced if the owner of the "thing" had exposed it imprudently, that is as the result of his contributory negligence, the code spoke in terms of comparative negligence. The mitigation suggested would then produce an apportionment in damages to be controlled by the circumstances; the relative amounts of negligence being the controlling factor. True, the provision of the code spoke of the destruction of, or the injury to, a "thing" so it is doubtful whether, as some writers have suggested,⁷⁸ the use of the word "thing," equivalent to the word "chose" in the French text, would justify construing the article to extend to all cases involving contribu-

⁷⁵ *Missouri Pac. Ry. Co. v. Walters*, 78 Kan. 39, 96 P. 346 (1908); *A. T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 P. 576 (1896).

⁷⁶ *Sayeg v. Kansas Gas & Electric Co.*, 156 Kan. 65, 131 P. (2d) 648 (1942).

⁷⁷ *Dart La. Civ. Code* 1945, Art. 2323. See also *La. Code* 1825, Art. 2303.

⁷⁸ Hillyer, "Comparative Negligence in Louisiana," 11 *Tul. L. Rev.* 112 (1936), at p. 123; Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at p. 132.

tory negligence, regardless of whether the injury be to property or to person. An extension of the provision, by analogy, to include personal injuries would not have been too daring, but nothing like that has happened.

On the contrary, the Louisiana Supreme Court has not even applied the provision in question to cases where recovery was sought for the destruction of corporeal property but rather has applied the doctrine of contributory negligence to the point where, if such negligence has been found to be the proximate cause, all right of recovery has been denied. It is remarkable that the provision has not been utilized for over one hundred years, but a short review of the most important pertinent Louisiana cases will serve to make this clear.

Two cases are most frequently cited as early authority for the establishment of the contributory negligence doctrine in Louisiana. They are the cases of *Lesseps v. Pontchartrain Railroad Company*⁷⁹ and *Fleytas v. Pontchartrain Railroad Company*,⁸⁰ both decided in 1841. In the first of these two cases, one in which plaintiff's slave, cart and mules had been run down by the defendant railroad, the decision ran in favor of the defendant. The court there, without citation of authority, said: "The charge of negligence . . . against the engineer . . . is not proved, without which the plaintiff cannot expect to recover, in a case where it is proved to have been on the side of his servant."⁸¹ But there is ambiguity in the language for it sounds as if the plaintiff, had he been able to prove the engineer's negligence, might have had reason to expect a recovery despite the contributory negligence of his slave. In the second, the plaintiff's slave was killed while sleeping on the tracks. Again, the testimony failed to show that "the engineer did not act with due care," which was sufficient to decide the case. But the court, without justification, cited the *Lesseps* case as authority and added the remark that if the slave was guilty of great negligence, or of

⁷⁹ 17 La. Rep. 361 (1841).

⁸⁰ 18 La. Rep. 339 (1841).

⁸¹ 17 La. Rep. 361 at 364.

having disabled himself by intoxication, his owner could not expect compensation for him. Relying on and quoting from authority from common law jurisdictions, it said: "In cases like the present, where the accident may be attributed to the fault or negligence of both parties, the plaintiff cannot recover."⁸² All this, of course, was *obiter dictum*; but it, and the ambiguous language of the Lesseps case, together with common law authorities, proved to be sufficient to establish the rule of contributory negligence in Louisiana.

In the next case, that of *Myers v. Perry*,⁸³ the court, after having restated the principle that in case of mutual fault the plaintiff may not recover, and after having supported it with ample authority from common law jurisdictions, said: "These decisions rest on principles recognized in our jurisprudence, and repeatedly [*sic*] sanctioned by our predecessors."⁸⁴ The reference to repeated prior sanction for the view taken rested solely on the Lesseps and the Fleytas cases, neither of which amounted to very strong authority for reasons already indicated. But strong or not, the Louisiana courts have ever since adhered to the contributory negligence doctrine, both in property damage cases⁸⁵ and in personal injury and death cases,⁸⁶ although not without reluctance on the part of some of the intermediate reviewing courts. In *Mason v. Price*,⁸⁷ for example, one of the

⁸² 18 La. 339 at 340.

⁸³ 1 La. Ann. 372 (1846).

⁸⁴ 1 La. Ann. 372 at 374.

⁸⁵ *Vines v. Hartford Acc. & Ind. Co.*, 36 So. (2d) 729 (La. App., 1948); *Mason v. Price*, 32 So. (2d) 853 (La. App., 1947); *Belle Alliance Co. v. Texas & P. Ry. Co.*, 125 La. 777, 51 So. 846 (1910); *Ins. Co. v. Werlein*, 42 La. Ann. 1046, 8 So. 435 (1890).

⁸⁶ *Legendre v. Consumers' Seltzer & Mineral W. Co.*, 147 La. 120, 84 So. 517 (1920); *Burvant v. Wolfe*, 126 La. 787, 52 So. 1025, 29 L. R. A. (N. S.) 677 (1910); *Ortolano v. Morgan's L. & T. R. & S. S. Co.*, 109 La. 902, 33 So. 914 (1903); *Rice v. Crescent-City Railroad Co.*, 51 La. Ann. 108, 24 So. 791 (1899); *Walker v. Vicksburg, S. & P. Ry. Co.*, 41 La. Ann. 795, 6 So. 916 (1889); *Schwartz v. Crescent-City Railroad Co.*, 30 La. Ann. 15 (1878); *McLelland v. Harper*, 38 So. (2d) 425 (La. App., 1948); *Falgout v. Younger*, 192 So. 706 (La. App., 1939); *Inman v. Silver Fleet of Memphis*, 175 So. 436 (La. App., 1937); *Wyble v. Putfork*, 141 So. 776 (La. App., 1932); *Wirth v. Pokert*, 19 La. App. 690, 140 So. 234 (1932); *Mathes v. Schwing*, 11 La. App. 5, 123 So. 156 (1929), reversed in 169 La. 272, 125 So. 121 (1929).

⁸⁷ 32 So. (2d) 853 (La. App., 1947).

judges wistfully remarked: "In this State, contrary to many other States, the rule of comparative negligence is not recognized."⁸⁸ In another case, the court said:

Whether or not the courts of this State have strayed from the policy and system of the civil law as expressed in the [Louisiana] Civil Code is a matter we have no authority to decide, as we are bound to follow the jurisprudence that refuses to recognize the doctrine of comparative negligence.⁸⁹

Even stronger is the tacit comment made in *Mathes v. Schwing*,⁹⁰ to the effect that were "we authorized, under the jurisprudence of Louisiana, to weigh the negligence of the defendants against that of [the victim] . . . the defendants would suffer, because . . . their negligence would greatly outweigh that of the [victim]."⁹¹

How, then, did the Louisiana courts reconcile their decisions, at least in property damage cases, with the clear provision of Article 2323 set out above? In the first three cases noted herein, that is in the *Lesseps*, the *Fleytas*, and the *Myers* cases, no mention was made, in the opinions, of the existence of such a provision. Apparently the first recognition given thereto occurred in *Fortunich v. City of New Orleans*.⁹² A mob had there done damage at night to certain fruit stands operated by the plaintiff in the public market place. A recovery was sought from the city under a riot statute. The municipality defended on the ground that the plaintiff, by keeping his stalls open at night, had violated a local ordinance. It was held, on the authority of the provision in question, that such defense, if properly pleaded, could result in a mitigation of the damages.

Twenty-three years later, in *Levy v. Carondelet Canal and Navigation Company*,⁹³ the contributory negligence doctrine was

⁸⁸ 32 So. (2d) 853 at 855.

⁸⁹ *Inman v. Silver Fleet of Memphis*, 175 So. 436 at 439 (La. App., 1937).

⁹⁰ 11 La. App. 5, 123 So. 156 (1929), reversed in 169 La. 272, 125 So. 121 (1929).

⁹¹ 11 La. App. 5 at 9, 123 So. 156 at 158.

⁹² 14 La. Ann. 115 (1859).

⁹³ 34 La. Ann. 180 (1882).

applied without any mention of the code article, although reference thereto would have been proper. Eight more years passed and then, in *Factors & Traders Insurance Company v. Werlein*,⁹⁴ the court quoted the article and authorities from other common-law jurisdictions but came to the conclusion that the plaintiff had not employed reasonable exertion to lessen the danger, that is had not used due care to avoid all consequential damage. The court ended its opinion on a note taken from the *Levy* case where it had been said: "If it be true that there was mutual negligence . . . no action can be maintained. In such cases there cannot be usually an apportionment of damages."⁹⁵

Article 2323 drops out of sight in the years which followed the last mentioned case to the point where one begins to wonder if the court was ashamed of the provision as some sort of youthful folly to be laid to rest if not deliberately disregarded. But its existence was recalled, in 1932, in the personal injury case of *Wyble v. Putfork*,⁹⁶ where its applicability was denied. Four years later, Hillyer published his exhaustive essay on the subject. The next year, in *Inman v. Silver Fleet of Memphis*,⁹⁷ also a personal injury case, applicability of the provision was again denied. Malone then wrote his essay entitled "Comparative Negligence—Louisiana's Forgotten Heritage." As more recent cases, those dealing with property damage, do not refer to Article 2323 but apply only the contributory negligence rule,⁹⁸ one is tempted to speak more nearly of Louisiana's "rejected" heritage.⁹⁹

The anomaly that a jurisdiction, one equipped with a stat-

⁹⁴ 42 La. Ann. 1046, 8 So. 435 (1890).

⁹⁵ *Levy v. Carondelet Canal & Nav. Co.*, 34 La. Ann. 180 at 181 (1882).

⁹⁶ 141 So. 776 (La. App., 1932).

⁹⁷ 175 So. 436 (La. App., 1937). Subsequent to Hillyer's article and this decision, a series of notes appeared in the *Tulane Law Review* in which it was repeatedly urged that Louisiana should adopt a comparative negligence doctrine. See 15 *Tul. L. Rev.* 480, 16 *Tul. L. Rev.* 285 and 419, and 18 *Tul. L. Rev.* 654.

⁹⁸ *Vines v. Hartford Acc. & Ind. Co.*, 36 So. (2d) 729 (La. App., 1948); *Mason v. Price*, 32 So. (2d) 853 (La. App., 1947).

⁹⁹ Reference is made to Franklin, "*La Possession Vaut Titre*," 6 *Tul. L. Rev.* 589 (1932), at p. 604, where he, in connection with another problem, states that a "reception of the Anglo-American law has taken, and continues to take place in Romanist Louisiana in violation not only of the texts of the [Louisiana] code but of the traditional technique of the civil law. . . ."

ute at least partly opening the door to the apportionment of loss, should nevertheless adopt the doctrine of contributory negligence has been ascribed to three main reasons. In the first place, Malone says: "Contributory negligence was introduced into the jurisprudence of Louisiana by . . . the ever presence of persuasive authority from neighboring jurisdictions."¹ Pressure of this kind went hand in hand with a nation-wide urge toward uniformity, particularly in railroad cases, for "there began to exist a keen appreciation of the need for a substantial unanimity of the courts in cases where the same carrier was faced with litigation in a variety of States on a single recurrent set of facts."²

Secondly, economic considerations played an important part. A fast expanding, efficient, at least for that period, net of street railroads had been established in New Orleans in which a considerable capital investment had been made. While the transportation system served the needs of the population in a satisfactory fashion, its development was accompanied by an increasing number of traffic accidents leading to a not inconsiderable number of claims made by victims for indemnification. These claims threatened to become a burden which the street railroads might not have been financially able to shoulder. There is small occasion to wonder, then, that the courts, believing the solvency and even the existence of the useful car system to be in danger, should favor the powerful defense of contributory negligence.³

But third, and perhaps not least, was the fact that, at that time, no other doctrine had been developed or was readily available for use in Louisiana, as the tradition of an established comparative negligence doctrine had not yet been formulated. Article 2323, according to its wording, applied only to situations involving property damage. Other provisions of the Louisiana Code have been quoted to support the existence of a theory of com-

¹ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1945), at p. 140.

² *Ibid.*, p. 135. See also *Williams v. Palace Car Co.*, 40 La. Ann. 417, 4 So. 85 (1888).

³ For details, see Malone, *op. cit.*, at 138.

parative negligence, but those references are not convincing. Article 3556(13), for example, simply defines the three degrees of negligence.⁴ No provision is there made for apportionment of damages. Article 1934, sub-paragraph 3, directs that, in determining the damages resulting from the breach of certain contracts, as in case of a promise to marry, or from certain torts, much discretion is to be permitted to the judge or the jury.⁵ The measure of damage in such cases may be assessed without taking only the plaintiff's pecuniary loss or the pecuniary gain of which he has been deprived into consideration.⁶ But while discretion is permitted, there is no indication that such discretion may be used to mitigate or alleviate the effect of the damage. Finally, Article 1880, referred to by at least one Louisiana commentator as showing a particular adoption of the comparative negligence doctrine, has substantially no bearing on the subject.⁷ Its application is limited to the situation where a vendor, by error or imposition, has been induced to sell at a price one-half or less of the actual value. If, for such reason, the contract is rescinded, provision is made for adjudication of mutual claims for restoration, profits, improvements and the like. Nothing is said about apportionment of damages and no apportionment is intended thereby. All that is contemplated is that, as far as is possible, the situation which existed before the making of the contract should be re-established.

Thus, all of comparative negligence that may be said to remain in the Louisiana Code is to be found in Article 2323, with its provision for the reduction of damage in property cases according to the owner's own imprudence. That provision, in

⁴ Dart La. Civ. Code 1945, Art. 3556(13). The present provision was formerly La. Civ. Code 1825, Art. 3522(10).

⁵ *Ibid.*, Art. 1934(3). That provision appears as Art. 1928 of the La. Civ. Code of 1825.

⁶ The discretion which may be exercised is not untrammelled. The existence of damage must be certain, for the court has discretion only in fixing the amount thereof, which amount must be related to the facts and circumstances of the case: *Angelloz v. Humble Oil & Refining Co.*, 196 La. 604, 199 So. 656 (1940), and cases there cited.

⁷ Dart La. Civ. Code 1945, Art. 1880. The present provision is based on La. Civ. Code 1825, Art. 1874. See also Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at 117-8.

all probability, originated in the ingenuity of the framers of the 1825 Code.⁸ The concept cannot be traced to the Louisiana Code of 1808, to the Code Napoleon,⁹ to earlier French cases,¹⁰ or to the Spanish law¹¹ which, at times, have formed a part of the law of that state.¹² Nor can it be said that Article 2323, with its theory for mitigation of damage in property cases where mutual fault exists, originated in the French law prior to the Code Napoleon. The *Coutumes de Paris*, in effect in Louisiana, did not deal with the question of damage resulting from negligence; in fact, none of the French *coutumes* is so complete that it embraces the whole field of law or even the whole of private law. Behind these statutory enactments stands the French *droit commun* or common law, a composite of Roman law amalgamated with local customs and with some principles taken from the Germanic law.¹³ It must be recalled that the Roman law had not developed a doctrine of comparative negligence.¹⁴ Nor is it likely that any substantial contribution for the adoption or development of the comparative negligence idea in Louisiana could have come from the Roman-Dutch law. It is not possible to follow Hillyer's argument to that effect. He relies on the great Dutch scholar Voet,¹⁵ but that writer, commenting on the "barber" case,¹⁶ says only that, in case of concurrent fault, he is liable whose guilt is the greater.¹⁷ Direct evidence of the presence of the essential element of comparative negligence, that is for mitigation and apportionment of damages, is missing in that source.

⁸ See Hillyer, *op. cit.*, at p. 122. Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at 129, says: "The genius of the Louisiana juriconsults produced a unique and advanced document."

⁹ Malone, *op. cit.*, p. 129.

¹⁰ See Part I of this article: 28 *CHICAGO-KENT LAW REVIEW* 239-40.

¹¹ See above, 28 *CHICAGO-KENT LAW REVIEW* 243-4.

¹² Tucker, "Source Books of Louisiana Law," 6 *Tul. L. Rev.* 280, 7 *Tul. L. Rev.* 82, and 8 *Tul. L. Rev.* 396 (1932-4).

¹³ Warnkoenig, *Franzoesische Staats-und Rechtsgeschichte* (Schweighauserische Verlagsbuchhandlung, Basel, 1875), 2d Ed., Vol. 2, p. 87.

¹⁴ See above, 28 *CHICAGO-KENT LAW REVIEW* 216-8.

¹⁵ Hillyer, "Comparative Negligence in Louisiana," 11 *Tul. L. Rev.* 112 (1936), at 122.

¹⁶ Dig. 9.2.11. pr. The case is noted above, 28 *CHICAGO-KENT LAW REVIEW* 212-4.

¹⁷ Voet, *Commentarius ad Pandectas* (Joh. Jac. Curth, Amsterdam, 1778), Vol. 2, p. 581.

It is necessary to repeat, therefore, that all that can be found concerning a doctrine of comparative negligence in Louisiana is to be located in Article 2323. Even so, this contribution to the development of the doctrine is a highly valuable one in any case. It could have been of decisive effect on the shape of the whole of the negligence law in this country because, at the time of its enactment, the so-called "formative era" of contributory negligence had hardly begun and the doctrine had not then become firmly entrenched. If, during the middle of the nineteenth century, the Louisiana courts, instead of nullifying the article by not applying it, had extended its principle, by analogy, to all negligence situations in which mutual fault was involved, Louisiana might now be entitled to high praise as the first state in this country to lead the way to a new solution for an old problem.

E. DEVELOPMENTS IN GEORGIA

A form of comparative negligence doctrine has prevailed in the state of Georgia for nearly one hundred years,¹⁸ but care must be taken to avoid drawing an erroneous conclusion from the fact that Georgia courts, when dealing with its principles, have sometimes spoken of it as a law relating to contributory negligence.¹⁹ The Georgia doctrine, however, exhibits two distinct peculiarities and limitations. In the first place, the plaintiff's damage will not be diminished but will be entirely disregarded if he has failed to avoid the consequences of the defendant's negligence after discovery thereof or if plaintiff should have, but has not, discovered the existence of such negligence. Secondly, the plaintiff is denied the right to recover if his negligence is equal to or in excess of the fault displayed by the defendant.

Before attempting to analyze this doctrine, it might be well

¹⁸ Recent applications thereof may be seen in *Head v. Georgia Power Co.*, 70 Ga. App. 32, 27 S. E. (2d) 339 (1943); *Savannah Electric Co. v. Cranford*, 130 Ga. 421, 60 S. E. 1056 (1908); and *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802 (1901).

¹⁹ See, for example, *Elk Cotton Mills v. Grant*, 140 Ga. 727, 79 S. E. 836 (1913); *Savannah Electric Co. v. Cranford*, 130 Ga. 421, 60 S. E. 1056 (1908); *Americus Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105 (1891).

to determine the way in which it originated. There has been some speculation over whether the rule owes its existence to the activities of the judiciary or to the efforts of the legislature. While the latter seems to have won the credit,²⁰ there is occasion to commend the courts of that state for having introduced the principle as to diminution of damages in cases of mutual fault as well as for having fashioned a workable system for the apportionment of damages by extensive construction of two rather meager and separate statutory provisions. The first of these statutes states:

No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him.²¹

The second provision declares:

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.²²

Both the provisions mentioned appear, for the first time, in the Georgia Code of 1860-2.²³ They cannot be located in earlier publications which contain the statutes enacted from time to time by the Georgia legislature nor in the compilations which preceded the code of that year.²⁴ For that matter, the historical notes ap-

²⁰ *City of Ocilla v. Luke*, 28 Ga. App. 234, 110 S. E. 757 (1922). See also note to annotation in 114 A. L. R. 830 at 835; 45 C. J., Negligence, § 598; 65 C. J. S., Negligence, § 172.

²¹ Ga. Code Ann. 1936, § 94-703.

²² *Ibid.*, § 105-603.

²³ See Ga. Code 1860-2, §§ 2979 and 2914 respectively.

²⁴ Neither Dawson, *Compilation of the Laws of Georgia* (1831), nor Hotchkiss, *Codification of the Statute Law of Georgia* (1845), contains the text of such statutes.

pendent to later codes, designed to indicate the original legislative source, if any, of the several provisions, fail to make any reference to the date of enactment. It can only be supposed, therefore, that these provisions were framed by the codifiers themselves, for they had not been commissioned to create any new rules of law²⁵ and professed to have "kept themselves fully and carefully within the pale of the powers and duties conferred."²⁶ If they did not fashion entirely new law on the point, they must have found the rule for diminution of damages in certain decisions rendered by the Georgia Supreme Court shortly prior to their appointment.²⁷

A railroad crossing accident had happened in 1851, the legal consequences of which eventually came before the Supreme Court of Georgia for decision on three different occasions and thereby contributed much toward the development of the Georgia law of negligence to be applied in cases of mutual fault. The factual situation involved a mule cart driven by a slave, and carrying a woman and her four children, which had been run down by the defendant railroad resulting in the death of the slave, the deaths of three of the four children, and the destruction of the mule cart. The slave and the cart had belonged to a decedent's estate, and the administrator thereof sued to recover for the property damage, charging the railroad with approaching and passing the crossing at too high a rate of speed. The railroad, on the other hand, asserted that the driver, that is the slave who had been killed in the accident, had negligently tried to cross the tracks although he had seen the train coming. The court in that case, one entitled *The Macon & Western Railroad Company v. Davis*,²⁸ approved the contributory negligence rule which had been announced in *Butterfield v. Forrester*²⁹ but had been modi-

²⁵ Ga. Acts 1858, p. 95, directed the commissioners to "prepare . . . a Code, which should, as near as practicable, embrace . . . the laws of Georgia, whether derived from the common law, the Constitutions, the statutes of the State, the decisions of the Supreme Court, or the statutes of England of force in this State."

²⁶ See Report of the Committee, Ga. Code 1895, Vol. 1, p. v.

²⁷ The three codifiers were commissioned pursuant to an act approved Dec. 9, 1858: Ga. Code 1895, Vol. 1, p. iii.

²⁸ 18 Ga. 679 (1855).

²⁹ 11 East 60, 103 Eng. Rep. 926 (1809).

fied by *Lynch v. Nurdin*,³⁰ and said that it ought to be left to the jury to determine "whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented the collision."³¹

Following that action, the surviving child sought to recover for her personal injuries. She obtained a verdict in the trial court and a motion by defendant for a new trial was overruled. When reversing that holding, the Supreme Court directed that the rule last announced should be applied,³² but indicated that, notwithstanding the fact that plaintiff may not have been free from fault, still the defendant might be held responsible if, in the exercise of due care, it could have prevented the injury.³³ Adherence was thereby given to a contributory negligence doctrine, but one which might be mitigated by means of a doctrine of last clear chance if that chance was open to, but not taken advantage of by, a defendant.³⁴ It also said that the rule aforementioned should be applied to both parties; that the party seeking to recover must prevent his injuries by the use of ordinary care; and that it was error to deny the giving of an instruction to the effect that if both parties were negligent and the plaintiff could have avoided the effect of the defendant's negligence by the use of ordinary diligence but did not, then the defendant was not to be held liable. The principle that the plaintiff's failure to use his last clear chance to avoid harm should serve to defeat his recovery was thereby established and is still the law in Georgia.³⁵

At the new trial so ordered, the child again secured a verdict in her favor. The railroad again appealed, with the result that the issue came before the Georgia Supreme Court, in 1858, for the third time. That body, speaking through Mr. Justice Lumpkin, said: "It has been argued that, inasmuch as there was

³⁰ 1 Ad. & Ellis (N. S.) 29, 41 Eng. C. L. 422, 113 Eng. Rep. 1041 (1841).

³¹ 18 Ga. 679 at 687.

³² *The M. & W. R. R. Co. v. Winn*, 19 Ga. 440 (1856).

³³ 19 Ga. 440 at 442.

³⁴ The nature of the decision would seem to provide further indication that, at that time, there was no apportionment provision on the statute books of Georgia.

³⁵ See, for example, *United States v. Fleming*, 115 F. (2d) 314 (1940).

fault on both sides, that the misconduct of the plaintiff should mitigate the damages . . . In a proper case, I am inclined to think the principle is a correct one.”³⁶ Here may lie clear evidence for the establishment of a rule for diminution of damages in cases of mutual fault, but the principle was not applied because the slave was not found to have been negligent. A year later, in *Flanders v. Meath*,³⁷ the court referred to this dictum as a principle “which we hold to be sound law . . . [that] where both parties are in fault, but the defendant most so, the fault of the plaintiff may go in mitigation of damages.”³⁸ It was followed up, in *Yonge v. Kinney*,³⁹ with an expression to the effect that a person who is himself greatly to blame ought not recover full damages. Not until after these decisions had been pronounced, shaping a comparative negligence doctrine, was the Georgia Code of 1860-2 deliberated upon, written, and enacted.

If the Georgia Supreme Court had done nothing else, by these decisions, than provide the codifiers with an opportunity to incorporate a diminution of damage rule into the code of that state, even though it might be one limited to injuries inflicted by railroads, its contribution to the development of the doctrine would have been remarkable. But, after the codification, the judiciary continued to make other important contributions by extensive construction of the two statutory provisions mentioned above so as to merge their basic principles into one system. It has already been pointed out that the text of Section 94-703, which alone makes provision for diminution of damages in case of mutual fault, is designed to deal with injuries growing out of railroading operations exclusively. The principle thereof has, however, been applied to other personal injury cases as, for instance, to pedestrians who have been run down by automotive vehicles,⁴⁰ to children who have been injured while working in

³⁶ *The Macon & Western R. R. Co. v. Winn*, 26 Ga. 250 (1858), at p. 254.

³⁷ 27 Ga. 358 (1859).

³⁸ 27 Ga. 358 at 362.

³⁹ 28 Ga. 111 (1859).

⁴⁰ *Berry v. Jowers*, 59 Ga. App. 24, 200 S. E. 195 (1938).

mills or factories,⁴¹ and to invitees who have been hurt by tripping or falling in buildings where they were rightfully present.⁴² The same is also true in situations involving damage to property, as a car in an automobile collision,⁴³ or an automobile running against an obstruction in a public street.⁴⁴

On the other hand, the courts have also applied the principle of Section 105-603 to all negligence cases, especially to railroad cases, where mutual fault is involved. Pursuant thereto, the plaintiff may not recover if he, by ordinary care, could have avoided the consequences of the defendant's negligence. Conversely, in other cases, the defendant is not to be entirely relieved, even though the plaintiff may, in some way, have contributed to the injury sustained. It is in the construction of the first of these ideas that one again meets the principle that a plaintiff's failure to use his last clear chance should serve to defeat his recovery.⁴⁵ That principle is applied, however, only where the fault of the defendant has become apparent to the victim or where, by the exercise of ordinary care, the victim could have become aware of it and thereafter fails to exercise ordinary and reasonable diligence to avoid the consequences of defendant's neglect.⁴⁶

A failure to avoid the consequences of defendant's negligence before such negligence has become apparent does not preclude a recovery but will authorize the jury to diminish the damages proportionately to the degrees of fault displayed.⁴⁷ Recovery is then allowed, if at all, on the basis of the second sentence of the section, for it has been held that the "other cases" there

⁴¹ *Elk Cotton Mills v. Grant*, 140 Ga. 727, 79 S. E. 836 (1913).

⁴² *Wynne v. Southern Bell Tel. Co.*, 159 Ga. 623, 126 S. E. 388 (1925); *Moore v. Sears, Roebuck & Co.*, 48 Ga. App. 185, 172 S. E. 680 (1934).

⁴³ *Lamon v. Perry*, 33 Ga. App. 248, 125 S. E. 907 (1924).

⁴⁴ *City of Ocilla v. Luke*, 28 Ga. App. 234, 110 S. E. 757 (1922).

⁴⁵ *United States v. Fleming*, 115 F. (2d) 314 (1940); *The M. & W. R. R. Co. v. Winn*, 19 Ga. 440 (1856).

⁴⁶ *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802 (1901); *Americus Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105 (1891); *Pollard v. Heard*, 53 Ga. App. 623, 186 S. E. 894 (1936); *Georgia R. R. & Banking Co. v. Stanley*, 38 Ga. App. 773, 145 S. E. 530 (1928); *Central of Georgia Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517 (1917).

⁴⁷ *Wynne v. Southern Bell Tel. Co.*, 159 Ga. 623, 126 S. E. 388 (1925); *Wilson v. Pollard*, 62 Ga. App. 781, 10 S. E. (2d) 407 (1940).

referred to are manifestly those in which the plaintiff could not, by ordinary care, have avoided the consequences of the defendant's negligence.⁴⁸ It being thereby determined that a recovery could be possible, the action then becomes subject to the diminution of damages rule set forth in Section 94-703 which has, as mentioned above, been extended to cover all negligence cases.⁴⁹ Another important extension in meaning of Section 105-603 of the Georgia Code has come about from its application to property damage cases. While forming a part of a chapter entitled "Personal Injuries," the section has been held applicable to cases of the type last mentioned as well as to personal injury cases;⁵⁰ and that without express restatement of the rule.⁵¹

By carrying the enlarged principle of Section 105-603, as so construed, over into the area of the railroad cases,⁵² and by applying the apportionment rule of expanded Section 94-703 to all negligence cases, the courts of Georgia have merged the ideas of both provisions into one comprehensive system. Only one unfortunate limitation, not expressly required by the Code, has crept in to burden the system and that is the fact that the plaintiff may not recover even an apportioned part of his damage, is to be fully defeated, if his negligence is equal to or exceeds that of the defendant.⁵³ The comparative negligence system pres-

⁴⁸ *Americus Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105 (1891).

⁴⁹ See cases cited in notes 40 to 44 inclusive, ante.

⁵⁰ *Miller v. Smythe*, 95 Ga. 288, 22 S. E. 532 (1894); *The Savannah, Florida & Western Ry. v. Stewart*, 71 Ga. 427 (1883); *Georgia R. R. & Banking Co. v. Neeley*, 56 Ga. 540 (1876).

⁵¹ *County of Macon v. Chapman*, 74 Ga. 107 (1884); *Southern Stages, Inc. v. Clements*, 71 Ga. App. 169, 30 S. E. (2d) 429 (1944); *Lamon v. Perry*, 33 Ga. App. 248, 125 S. E. 907 (1924); *City of Ocilla v. Luke*, 28 Ga. App. 234, 110 S. E. 757 (1922).

⁵² *Southern Railway Company v. Watson*, 104 Ga. 243, 30 S. E. 818 (1898); *Americus Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105 (1891); *Central Railway Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517 (1917). See also *Wilson v. Pollard*, 62 Ga. App. 781, 10 S. E. (2d) 407 (1940); *Southern Ry. Co. v. Parkman*, 61 Ga. App. 62, 5 S. E. (2d) 685 (1939).

⁵³ *Christian v. Macon Railway Co.*, 120 Ga. 314, 47 S. E. 923 (1904); *Brunswick Railroad Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551 (1901); *Smith v. American Oil Co.*, 77 Ga. App. 463, 49 S. E. (2d) 90 (1948); *Southern Stages, Inc. v. Clements*, 71 Ga. App. 169, 30 S. E. (2d) 429 (1944); *Whatley v. Henry*, 65 Ga. App. 668, 16 S. E. (2d) 214 (1941); *Southern Ry. Co. v. Parkman*, 61 Ga. App. 62, 5 S. E. (2d) 685 (1939); *Pollard v. Heard*, 53 Ga. App. 623, 186 S. E. 894 (1936); *Central of Georgia Ry. Co. v. Larsen*, 19 Ga. App. 413, 91 S. E. 517 (1917).

ently operating in Georgia, therefore, divides all cases into two categories. Under the first, even though the plaintiff may have contributed in some way to the injury or damage sustained, he may recover an amount proportioned by the amount of default attributable to himself, provided (a) the negligence of both parties concurred proximately to cause the injury or damage;⁵⁴ (b) the plaintiff could not, by ordinary care, have avoided the consequences of defendant's negligence,⁵⁵ keeping in mind that plaintiff's duty to exercise such ordinary care does not arise until the defendant's negligence is in existence and is either apparent to the plaintiff or its existence would be apprehended by an ordinarily prudent person;⁵⁶ and (c) plaintiff's negligence was of lesser degree than that of the defendant.⁵⁷ Under the second, the plaintiff may not recover at all (a) if his negligence was the sole proximate cause of the injury or damage;⁵⁸ (b) if, by ordinary care, he could have avoided the consequences of defendant's negligence, after such negligence began or was existing,⁵⁹ and was, or should have been, known to him;⁶⁰ or (c) if plaintiff's negligence was equal to or greater than that of the defendant.⁶¹

IV. AMERICAN STATUTORY LAW.

Although the aforementioned praiseworthy attempts to accord fairer treatment to the victims of accidental injury, where mutual fault was present, had been made by the courts of a few American jurisdictions, it became quite clear, by the beginning of the present century, that the tenacious adherence to the con-

⁵⁴ Alabama, *G. S. Ry. Co. v. Coggins*, 88 F. 455 (1898); *Smith v. American Oil Co.*, 77 Ga. App. 463, 49 S. E. (2d) 90 (1948).

⁵⁵ *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802 (1901); *Americus Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105 (1891); *Southern Stages, Inc. v. Clements*, 71 Ga. App. 169, 30 S. E. (2d) 429 (1944).

⁵⁶ *United States v. Fleming*, 115 F. (2d) 314 (1940); *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802 (1901).

⁵⁷ See cases cited in note 53, ante.

⁵⁸ *Whatley v. Henry*, 65 Ga. App. 668, 16 S. E. (2d) 214 (1941).

⁵⁹ See cases cited in note 55, ante, and *Southern Railway Co. v. Watson*, 104 Ga. 243, 30 S. E. 818 (1898).

⁶⁰ *Smith v. American Oil Co.*, 77 Ga. App. 463, 49 S. E. (2d) 90 (1948).

⁶¹ See cases cited in note 53, ante.

tributory negligence doctrine by the judiciary in the great majority of states⁶² could be overcome only by legislative action. Little had been done, in that regard, prior to the enactment of the two Federal Employers' Liability Acts. Florida, it is true, had substantially copied the railroad liability section of the Georgia code,⁶³ with its provision for diminution of damage in cases of mutual fault,⁶⁴ and Maryland had made the apportionment of damage rule applicable to cases of miners and clay workers employed in two counties of the state.⁶⁵ But it was the hazardous condition under which railroad employees had been working that did most to stimulate the growth of the statutory comparative negligence doctrine in this country.

Congress, in 1906, passed the first of the railroad employers' liability acts embodying the doctrine,⁶⁶ but it was declared unconstitutional in part because made to cover all employees of common carriers whether engaged in interstate or foreign commerce, or not.⁶⁷ The second statute, enacted in 1908, was limited in operation to railroad employees engaged in interstate commerce,⁶⁸ and, with necessary modification, became the pattern for numerous state statutes protecting intrastate railroad employees. From thence, it was but a short step to extend the principle to other groups of employees, to all persons endangered by the railroads, and finally to all people. Since 1906, more than thirty state statutes of differing scope and effect have been enacted, all of which nullify the defense of contributory negligence but allow the fault of the plaintiff to be shown for the purpose of diminishing the amount of the recovery according to the relative proportions of fault displayed by plaintiff and defendant. The federal government, also, has not been idle, for it has incorporated the

⁶² See annotation in 114 A. L. R. 830, particularly p. 836.

⁶³ Fla. Stat. Ann. 1944, § 768.06. The provision was first enacted in 1887.

⁶⁴ See Ga. Code Ann. 1937, § 94-703.

⁶⁵ Md. Acts 1902, Ch. 412, p. 595.

⁶⁶ 34 Stat. 232 (1906).

⁶⁷ *The Employers' Liability Cases*, 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297 (1907); *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87, 30 S. Ct. 21, 54 L. Ed. 106 (1909).

⁶⁸ 35 Stat. 65 (1908), as amended by 36 Stat. 291 (1910); 45 U. S. C. § 51 et seq.

principle of apportionment into the Merchant Marine or Jones Act⁶⁹ and the statute relating to death on the high seas from wrongful conduct.⁷⁰

The purpose of this article would not be served by, nor would space permit, a detailed review of the statutes mentioned, and only some of the important features concerning their scope and premises will be shown. For that matter, distinctions and enumerations hereinafter set up are not made with any claim of completeness. State workmen's compensation acts are disregarded as one of the fundamental premises for such statutes is that the employer should be exposed to liability even without fault.⁷¹ Also eliminated are such statutes as have abolished the defense of contributory negligence without replacing it with some form of rule for the diminution of damage. Since the application of statutes of this last type will never produce an apportionment, a basic element of any true comparative negligence doctrine, it is inaccurate to class them as being statutes relating to comparative negligence,⁷² even though they may require some degree of comparison between the respective faults of the parties.⁷³

The remaining statutes, those which apply some form of doctrine of comparative negligence, are to be distinguished in two main respects. The first relates to the type of accident or the grouping of persons and goods to which a particular statute will apply. Some statutes, for example, will cover injuries both to persons and to property; others to one or the other but not both. Some statutes are extensive enough to cover all accidents; others relate to specific situations, as to master and servant cases, to

⁶⁹ 41 Stat. 988, 1007 (1920); 46 U. S. C. § 688.

⁷⁰ 41 Stat. 537 (1920); 46 U. S. C. § 766.

⁷¹ With few exceptions, the state workmen's compensation acts have removed the complicated issue of contributory negligence and have made the employer an insurer, so to speak, of the employee's safety while on the job. Many statutes require the employer to insure his compensation risk: Dodd, *Administration of Workmen's Compensation* (The Commonwealth Fund, New York, 1936), pp. 53-4 and 508.

⁷² *Peterson v. Silver Peak Gold Min. Co.*, 37 Nev. 117 at 123, 140 P. 519 at 522 (1914).

⁷³ See, for example, Nev. Comp. Laws 1929, § 9198.

railroad cases generally, or to railroad crossing accidents. The second point of contrast turns on the amount of plaintiff's contributory negligence which is to be excused; excused, that is, to the point where he is allowed to recover at least a portion of his damage.

In the first of these categories, four major subdivisions appear: (A) There are four state statutes of general nature designed to apply alike to all persons and all property involved in all types of accidents. These statutes are to be found in Mississippi, Nebraska, South Dakota and Wisconsin.⁷⁴ Two other statutes, from Massachusetts and New Mexico, might have been included in this grouping but for the fact that they are limited to wrongful death situations and have been narrowly construed.⁷⁵ (B) Four other states, without purporting to apportion negligence and damage in all cases, have enacted statutes which provide for diminution of a plaintiff's damage if the harm has been inflicted by a railroad.⁷⁶ To these four might be added a fifth, that from Virginia, but for the fact that its statute is limited

⁷⁴ Miss. Laws 1910, Ch. 135, now Miss. Code Ann. 1942, § 1454; Neb. Rev. Stat. 1943, § 25-1151, first adopted in 1913; S. D. Laws 1941, Ch. 160, p. 184; and Wis. Stat. 1949, § 331.045, originally enacted in 1931. Mississippi is entitled to credit for being the first state to enact a statute applying to all persons. It was expanded, in 1920, to cover all types of property damage: Miss. Laws 1920, Ch. 312. It has been said that Mississippi has "been more successful than any other state in its application of the doctrine of comparative negligence." See Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 640, and Whelan, "Comparative Negligence," 1938 *Wis. L. Rev.* 465, at p. 471. See also notes in 20 *Miss. L. J.* 99 at 100, and 17 *Temple L. Q.* 276. The latter, at p. 284, states: "In reading the cases one is impressed with the inherent fairness, the resultant legal equality and the lack of confusion in the administration" of the Mississippi statute.

⁷⁵ See Mass. Ann. Laws 1933 (1949 Supp.), Ch. 229, §§ 2, 2A and 2C; N. Mex. Stat. 1941, § 24-103. The Massachusetts statute provides that if a person "in the exercise of due care," is fatally injured by the negligence of a railroad or of another person, recovery may be had within fixed limits "to be assessed with reference to the degree of [the tort-feasor's] culpability." If plaintiff's contributory negligence, under such a provision, were to be regarded as a factor to decrease the degree of the defendant's culpability, the result would be an application of the comparative negligence doctrine. Massachusetts courts, however, placing emphasis on the victim's need for exercising "due care," have been rigidly applying the doctrine of contributory negligence: *Gregory v. Maine Central R. R. Co.*, 317 Mass. 636, 59 N. E. (2d) 471, 159 A. L. R. 714 (1945).

⁷⁶ Ark. Stat. Ann. 1947, § 73-1004, enacted in 1919; Fla. Stat. Ann. 1944, § 768.06, adopted in 1887; Ga. Code Ann. 1936, §§ 94-703 and 105-603; Iowa Code 1946, Vol. 2, p. 1843, Civ. Pro. Rule 97, enacted in 1915. While the texts of the Georgia provisions appear to be limited in scope, they have been given the meaning here indicated. See discussion ante, notes 18 to 61.

in operation to accidents at railroad crossings only.⁷⁷ (C) Another subdivision grows up around the second Federal Employers' Liability Act and the numerous state acts which have followed it, to the favor of railroad employees, by abolishing the defense of contributory negligence completely where the railroad has contributed to the accident by the violation of a safety statute, but by apportioning damage in other negligence cases.⁷⁸ Some of these differ, however, as will be pointed out later, over the extent to which the plaintiff's negligence will be excused in allowing at least a partial recovery. (D) The fourth, and last, grouping would include those states which have extended the underlying thought of the federal statute, *i. e.*, employee protection, to employees other than railroad employees, either by covering all employees,⁷⁹ those engaged in manufacturing, mining, constructing, building, or other like hazardous occupations carried on by means of machinery,⁸⁰ or to all employees of corporations.⁸¹

The second point of contrast, as will be recalled, is concerned with the amount of contributory negligence on plaintiff's part

⁷⁷ Va. Code Ann. 1942, § 3959. The provision was first enacted in 1919.

⁷⁸ The pertinent part of 45 U. S. C. § 51 et seq., particularly § 53, directs: "In all actions . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such employee . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The federal pattern has been closely followed in Ark. Stat. Ann. 1947, § 73-916; Colo. Stat. Ann. 1935, Ch. 139, § 87(2); D. C. Code 1940, Tit. 44, § 402; Ga. Code Ann. 1936, § 66-402; Iowa Code Ann. 1949, §§ 479-124 and 479-125; Kan. Gen. Stat. Ann. 1935, § 66-238; Ky. Rev. Stat. 1948, § 277.320; Mich. Comp. Laws 1948, § 419.52; Minn. Stat. Ann. 1948, § 219.79; Mont. Rev. Code 1947, § 72-649; Neb. Rev. Stat. 1943, § 74-704; N. C. Gen. Stat. 1943, Ch. 60, § 67, which provision has been extended to employees of logging roads and tramroads: Ch. 60, § 70; N. D. Rev. Code 1943, § 49-1603; Page Ohio Gen. Code Ann. 1945, § 9018; S. C. Code 1942, § 8367; S. D. Code 1939, § 52.0945; Vernon Tex. Civ. Stat. Ann. 1925, Art. 6440; Va. Code Ann. 1942, § 5792; Wis. Stat. 1949, § 192.50 (3); Wyo. Comp. Stat. Ann. 1945, § 65-502.

⁷⁹ Cal. Labor Code 1937, § 2801; Page Ohio Gen. Code Ann. 1945, § 6245-1.

⁸⁰ Alaska Comp. Laws Ann. 1949, § 43-2-52; Ariz. Code Ann. 1933, § 56-805; Fla. Stat. 1941, § 769.03. Oregon, by its Comp. Laws Ann. 1940, § 113-612, first enacted in 1903, had adhered to the contributory negligence defense in its provision as to railroad employees. In its general employers' liability act, enacted in 1911, however, it switched to the comparative negligence doctrine as to employees of designated hazardous occupations: Ore. Comp. Laws Ann. 1940, § 102-1606.

⁸¹ Ark. Stat. Ann. 1947, § 81-1202.

which will be excused. Certain of the statutes referred to, whether of general or specialized application, may be cataloged on the basis of the degree to which plaintiff's contributory negligence, insufficient to bar full recovery, will serve to limit his recovery to a portion of his damage. Under some of them, not even a high degree of contributory negligence will necessarily defeat the claim.⁸² In other states, under certain statutes of limited application proportionate recovery is permitted only if the plaintiff's neglect is not as great as that of the defendant.⁸³ Still another class of statutes limits the plaintiff's right to a proportionate recovery to situations where his contributory negligence may be said to be slight, so that the fault of the defendant appears gross in comparison.⁸⁴ But in only one state, Georgia, does it appear that plaintiff's right to proportionate recovery is conditioned on the fact that his negligence must not amount to a "failure to exercise ordinary care."⁸⁵

No statute applying the comparative doctrine is presently in effect in Illinois. The first Illinois workmen's compensation act had provided that if an employer elected not to provide and pay compensation under the act he was not to escape liability for in-

⁸² See statutes cited in note 78, ante, except those enacted in Arkansas, District of Columbia, Georgia, Michigan, Nebraska, and Ohio. In addition, attention should be drawn to *Ariz. Code Ann.* 1933, § 56-805; *Ark. Stat. Ann.* 1947, § 81-1202; *Fla. Stat. Ann.* 1944, §§ 768.06 and 769.03; *Iowa Code* 1946, Vol. 2, p. 1843, *Civ. Pro. Rule* 97; *Miss. Code Ann.* 1942, § 1454; *Ore. Comp. Laws Ann.* 1940, § 102-1606; *Va. Code Ann.* 1942, § 3959; and 46 *U. S. C.* §§ 688 and 766.

⁸³ *Ark. Stat. Ann.* 1947, §§ 73-916 and 73-1004; *Mich. Comp. Laws* 1948, § 419.52; *Wis. Stat.* 1949, § 331.045. Statutes of this type, and particularly the one in Wisconsin, have been subjected to criticism. Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), at p. 64, says it is "absurd" that, under the Wisconsin statute, a plaintiff almost as negligent as the defendant may recover a substantial portion of his damage but may not recover a cent if both parties are equally negligent. A minute alteration in the findings can make a tremendous difference in the result. The hope that, in practice, such inequities could be avoided has not always been fulfilled: *Nelson v. Chicago, M., St. P. & P. Ry. Co.*, 252 *Wis.* 585, 32 *N. W.* (2d) 340 (1948). See also Campbell, "Wisconsin's Comparative Negligence Law," 7 *Wis. L. Rev.* 222 (1930); Nunnery, "Mississippi's Comparative Negligence Statute—Wisconsin Statute Compared," 20 *Miss. L. J.* 99 (1948); Padway, "Comparative Negligence," 16 *Marq. L. Rev.* 3 (1931); Whelan, "Torts—Negligence—Comparative Negligence Statute," 20 *Marq. L. Rev.* 189 (1935); Whelan, "Comparative Negligence," 1938 *Wis. L. Rev.* 465; and note in 7 *Wis. L. Rev.* 122.

⁸⁴ *Alaska Comp. Laws Ann.* 1949, § 43-2-52; *Cal. Labor Code* 1937, § 2801; *D. C. Code* 1940, Tit. 44, § 402; *Neb. Rev. Stat.* 1943, §§ 25-1151 and 74-704; *Page Ohio Gen. Code* 1945, §§ 6245-1 and 9018; *S. D. Laws* 1941, Ch. 160, p. 184.

⁸⁵ *Ga. Code Ann.* 1936, § 66-402, and also § 105-603.

juries produced by the contributory negligence of his employee, but that such negligence was to be considered by the jury as a basis for reducing the amount of the damage.⁸⁶ That provision disappeared two years later with the enactment of the second Illinois workmen's compensation act. The latter denied employers in certain specified hazardous occupations, who elected not to provide and pay under the act, the use of the three common-law defenses of contributory negligence, assumption of the risk, and the fellow-servant rule.⁸⁷ That section, in turn, was repealed,⁸⁸ so that, since 1917, Illinois employers of labor in certain hazardous occupations no longer have the right to elect whether to come under the act, but are automatically subject to its terms.⁸⁹ There has been no statutory regulation in Illinois outside of the employment relationship and the doctrine of contributory negligence, in those areas, retains its fullest vigor and harshness.

V. CONCLUSION.

In the preceding pages, an attempt has been made to follow the march of the doctrine of apportionment of loss in case of mutual fault, a doctrine which takes into account the relative negligent faults of the tort-feasor on the one hand and those of the victim on the other. It has been shown how the doctrine started about the time of the *Consulato del Mare*, how it gained influence in modern admiralty law, how, during the nineteenth century, it conquered the world of the civil law, and how, during the twentieth century, it has been taking possession of a substantial number of countries devoted to the common law. That principle of apportionment, now styled the doctrine of comparative negligence, has become the law in England, in nearly all of Canada, and has, by enactment in the form of more than thirty-five

⁸⁶ Ill. Laws 1911, p. 315, § 1(3).

⁸⁷ Ill. Laws 1913, p. 337, § 3. See also *Day v. Chicago, Milwaukee & St. P. Ry. Co.*, 208 Ill. App. 351 (1917), affirmed in 284 Ill. 534, 120 N. E. 480 (1918).

⁸⁸ Ill. Laws 1917, pp. 505-7.

⁸⁹ Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 139. See also *Smith-Hurd Ill. Ann. Stat.*, Ch. 48, particularly the commentary by Angerstein, at p. 299, preceding § 138.

statutes having to do with one or more fields, been adopted by more than twenty-five of the United States.

There is no doubt, however, that its progress has met with resistance in some areas. A bill introduced in the New York legislature in 1931, one closely following the wording of both the federal Employers' Liability Act and the general Mississippi statute, was killed in committee.⁹⁰ Another attempt, made in 1947, also failed.⁹¹ A House Bill introduced into the Pennsylvania legislature in 1943, one providing for the application of the doctrine to all cases of mutual negligence, met a similar fate. Concerning that measure, one writer suggested that the bill

should be written into the law of Pennsylvania without a struggle. This, however, will not come to pass. The law of contributory negligence favors corporate defendants, insurance companies, and public utilities. They are not subject to the denial of justice which a strict application of the rule produces, as they do not come into court in the capacity of a plaintiff . . . Their opposition to the proposed bill will be strenuous.⁹²

Whether for these reasons, or for others, Pennsylvania so far has not yet adopted a general comparative negligence statute. Nor has Michigan, where a similar proposal, offered in 1947, died in committee.⁹³ For that matter, a draft of a bill dealing with comparative negligence, prepared by a committee of the Chicago Bar Association for introduction in the Illinois General Assembly, and which had the approval of the Board of Governors of that association, was withheld instead of being submitted at the last legislative session.⁹⁴ One is led to wonder if there may not be significance in the fact that this stubborn resistance has ex-

⁹⁰ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 643.

⁹¹ See note in 22 *N. Y. U. L. Q.* 458.

⁹² Note in 17 *Temple L. Q.* 276 (1943), at p. 286.

⁹³ Neef, "Comparative Negligence," 27 *Mich. St. B. J.* 34 (May, 1948).

⁹⁴ See Report of Legislative Committee (1948-49), 30 *Chicago Bar Record* 391 at 394.

hibited itself chiefly in those states primarily devoted to industrial activity and where living conditions are more congested.

Whatever the reason, such reluctance to adopt so humane a doctrine is regrettable. Not only has the harshness of the contributory negligence doctrine been pointed out, but attention has been called to the fact that numerous scholars, and even some courts, have for decades deplored its existence. The essential fairness of the comparative negligence rule, by contrast, has not been questioned. Whatever hesitation there has been to abolish the defense of contributory negligence or to replace it with the comparative negligence doctrine appears to have been based on an apprehension that the apportionment doctrine would be one too difficult to administer. In that regard, three points are urged most often by the opposition. They would appear to fear (1) an alleged impossibility for accurate apportionment of fault and negligence between the parties; (2) an anticipated prejudice on the part of juries in favor of victims to such an extent that it would practically nullify the effect of the contributory faults of plaintiffs; and (3) such overwhelming administrative difficulty, should courts be forced to interfere with jury action of the type mentioned, that the very influence of the courts themselves would be weakened.⁹⁵ It is submitted that these objections have been refuted by the frictionless application of the comparative negligence rule not only in civil law countries, where it has operated for more than a century, but also in some of the common law jurisdictions, where the rule has been applied for upwards of four decades.

As to the first, it is true that no system of apportionment can be completely accurate, but then nothing on earth is perfect. The whole human system for dispensation of justice is imperfect. What can be done, however, is to come to a solution as reasonable as possible under the circumstances.⁹⁶ Small imperfections can

⁹⁵ The presence of these alleged objections is noted by Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), at p. 53; Campbell, "Wisconsin's Comparative Negligence Law," 7 *Wis. L. Rev.* 222 (1931); Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932).

⁹⁶ See, for example, Franck, "Collisions at Sea," 12 *L. Q. Rev.* 260 (1896), at 264.

be disregarded, small inequities tolerated, if the final result is generally satisfactory. Even these imperfections would be preferable to the serious miscarriage of justice which results from denying to the partly negligent plaintiff all right of recovery.

But it is surprising that these anticipated defects have not yet appeared to hamper the workings of the apportionment rule. Disregarding the good results obtained in the civil law countries, achieved under the maritime laws of most seafaring nations, and accomplished by the English Admiralty courts since adoption of the Maritime Conventions Act of 1911,⁹⁷ there has still been time for some American courts, both state and federal, to familiarize themselves with the apportionment problem. No special difficulties have arisen, no hidden pitfalls in the doctrine into which courts may fall have been found.⁹⁸ Even the courts of New York, itself unfavorable to the comparative negligence doctrine, are able to apply the doctrine in cases arising under the federal or the Canadian law.⁹⁹

Apportionment of fault and damage by juries presents no problems more difficult than those which juries must solve in other types of cases as, for example, determining the amount recoverable for a lost limb, for pain and suffering, for a spoiled reputation, or for an alienated affection. They have found a way through lengthy and highly technical instructions necessary in other suits. Properly charged, they will be able to weigh and balance the amounts of negligence of either party and to master the strictly factual problems of apportionment. For that matter, by way of answer, to the second objection, it might be said that any tendency on the part of juries to favor plaintiffs would not likely be increased, in the application of the apportionment doctrine, over that tendency already present in the other situations just mentioned. If such a tendency is likely to result in inequities and injustice, trial judges and reviewing courts will,

⁹⁷ Franck, "A New Law for the Seas," 42 L. Q. Rev. 25 (1926), at p. 29.

⁹⁸ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1945), at 144; Mole and Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932), at 645.

⁹⁹ Mole and Wilson, *op. cit.*, at p. 647 et seq.

as they always have in the past, find ways to protect the defendant therefrom.

Only the third objection poses any substantial question but, on analysis, it will be seen to be unfounded. If anything, the influence of the courts will be strengthened rather than weakened by application of the apportionment doctrine for it will give them a unique chance to remain the determining factor in an area of law which already has begun to slip away from their control and jurisdiction. During the second decade of this century, despite state and federal employers' liability acts with their changes favoring employees, it was felt that these statutes only served to lessen the severity of the defenses which might be interposed in industrial injury suits. Dissatisfaction still existed over the necessity that the employee should prove fault on the part of the employer. Complaints were raised against the insufficiency of the compensation granted, against delay, against wastefulness of the system, and over the fact that an increasing antagonism between employer and employee was being generated by litigation. Records in Illinois, for instance, showed that at least a third of more than six hundred fatal industrial accident cases ended without recovery, while in the majority of successful cases one-third of the compensation was retained by the attorney for his fees. Worse yet, it usually took as much as three years before payment for damage was actually received by the employee or by his dependents.¹ There is no reason to believe that conditions in Illinois were less satisfactory than in other states, particularly since the search for a more effective remedy resulted in a wide-spread series of workmen's compensation acts.

Desirable as these workmen's compensation laws may have been in changing the substantive law relating to industrial injury, one unfortunate side effect lay in the fact that jurisdiction over a whole complex of claims was taken from the trial courts of the judicial department and transferred to administrative agencies. The day could well come when the dissatisfaction with the harsh

¹ In general, see Dodd, *Administration of Workmen's Compensation* (The Commonwealth Fund, New York, 1936), pp. 16, 19, 20, 22 and 24.

treatment judicially accorded to the contributorily negligent plaintiff in an injury case will not only result in the abolition of the defense of contributory negligence but also produce a transfer of jurisdiction over all injury cases to administrative agencies, despite constitutional difficulties, with a consequent weakening of the judicial department. Adoption of the comparative negligence doctrine in those jurisdictions which are still reluctant to act would not only remove that threat but would furnish the courts with an efficient tool for the administration of justice in all negligence cases.

The problem, then, is not so much one as to whether the doctrine of comparative negligence should be adopted but rather how that aim can be achieved. Unfortunately, not much can be expected at the hands of the courts for, of the few who attempted the change prematurely, most returned to the contributory negligence doctrine. More than one hundred years of application of that doctrine have left indelible traces behind, traces so strong that it is doubted whether courts, even if they wished, could muster the power to break the bond of precedent. Only the legislature, then, can help. Whether a detailed statute such as the complete and careful draft prepared by Professor Gregory,² or some single short provision,³ would be preferable need not now be decided. If some existing statute is to be copied, those enacted in Wisconsin,⁴ Nebraska,⁵ and South Dakota⁶ should certainly be eliminated because of objections already noted. The Mississippi statute⁷ or the federal Employers' Liability Act⁸ are clear cut and do not suffer from these limitations but, as Gregory has pointed out,⁹ they fail as soon as more than one plaintiff or more than one

² Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), at 156 et seq.

³ See Smith, "A Proposed Code Provision on Tort Liability," 10 *La. L. Rev.* 253 (1950).

⁴ Wis. Stat. 1949, § 331.045.

⁵ Neb. Rev. Stat. 1943, § 25-1151.

⁶ S. D. Laws 1941, Ch. 160, p. 184.

⁷ Miss. Code Ann. 1942, § 1454.

⁸ 45 U. S. C. § 51 et seq.

⁹ Gregory, *op. cit.*, pp. 58 and 72.

defendant become involved.¹⁰ Perhaps the purpose might be served better by a statute following one of the Canadian patterns, such as that to be found in Alberta;¹¹ but further analysis would require going into details best left to legislative draftsmen. All that need now be said is that the march of the comparative negligence doctrine has not ended; it still does, and should, go on.

APPENDIX

The text of the significant parts of the Alberta Contributory Negligence Act of 1937 is here reproduced so as to provide a basis for comparison with other statutes. It reads:

Proportional Liability for Loss

2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which such person was at fault:

Provided that,—

- (a) if, having regard to all circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and
- (b) nothing in this section shall operate as to render any person liable for any loss or damage to which his fault has not been contributed.

Degree of Fault

3. Where damages have been caused by the default of two or more persons, the court shall determine the degree in which each was at fault, and where two or more persons are found liable they shall be jointly and severally liable for the fault to the person suffering loss or damage, but as between themselves in the absence of any contract express or implied, they

¹⁰ *Ibid.*, p. 72.

¹¹ The text of the Alberta statute is set out in an appendix hereto.

shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

4. In any action the amount of damage or loss, and the degrees of fault shall be questions of fact.

5. Where the trial is before a judge with a jury the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or the omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be contemporaneous with it.

6. Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

7. When it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, he may be added as a party defendant upon such terms as are deemed just.¹²

¹² Alberta Rev. Stat. 1942, Vol. 2, c. 116. The reproduction is illustrative only and is not given with any thought that the Alberta statute is in any way preferable to the Ontario statute recommended by Gregory, *op. cit.*, p. 69. It has been suggested that paragraphs 5 and 6 of the Alberta statute, by asking whether, "notwithstanding the fault of one party," the plaintiff might have avoided the harm, thereby raising a question of ultimate negligence, are likely to "continue confusing juries." See Wright, "The Law of Torts: 1923-1947," 26 *Can. Bar Rev.* 46 (1948), at p. 71.

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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURY FROM OPERATION, OR USE OF HIGHWAY—
WHETHER OR NOT AMENDMENTS TO NON-RESIDENT MOTORIST STATUTES
PROVIDING FOR SERVICE ON PERSONAL REPRESENTATIVE OF DECEASED NON-
RESIDENT ARE CONSTITUTIONAL—Although statutes providing for sub-
stituted service upon non-resident motorists in actions arising from use
of local highways have received a great deal of judicial attention since
their inception, it became necessary for both the Court of Appeals of

New York and the Supreme Court of Michigan recently to decide a comparatively new problem growing from their application. Both courts were required to pass on the validity of amendments to the statutes of the respective states providing for substituted service on executors or administrators of non-resident motorists in the event of the death of the latter prior to the acquisition of jurisdiction. In the first of these cases, that of *Leighton v. Roper*,¹ the plaintiff, residing in New York, had been injured in an automobile collision occurring in that state. The driver of the other automobile, a resident of Indiana, died before any action had been instituted and the defendant had been appointed administrator of the estate by an Indiana court. The estate possessed no assets in New York except such as might grow out of an automobile liability insurance policy issued to the decedent by a foreign insurance company not licensed to do business in New York. A summons and a complaint in plaintiff's New York action to recover for damages, charging the decedent with negligence, were served on defendant, in his representative capacity, in the fashion directed by the New York statute.² Defendant appeared specially to quash the service and to dismiss the complaint on the ground that the statute, as applied to him, was unconstitutional. The service was sustained by the lower courts and their judgment was affirmed by the New York Court of Appeals. The Michigan case of *Flopa v. DuPre*³ arose under similar circumstances except that there the defendant's decedent, an Ohio resident, in his lifetime, had allowed his automobile to be driven on the highways of Michigan by a third person. While so operated, a collision occurred in which the plaintiff, a resident of Michigan, was injured. After defendant's appointment as administratrix by an Ohio court following the non-resident owner's death, plaintiff brought suit in Michigan. Service of process was had on defendant pursuant to the Michigan statute.⁴ That defendant also filed a special

¹ 300 N. Y. 434, 91 N. E. (2d) 876 (1950), affirming 275 App. Div. 994, 90 N. Y. S. (2d) 919 (1949), which had affirmed 194 Misc. 893, 87 N. Y. S. (2d) 527 (1948).

² Thompson's Laws N. Y., 1945 Supp., Vehicle and Traffic Law, § 52, p. 725, provides: "A non resident operator . . . of a motor vehicle . . . which is involved in an accident or collision in this state should be deemed to have consented that the appointment of the secretary of state as his true and lawful attorney for the receipt of process . . . shall be irrevocable and binding upon his executor or administrator. When the non resident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such non resident in the same manner . . . as is provided in the case of a non resident." The statute also provides for the continuance of the action against the executor or administrator upon proper motion and notice if the non resident should die during a duly commenced suit.

³ 327 Mich. 660, 42 N. W. (2d) 777 (1950).

⁴ Mich. Comp. Laws 1948, § 256.521. For re-enactment, see P. A. 1949, No. 300, § 403; Mich. Stat. Ann., 1949 Cum. Supp., § 9.2103. It reads, in part: ". . . the operation on a public highway in this state of a motor vehicle owned by a non resident if so operated with his consent, express or implied, shall be deemed equiva-

appearance and a motion to dismiss the complaint, likewise asserting that the statute was unconstitutional. The motion was denied by the trial court and the Supreme Court of Michigan affirmed.

All forty-eight of the American states, as well as the District of Columbia, presently have statutes providing for substituted service on non-resident motorists who become involved in automobile accidents while travelling over the highways or while within foreign jurisdictions.⁵ Such service is usually accomplished by statutory appointment of some state official as agent of the non-resident for purpose of receipt of process, the statute charging that official with the responsibility of notifying the non-resident motorist in some manner which complies with procedural due process requirements. As originally enacted, these statutes made no provision for service on the non-resident's executor or administrator in the event of the non-resident's death before or during suit. For that reason, it had been uniformly held that jurisdiction could not be obtained over the legal representative either because death terminated the agency, it not being coupled with an interest, or because strict construction of the statutes required that result.⁶ Two cases in that category went one step further and, at least by way of dicta, seriously questioned whether it would ever be possible, constitutionally, to subject the executor or administrator to service under some form of statutory amendment.⁷

lent to an appointment by such non resident of the secretary of state to be his true and lawful attorney . . . The death of such non resident shall not operate to revoke the appointment . . . and . . . any action growing out of such accident or collision may be commenced or prosecuted against his executor or administrator . . . and service of the summons shall be made" in the same manner as if the non resident was still living.

⁵ A compilation thereof appears in *Knoop v. Anderson*, 71 F. Supp. 832 at 836-7 (1947), and also in 27 CHICAGO-KENT LAW REVIEW 231-2, particularly notes 5-11, inclusive.

⁶ *Warner v. Maddox*, 68 F. Supp. 27 (1947); *Buttson v. Arnold*, 4 F. R. D. 492 (1945); *Brogan v. Maclin*, 126 Conn. 92, 9 A. (2d) 499 (1939); *Riggs v. Schneider's Ex'r*, 279 Ky. 361, 130 S. W. (2d) 816 (1939); *Downing v. Schwenck*, 138 Neb. 395, 293 N. W. 278 (1940); *Young v. Potter Title & Trust Co.*, 114 N. J. L. 561, 178 A. 177 (1935), affirmed in 115 N. J. L. 518, 181 A. 44 (1935); *Lepere v. Real Estate Land Title Trust Co.*, 11 N. J. Misc. 887, 168 A. 858 (1933); *Vecchione v. Palmer*, 249 App. Div. 661, 291 N. Y. S. 537 (1936); *Dowling v. Winters*, 208 N. C. 521, 181 S. E. 751 (1935); *Harris v. Owens*, 142 Ohio St. 379, 52 N. E. (2d) 522 (1944); *Donnelly v. Carpenter*, 55 Ohio App. 463, 9 N. E. (2d) 888 (1936); *Minehart v. Shaffer*, 86 Pittsb. L. J. 317 (1938); *State ex rel. Ledin v. Davidson*, 216 Wis. 216, 256 N. W. 718, 96 A. L. R. 589 (1934). The contention that death terminated the agency between the non-resident motorist and the secretary of state was also presented in the instant cases. The courts refused to sustain the contention on the ground that the agency was not one created by common law but was one based on an exercise of the policy power, hence the principle did not apply: *Oviatt v. Garretson*, 205 Ark. 792, 171 S. W. (2d) 287 (1943); *Gesell v. Wells*, 134 Misc. 594, 236 N. Y. S. 381 (1929). The Tennessee statute treats the agency as one at common law, but declares it to be irrevocable until one year after the death of the non-resident motorist: *Tenn. Pub. Acts 1949*, Ch. 47, p. 174.

⁷ *Vecchione v. Palmer*, 249 App. Div. 661, 291 N. Y. S. 537 (1936); *State ex rel. Ledin v. Davidson*, 216 Wis. 216, 256 N. W. 718, 96 A. L. R. 589 (1934).

Notwithstanding, six states⁸ in addition to New York and Michigan have passed amendments of the type here under consideration in recognition of the fact that the injured person's remedy should not be made to depend on the continued existence of the non-resident motorist.⁹

The United States Supreme Court, in the case of *Hess v. Pawloski*,¹⁰ carved out the constitutional path to be followed by service statutes by noting that the state might, in the public interest, "make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike who use its highways."¹¹ It there adopted a theory which recognized that the "physical" concept of jurisdiction, laid down under a rule that had forbidden states from exercising jurisdiction over persons and things beyond territorial limits,¹² had been greatly extended so that a more functional approach to the problem of jurisdiction might be taken.¹³ The constitutional question which confronted the courts in the instant cases, then, was whether or not the police power, under which highway use is regulated, could be extended one step farther so as to bring personal representatives of non-resident drivers within the purview of the modern service statutes.

Prior to the instant cases, the decision in *Knoop v. Anderson*¹⁴ represented the only direct adjudication on the fundamental constitutional issue. The plaintiff there, an Iowa resident, had been negligently injured on an Iowa highway by a truck owned by a South Dakota resident. The owner of the truck died subsequent to the accident and the defendant had been appointed administratrix of the owner's estate by a South Dakota court. In a suit based on such negligence, begun in an Iowa state court, service of process was made in the fashion directed by the

⁸ Pope's Ark. Stat. 1944, Supp. § 1375; Fla. Stat. Ann., 1949 Supp., Ch. 47, § 47.29(2); Iowa Code 1946, Vol. 1, Ch. 321, §§ 321.498-9; Md. Ann. Code (Flack) 1939, Art. 56, § 186.189; Neb. Rev. Stat. 1943, Vol. 2, Ch. 25, art. 5, § 25-530, as amended in 1949; Wis. Stats. 1949, Ch. 85, § 85.05(3).

⁹ *Leighton v. Roper*, 194 Misc. 893 at 899, 87 N. Y. S. (2d) 527 at 533 (1948), quoted from the 1944 report of the New York Judicial Council, p. 253, to the effect that "the more serious the accident in which the non resident was involved, the more likely it will be that death will have resulted and if the executor or administrator of such non resident could not be sued here, it is obvious that in those cases where the remedy granted by § 52 of the Vehicle and Traffic Law would be most efficacious, the statute may be rendered ineffective by the subsequent death of the non resident motorist."

¹⁰ 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

¹¹ 274 U. S. 352 at 356-7, 47 S. Ct. 632 at 633, 71 L. Ed. 1091 at 1094-5.

¹² *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878).

¹³ A discussion pointing up the trend away from the physical test of jurisdiction, as laid down in *McDonald v. Mabee*, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1915), and a more functional approach may be found in a note in 34 Ky. L. J. 139.

¹⁴ 71 F. Supp. 832 (1947), noted in 2 Ark. L. Rev. 456, 33 Corn. L. Q. 276, 61 Harv. L. Rev. 355, 33 Iowa L. Rev. 407, 19 Miss. L. J. 356, 15 U. of Chi. L. Rev. 451; 57 Yale L. J. 647.

Iowa statute, which had been amended to provide for service on executors and administrators.¹⁵ After the defendant had removed the case to the federal district court on the ground of diversity of citizenship, that court, on its own motion, raised the jurisdictional question and held, after argument, that jurisdiction was lacking because the portion of the statute applying to executors or administrators was invalid. That conclusion was reached on the basis of three principles, to-wit: (1) a judgment against an estate represented by an executor or administrator on a tort committed before decedent's death had to be *in rem* and not *in personam*; (2) any judgment would be unenforceable in the state of domicile of the foreign representative; and (3) no foreign representative has legal standing outside the jurisdiction of his appointment.

The court in the Knoop case apparently conceived that only two types of judgment were possible. One, running against the assets of the estate, would necessarily be an *in rem* judgment, requiring jurisdiction over the res; the other would be *in personam*, but would be against the administrator personally as if he were an administrator *de son tort*. It is apparent that neither type of judgment would be appropriate to cases of this character for the court of suit gets no control over the assets of an estate being administered elsewhere and the legal representative, in all probability, has not made the statutory official his personal agent to accept service in his, the legal representative's, behalf. The case of *Stacy v. Thrasher*,¹⁶ however, sets out a third possibility. The United States Supreme Court there said that the argument that there is privity between an administrator appointed in one state and an executor appointed in another "assumes that the judgment is *in rem* and not *in personam*, or that the estate has a sort of corporate unity or entity. But this is not true in either fact or legal construction. The judgment is *against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care.*"¹⁷ It is clear that it is the more limited type of judgment last mentioned which is appropriately sought in cases like the instant ones, so constitutionality of the statutory amendments here concerned should not be questioned on the first of the grounds used in the Knoop case.

The second argument against validity, one based upon the unenforceability of the judgment in the state of the executor's appointment, has no sound basis in legal reality. It has been held that the effect of a judgment and the constitutionality of jurisdiction should be treated as

¹⁵ Iowa Code Anno., Vol. 15, Tit. 13, Ch. 321, §§ 321.498-9.

¹⁶ 47 U. S. (6 How.) 44, 12 L. Ed. 337 (1848).

¹⁷ 47 U. S. (6 How.) 44 at 60, 12 L. Ed. 337 at 344. Italics added.

two distinct questions.¹⁸ A better approach would be to allow the court in which the judgment must eventually be enforced to settle the question of its effect, leaving the constitutional question of jurisdiction to be passed on by the court in which the action is brought.

It is the third objection, one which rests on the general rule that an executor or administrator is not subject to suit outside the jurisdiction of his appointment,¹⁹ which presents the most serious argument on the negative side of the question here involved. A careful examination of its attributes and legal foundations is, therefore, necessary. The proposition that a foreign executor is not amenable to suit outside the jurisdiction of his appointment owes its existence to the fact that it is a concomitant to the rule which prohibits an executor from bringing suit in a foreign jurisdiction.²⁰ A sort of balancing of equities was thereby created,²¹ but the foundation of the rule prohibiting the bringing of suit by the foreign executor rested on the supposition that the foreign executor would thereby be allowed to withdraw assets to the domiciliary state, subjecting local creditors to possible inequalities in the law of the place of appointment if such local creditors were forced to pursue their remedies in that jurisdiction.²² The case of *Blake v. McClung*,²³ however, has served to dissipate the fear of unequal administration so the rule prohibiting suit by a foreign executor has become so relaxed, by statute, that it is, for all practical purposes, inoperative.²⁴

Notwithstanding this, the corollary which prohibits suit against a foreign executor has remained more inflexible. Some jurisdictions, in retaining this rule, have adopted the attitude that since an executor or administrator derives his authority from the state in which he is appointed, he has no power to act outside of that state in his representative character.²⁵ By following this line of reasoning, the conclusion has been

¹⁸ *Craig v. Toledo, A. A. & N. M. R. Co.*, 30 Ohio S. & C. P. 146, 2 Ohio N. P. 64 (1895).

¹⁹ *Vaughan v. Northrup*, 40 U. S. (15 Pet.) 1, 10 L. Ed. 639 (1841). See also 21 Am. Jur., *Executors and Administration*, § 985; 34 C. J. S., *Executors and Administrators*, § 1012; and note in 27 L. R. A. 101.

²⁰ *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. S. 198 (1918). See also *Woerner, The American Law of Administration* (Little, Brown & Co., New York, 1899), 2d Ed., § 160.

²¹ *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. S. 198 (1918); note in 33 Corn. L. Q. 276 at 279.

²² *Story, Conflict of Laws*, 5th Ed., § 512.

²³ 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432 (1898).

²⁴ *Beale, Conflict of Laws*, Vol. 3, § 507.2.

²⁵ *Hargrave v. Turner Lumber Co.*, 194 La. 285, 193 So. 648 (1940); *In re Cowham's Estate*, 220 Mich. 560, 190 N. W. 680 (1922); *In re Thompson's Estate*, 339 Mo. 410, 97 S. W. (2d) 93 (1936). See also *Restatement, Conflicts of Law*, § 512, comment (a), and annotation in 40 A. L. R. 292 (1926).

reached that an essential element of jurisdiction is lacking in a suit against a foreign executor,²⁶ to-wit: a competent defendant; one which cannot be conferred by consent,²⁷ or by personal service within the territorial area of the court.²⁸ It is for this reason that general legislative attempts to subject foreign executors to suit have failed.²⁹ This reasoning, superficially examined, seems quite persuasive, but when it is recalled how the foundation of the rule has been undermined the forcefulness of the argument becomes greatly diminished. This becomes even the more apparent when it is noted that some courts have refused to apply the "limited authority" theory, insisting that the proper basis for the rule is one of comity and convenience in order to protect the orderly administration of estates.³⁰

The rule prohibiting suits against foreign executors has been rendered even less effective as the result of a number of exceptions previously developed. It has been said, for example, that the rule does not apply where a complete failure of justice would result if equity were to withhold relief,³¹ or where the personal representative collects or brings assets into the foreign jurisdiction.³² Further indication tending to show that the rule is not immutable may be found in the fact that where a foreign administrator or executor institutes an action, the weight of authority allows the forum to have jurisdiction to render judgment

²⁶ *Thorburn v. Gates*, 225 F. 613 (1915).

²⁷ *Burrowes v. Goodman*, 50 F. (2d) 92, 77 A. L. R. 249 (1931); *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44, 67 Am. St. Rep. 177 (1897); *Greer v. Ferguson*, 56 Ark. 324, 19 S. W. 966 (1892); *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455 (1849). But see contra: *Newark Savings Inst. v. Jones*, 35 N. J. Eq. 406 (1882). See also annotation in 77 A. L. R. 251.

²⁸ *Scruggs v. Scruggs*, 105 F. 128 (1900); *Security Ins. Co. v. Taylor*, 2 Biss. 446, 21 Fed. Cas. 12 and 607 (1871); *Hargrave v. Turner Lumber Co.*, 194 La. 285, 193 So. 648 (1940); *In re Thompson's Estate*, 339 Mo. 410, 97 S. W. (2d) 93 (1936). Contra: *Laughlin v. Soloman*, 180 Pa. 177, 36 A. 704, 57 Am. St. Rep. 633 (1897).

²⁹ *McMaster v. Gould*, 240 N. Y. 379, 148 N. E. 556, 40 A. L. R. 792 (1925); *Helme v. Buckelew*, 229 N. Y. 563, 128 N. E. 216 (1920). Contra: *Dewey v. Barnhouse*, 75 Kan. 214, 88 P. 877 (1907); *Craig v. Toledo, A. A. & N. M. R. Co.*, 3 Ohio S. & C. P. 146, 2 Ohio N. P. 64 (1895). The New York Court of Appeals, in the instant case, distinguished between the legislation before it and that found in the two New York cases here cited on the ground that the statutes in the latter were too general in application.

³⁰ *Stacy v. Thrasher*, 47 U. S. (6 How.) 59, 12 L. Ed. 343 (1848); *Filer & Stowell Co. v. Rainey*, 120 F. 718 (1903); *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106 (1871); *Thorburn v. Gates*, 103 Misc. 292, 171 N. Y. S. 198 (1918), affirmed in 184 App. Div. 443, 171 N. Y. S. 568 (1918).

³¹ *Kirkbride v. Van Note*, 275 N. Y. 244, 9 N. E. (2d) 852 (1937). See also 24 C. J., *Executors and Administrators*, § 2721; 34 C. J. S., *Executors and Administrators*, § 1013(3).

³² *Sylvania Industrial Corp. v. Lillienfeld*, 132 F. (2d) 887, 145 A. L. R. 612 (1943); *In re Paine's Estate*, 128 Fla. 151, 174 So. 430 (1937); *Fugate v. Moore*, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926 (1890).

against the foreign executor on a counterclaim.³³ As a form of consent jurisdiction is recognized in such cases, there is little support for the third objection advanced in the Knoop case.

By contrast, both courts concerned in the instant cases predicated the validity of the statutory amendments in question upon a reasonable exercise of the police power, sanctioned by *Hess v. Pawloski*.³⁴ When the limiting phraseology of the amendments, the fundamental purpose of such service statutes, and the valid exercise of the police power are weighed against the frail bases of the negative constitutional arguments heretofore considered, it would appear that the decisions achieved in the instant cases were justified. In addition to what might be termed legal reasons for validity, practical reasons also exist. In the first place, if the deceased non-resident motorist carried automobile liability insurance, the assets of the foreign estate would be protected up to the limits of the policy beside being spared the cost of defending the suit. If the policy or the insurance company should be within the state where the injury arose, there would be little sense in directing the injured person to sue elsewhere.³⁵ Secondly, the expense and inconvenience involved, if the injured person is to be forced to litigate in the state of the executor's appointment, might well deter the bringing of suits which ought to be brought. In the third place, there is no logical reason why the beneficial remedy provided by service statutes of the character in question should be made to depend on the accident of survival in a day when, too frequently, the very acts which give rise to a cause for suit also serve to terminate life.

It must be emphasized, however, that the statutes of a majority of states are incomplete for lack of any amendment similar to the one here discussed. In those jurisdictions, the legislatures should act to protect the remedy. If they do so act, the legislation could readily be sustained by courts willing to take a forthright attitude on the point.

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³³ *Lawrence v. Nelson*, 143 U. S. 215, 12 S. Ct. 440, 36 L. Ed. 130 (1892); *Lackner v. McKechney*, 252 F. 403 (1918); *Palm v. Howard*, 31 Ky. 316, 102 S. W. 267 (1907). See also annotation in 77 A. L. R. 249 (1932).

³⁴ 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). The New York Court of Appeals, in particular, held that consent jurisdiction, as manifested by the amendment, was also possible.

³⁵ See note in 33 *Corn. L. Q.* 276 (1947). In *Furst v. Brady*, 375 Ill. 425, 31 N. E. (2d) 606 (1940), noted in 19 *CHICAGO-KENT LAW REVIEW* 293, an ancillary administrator was allowed to defend the action against the non-resident motorist's estate when the court treated the insurance policy as an asset within the state where the action was brought. This approach, however, offers only a partial solution. It does not cover those cases where the policy is not present and the insurance company is not licensed to do business in the state where the accident occurred. That was the precise situation facing the court in *Leighton v. Roper*, cited in note 1, ante.

BAILMENT—CARE AND USE OF PROPERTY, AND NEGLIGENCE OF BAILEE—WHETHER OR NOT A CONSIGNEE, IN THE ABSENCE OF INSTRUCTION FROM THE CONSIGNOR, HAS A DUTY TO DECLARE THE FULL VALUE OF GOODS RETURNED TO THE CONSIGNOR VIA CARRIER—A novel decision recently handed down by the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Kassvan v. Thomas F. McElroy Company*,¹ concerned the duty of a consignee to declare the full value of goods being returned by carrier to the consignor. The defendant therein, a Chicago furrier, had requested the plaintiff, a New York furrier, to ship some furs on approval. Plaintiff shipped some \$4,000 worth of furs to defendant via Railway Express at a declared value of \$400, being approximately ten per cent. of their true value, in conformity with an insurance policy held by plaintiff.² Plaintiff made no offer to pay charges on the return shipment nor were any instructions given concerning the return of the furs, although this was the first transaction of its type entered into between the parties. The defendant, finding the furs were not of the type desired, returned the shipment the same day at a declared value of \$50, inasmuch as a full declaration of value would have involved an extra shipping charge of several dollars. The furs were lost while en route to the plaintiff and the \$50 value so declared served to limit the carrier's liability for the loss. Plaintiff thereupon instituted an action based on the theory that defendant had been negligent in fixing the reduced valuation rather than a full valuation on the merchandise. The trial court agreed with plaintiff and awarded a judgment for the full value of the furs less the amount collected from the carrier. The Circuit Court of Appeals reversed and remanded with an instruction that the complaint be dismissed.

The relationship developed between the parties was obviously one of a bailment for mutual benefit, hence, in attacking this problem, it is reasonable to start with the basic assumption that, where goods are sent by one to another, the bailee-consignee must use reasonable care both in safeguarding and in returning the goods.³ The problem, therefore, becomes one as to precisely what would, in a factual situation of this character, constitute the exercise of a reasonable degree of care on the part of the bailee-consignee.

Cases involving the consignee's duty to value properly the goods when depositing them with a carrier for return to the consignor have not arisen

¹ 179 F. (2d) 97 (1950).

² The insurance policy stipulated that: "It is understood and agreed that in respect to shipments by Railway Express Agency, the assured will declare to the Express Agency a valuation of 10% of the amount of each shipment." See 179 F. (2d) 97 at 98.

³ *Crescent Bed Co. v. Jonas*, 206 Cal. 94, 273 P. 28 (1928).

too frequently. Those which have arisen have been decided largely on the basis of the particular facts involved so that very little law, in the form of general principles, can be said to have evolved from them. Courts have, however, when deciding this issue, placed emphasis on one or more of four elements. Those elements are (1) the valuation placed upon the goods by the consignor at the time of the original shipment,⁴ (2) whether the consignor placed such valuation upon the goods of his own volition or at the request of the consignee,⁵ (3) the prior course of dealing between the parties insofar as it might tend to establish a common practice,⁶ and (4) the instructions, if any, given by the consignor in regard to the return of the goods.⁷

Illustration of the importance of the valuation placed upon the goods by the bailor-consignor is provided by two decisions. In the case of *Louisville Woolen Mills v. Britt*,⁸ the consignee received no notice that any valuation had been placed on the goods by the consignor when he shipped them. The consignee returned the goods at a nominal valuation and they were lost. When reversing a judgment for the plaintiff-consignor, the court held that, as the consignee had never been informed as to any valuation placed upon the goods by the consignor, the consignee was in no position to make an exact declaration of their value, as a consequence of which he was not liable for their undervaluation.⁹ It is certainly logical to say that a consignee should not be deemed negligent in failing to place a full valuation upon goods when he lacks any notice that the consignor has placed such a valuation thereon at the time of the original shipment. In *Whitehouse Bros. v. S. H. Abbott & Son*,¹⁰ the plaintiff-consignor sent the goods by express at a nominal valuation of \$50 and instructed the defendant to value them at \$50 if they were returned the same way. Despite the fact that the defendant-consignee returned the goods by parcel post at a \$25 valuation, the court held that he was not negligent because, if plaintiff had deemed the valuation to be placed on the goods a matter of importance, the plaintiff would not have directed that the same be sent at the

⁴ *Newman v. Clayton F. Summy Co.*, 133 F. (2d) 465 (1942); *Louisville Woolen Mills v. Britt*, 90 Pa. Super. 517 (1927); *Whitehouse Bros. v. S. H. Abbott & Son*, 228 S. W. 599 (Tex. Civ. App., 1921).

⁵ *Rich's, Inc. v. Empire Gold Buying Service, Inc.*, 69 Ga. App. 279, 25 S. E. (2d) 88 (1943); *Graubart v. Posner*, 188 Misc. 722, 68 N. Y. S. (2d) 910 (1947).

⁶ *Northern Assur. Co., Ltd. v. Wolk*, 182 Misc. 112, 49 N. Y. S. (2d) 754 (1944), affirmed without opinion in 269 App. Div. 768, 55 N. Y. S. (2d) 389 (1945).

⁷ *R. C. Read & Co. v. Barnes*, 252 S. W. 224 (Tex. Civ. App., 1923); *Whitehouse Bros. v. S. H. Abbott & Son*, 228 S. W. 599 (Tex. Civ. App., 1921).

⁸ 90 Pa. Super. 517 (1927).

⁹ 90 Pa. Super. 517 at 519.

¹⁰ 228 S. W. 599 (Tex. Civ. App., 1921).

nominal valuation.¹¹ Although the consignee had disregarded instructions to some extent, he had placed approximately the same valuation on the goods as had the consignor and it was the latter who had made the first undervaluation.

The second element of significance in matters of this kind is adequately depicted in the cases of *Graubart v. Posner*¹² and *Rich's, Inc. v. Empire Gold Buying Service, Inc.*¹³ In the first of these cases, evidence which tended to prove that the original nominal valuation by the plaintiff-consignor was placed upon the goods at the request of the defendant-consignee was regarded as immaterial by the trial court. A new trial was ordered to determine whether the consignor had, in fact, placed the original nominal valuation of its own volition or because of the request of the consignee. The court held that if the former was true, judgment should be for the consignee as the consignor would then be deemed to have authorized such nominal valuation. On the other hand, if the latter was true, judgment should be for the consignor. In the second case, the original undervaluation had been requested by the consignee upon his order blank. The decision was properly awarded to the plaintiff-consignor on the ground that it would be manifestly unjust to allow the consignee to avoid liability for the undervaluation when it had requested that original undervaluation. To hold otherwise, the court indicated, would allow the consignee, by his own action, to destroy the consignor's remedy against the carrier.

The third element, that is the problem of whether the consignee is negligent in undervaluing the goods when the two parties have consistently undervalued the goods in the course of many previous dealings, was presented in the case of *Northern Assurance Company, Limited v. Wolk*.¹⁴ There, both plaintiff-consignor and defendant-consignee had valued the goods at a mere \$50. They were lost in the course of a return shipment by the consignee. Negligence was said to be lacking in the doing of that which, in fact, these business men had been doing successfully for many years. It can, therefore, safely be said that, where both of the parties have consistently undervalued the goods and the consignor has never objected to the practice, the consignor has impliedly authorized the procedure to be followed. Obvious unfairness would exist in holding the consignee liable for doing that which he had apparently been authorized to do.

Absence of instruction regarding the manner of return can be noted

¹¹ See 228 S. W. 599 at 601.

¹² 188 Misc. 722, 68 N. Y. S. (2d) 910 (1947), noted in 32 Minn. L. Rev. 293.

¹³ 69 Ga. App. 279, 25 S. E. (2d) 88 (1943).

¹⁴ 182 Misc. 112, 49 N. Y. S. (2d) 754 (1944), affirmed without opinion in 269 App. Div. 768, 55 N. Y. S. (2d) 389 (1945).

in the case of *R. C. Read & Company v. Barnes*.¹⁵ The consignor there involved had sent goods by express at a nominal valuation of \$50. They were lost while being returned by the consignee via parcel post uninsured. It was held that, there being no instruction or agreement as to the manner of return, the defendant-consignee was not negligent in the manner in which he returned the goods. Here again it may be noted that the consignor had placed only a nominal valuation on the goods in the original shipment. As no specific instruction was given to the consignee concerning the manner of return, the court had to determine whether the manner pursued amounted to a careless handling of the property. Some reliance was placed on the decision in *Whitehouse Bros. v. S. H. Abbott & Son*,¹⁶ previously noted, wherein a low valuation had been fixed by the consignee despite instruction, but the outcome of the case was in favor of the consignee. It might be said, from these holdings, that the valuation placed upon the goods by the consignor at the time of the original shipment is more important, in determining the consignee's duty of valuation, than is the absence or presence of any certain instruction on the point. May it not be that the consignor's conduct operates as a tacit instruction to the consignee to do likewise?

A closely analogous situation is to be found in the duty of valuation that is placed upon a bailee who has received the goods by personal delivery from the bailor and has agreed to return them. If the bailee, under a duty to return, should for some reason decide to send the goods by carrier, rather than to deliver personally to the bailor, the bailee then becomes the consignor. Under such circumstance, it is not unreasonable for a court to hold that the bailee would be negligent if he undervalued the goods at the time of placing them with the carrier.¹⁷ It must be remembered that the bailee then makes the initial move in the situation and lacks any similar act of the bailor to follow.

Returning to the instant case, attention is directed to the fact that the court therein concerned believed that to require the consignee-defendant to place a full valuation upon the furs at the time of the return shipment, when the consignor-plaintiff had not done so in the original shipment, would be to require the defendant to exercise a higher degree of care in respect to the plaintiff's property than the plaintiff had been willing to exercise in the first instance.¹⁸ Upon a review of all of the cases, therefore, it would seem that the result achieved would be the only logical one to be

¹⁵ 252 S. W. 224 (Tex. Civ. App., 1923).

¹⁶ 228 S. W. 601 (Tex. Civ. App., 1921).

¹⁷ *Schlesinger v. Lennon*, 145 N. Y. S. 929 (1914); *Rhind v. Stake*, 28 Misc. 177, 59 N. Y. S. 42 (1899).

¹⁸ 179 F. (2d) 97 at 100.

attained. Where the consignee has been held liable, some aspect of fault on his part has been present. In the instant case, the consignee did nothing wrong. He only undervalued the goods as the consignor had done before him.¹⁹ He had been given no specific instruction as to how to value the goods. He had not requested the consignor to undervalue the property at the time of the original shipment. He had been furnished with no guide from any prior course of dealing between the parties which could be said to have established a practice for either full valuation or undervaluation. In the light of these facts, the court was right in placing the risk of loss on the person who took the initiative in the undervaluation.

J. KIRKLAND

CARRIERS—CARRIAGE OF GOODS—EFFECT OF FAILURE OF SHIPPER TO FURNISH CARRIER WITH WRITTEN NOTICE OF DAMAGE TO GOODS WITHIN TIME FIXED BY TERMS OF BILL OF LADING—Two recent cases arising within the state of Illinois deal with the problem of the effect to be given to a failure on the part of the shipper to give written notice to the carrier, pursuant to provisions contained in the bill of lading, of damage done to goods shipped. In the first of these cases, that of *Hopper Paper Company v. Baltimore & Ohio Railroad Company*,¹ the plaintiff, on August 10th, delivered a carload of paper to defendant for carriage by rail. A railway wreck, involving two of defendant's trains, led to an almost total destruction of the carload of paper.² On August 18th, the carrier advised the consignor by wire that the paper had been destroyed. On the following July 30th, defendant received a letter from the consignor to which was attached a written claim for the loss. In a suit filed in the United States District Court following such demand, the defendant asserted, by way of defense, that no claim in writing had been received by it within nine months after failure to make delivery, as was required both by statute³ and by the uniform bill of lading there utilized. Judgment in the lower court, however, was given for the plaintiff and, on appeal, the decision was affirmed by the Court of Appeals for the Seventh Circuit.

¹⁹ It is true that the valuation fixed by the consignee was \$350 smaller than the one chosen by the consignor and required by the insurance policy. The consignor's action was predicated on the assumption that the consignee was negligent in not placing a full valuation on the goods. An alternative count, based on a failure on the part of the consignee to follow the valuation fixed by the consignor, might have succeeded as the difference between the figures was substantial, much more so than the difference noted in *Whitehouse Bros. v. S. H. Abbott & Son*, 228 S. W. 599 (Tex. Civ. App., 1921).

¹ 178 F. (2d) 179 (1949).

² Salvage from the wreck was sold by the defendant, without the plaintiff's knowledge, but no accounting was made of the proceeds.

³ 49 U. S. C. A. § 20(11).

In the second case, that of *Berg v. Schreiber*,⁴ the plaintiff had purchased a shipment of jeep parts and had arranged to have the same delivered via the defendant's truck line. The defendant was a common carrier operating under a tariff rate and a uniform bill of lading approved by the Interstate Commerce Commission. Upon delivery, plaintiff discovered the presence of damage and so notified the defendant. An insurance adjuster, acting on behalf of the defendant, made a list of the damaged parts in conjunction with one of the plaintiff's men, which list was given to the plaintiff with a request that plaintiff file a written claim of loss based thereon. No such written claim was filed but suit was instituted to recover the amount of the damage suffered. Judgment thereon in the trial court favored the plaintiff, but was reversed in the Appellate Court for the First District on the basis of a failure to file a claim in writing within nine months.⁵ After granting leave to appeal, the Illinois Supreme Court agreed with the reversal and ordered the suit be dismissed.

Before further analysis of the problem is made, it might be well to note that the federal court, in the first case, was of the opinion that the statute involved was not a limitation law enacted for the special protection of interstate carriers but was, rather, a statute designed to provide carriers with such knowledge and information as would enable them to make prompt investigation.⁶ It believed, therefore, that a failure to give written notice of a claim for damage or loss, in accordance with the stipulation in the shipping contract, could either be excused or be disregarded where the carrier had, or was chargeable with, actual knowledge of all of the conditions and circumstances.⁷ The Illinois Supreme Court, on the other hand, relying on parts of the same precedent cited by the federal court,⁸ reached the conclusion that the parties could not

⁴ 405 Ill. 528, 92 N. E. (2d) (1950), affirming 337 Ill. App. 477, 86 N. E. (2d) 125 (1949). Tuohy, J., dissented to the opinion in the Appellate Court. It is understood that a petition for a writ of certiorari is pending before the United States Supreme Court.

⁵ No bill of lading had been used, but a uniform bill had been adopted and placed on file with the Interstate Commerce Commission.

⁶ *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1915).

⁷ In general, see 13 C. J. S., Carriers, § 240(a), p. 487.

⁸ *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1915). As the Blish case appears to be one of leading significance, it might be well to set out the facts thereof. The plaintiff there had shipped a carload of flour. The consignee found the flour to be rancid and returned the same to the carrier which wired plaintiff for instructions. Several telegrams passed between the parties, in the last of which plaintiff made claim for the value of the entire car. A judgment for plaintiff was affirmed on the basis that the telegrams between the parties, being properly identified to link up with the particular shipment, accomplished the statutory objective of providing reasonable notice.

waive the terms of the contract, so that the provisions of the uniform bill of lading controlled the outcome of the case. The seeming inconsistency in the two decisions produces a question as to whether or not the two cases are diametric opposites or whether there is some basis for distinction between them.

At common law, carriers were held to strict accountability for damage done to goods or for failure to deliver the same, an attitude based not so much upon contractual terms as on a public policy designed for the protection of the shipper. In 1915, Congress enacted the Carmack amendment to the Hepburn Act of 1906,⁹ one designed to abrogate the common law doctrine by putting in its place certain uniform statutory rules as to liability growing out of a breach of duty or default on the part of the carrier¹⁰ and also to supersede special regulations and policies upon the subject which had grown up in certain of the states or by contract.¹¹ While the statute purported to forbid the carrier from exacting any more drastic terms designed to limit or lessen its liability than those enumerated, a practice developed, through the use of a uniform bill of lading, suitably worded, of turning those limitations into stipulations binding on the shipper.¹² By so doing, a question developed as to whether or not these provisions became so absolute that they could not, under any cir-

⁹ Section 20(11) of 34 Stat. 593 (June 29, 1906), was amended on March 4, 1915, and again amended on August 9, 1916, by what is commonly known as the second Cummins Amendment. Subsequent amendments occurred on Feb. 28, 1920; July 3, 1926; March 4, 1927; April 23, 1920; and Sept. 18, 1940. The statute presently reads: "That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice." See 49 U. S. C. A. § 20(11). It will be noted that the only requirement for a *written* notice, under this provision, is one imposed on the carrier, not the shipper.

¹⁰ The Congressional purpose is explained in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1912). See also *Atlantic Coast Line R. Co. v. Sandlin*, 75 Fla. 539, 78 So. 667 (1918); *Missouri O. & G. Ry. Co. v. French*, 52 Okla. 222, 152 P. 591 (1915).

¹¹ See *New York, P. & N. R. Co. v. Peninsular Produce Exch. of Md.*, 240 U. S. 34, 36 S. Ct. 230, 60 L. Ed. 511 (1915); *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 35 S. Ct. 715, 59 L. Ed. 1137 (1915); *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868 (1913); *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 34 S. Ct. 380, 58 L. Ed. 703 (1913).

¹² See, for example, the provision set out in the opinion in *Berg v. Schreiber*, 405 Ill. 528 at 531, 92 N. E. (2d) 88 at 89 (1950). The bill there, in part, read: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose lines the loss, damage, injury or delay occurred, within nine months after delivery of the property . . . or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. . . . Where claims are not filed . . . in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

cumstance, be waived or ignored, so as to prevent the possibility of discrimination between shippers.

In that connection, courts are generally agreed that where no notice of any sort has been given to the carrier, who is, as a consequence, unaware of the damage which might have been done, no waiver or estoppel will be considered.¹³ This strict view is proper, for abuse could readily creep in if clear contract terms are to be utterly disregarded. On the other hand, where notice of a sort has reached the carrier, but it is claimed to be inadequate, two views have been developed as to the necessity for strict compliance. Courts are inclined to say, in these situations, that the issue is one of a practical problem to be dealt with in a practical way, but they are not in agreement concerning the sufficiency of the practical measures used in particular cases. Under one line of development, if there has been a substantial compliance with the purpose to be subserved by the giving of notice, the necessity for formal written notice will be excused, but the compliance must be "substantial."¹⁴ In direct contrast, other courts have held that if written notice is required by the bill of lading, oral notice will not suffice even though it would be sufficient if such requirement had not been imposed.¹⁵

Illustrative of the second of these attitudes is the case of *Southern Pacific Company v. Stewart*¹⁶ in which plaintiff's shipment of cows had been destroyed in transit and while in the defendant's pens. Written notice was supposed to be given but none was furnished. The defendant's agents, however, had clear actual knowledge of the facts, had shown concern over the cattle during the trip, and had even been negotiating for a settlement of plaintiff's claim. The court, apparently, could see nothing in the case but the requirement that the claim should be made in writing, for which reason it refused to make allowance for any waiver or to consider the possibility of compliance in the form of oral conversations. A similar result was attained in *Chicago, St. Paul, Minneapolis*

¹³ *Chicago, R. I. & P. Ry. Co. v. McElreath*, 69 Okla. 9, 169 P. 628, L. R. A. 1918C 425 (1917).

¹⁴ *Kidwell v. Oregon Short Line R. Co.*, 208 F. 1 (1913); *Cohen v. Southern Ry. Co.*, 358 Ill. 532, 193 N. E. 480 (1934); *Waxelbaum v. Southern Ry. Co.*, 168 Ill. App. 66 (1912); *E. H. Emery Co. v. Wabash R. Co.*, 183 Iowa 687, 166 N. W. 600 (1918); *Cudahy Packing Co. v. Bixley*, 199 Mo. App. 589, 205 S. W. 865 (1918); *Bond Stores v. Overland Package Freight Service*, 171 Misc. 135, 13 N. Y. S. (2d) 928 (1939); *Union P. Ry. Co. v. Pacific Market Co.*, 27 Wyo. 501, 200 P. 108 (1921).

¹⁵ *Manby v. Union P. Ry. Co.*, 10 F. (2d) 327 (1926); *Lewis v. Roth*, 328 Ill. App. 571, 66 N. E. (2d) 510 (1946); *Louisville & N. R. Co. v. Patton*, 288 Ky. 450, 156 S. W. (2d) 474 (1941); *Carbie Mfg. Co. v. Western Exp. Co.*, 149 Minn. 467, 184 N. W. 35 (1921); *Mt. Arbour Nurseries v. American R. Exp. Co.*, 221 Mo. App. 241, 300 S. W. 1051 (1928); *Schaff v. Ike Exstein & Bro.*, 270 S. W. 589 (Tex. Civ. App., 1925).

¹⁶ 248 U. S. 446, 39 S. Ct. 139, 63 L. Ed. 350 (1919).

& *Omaha Railway Company v. Kileen*¹⁷ where the carrier sued to collect freight charges and the shipper filed a counterclaim for damage done to the goods. The counterclaim was resisted on the basis that no notice had been given within nine months and the court agreed even though the carrier had offered to adjust the claim and one of its adjusters had inspected the cars. It was there held that the clause in the bill of lading requiring written notice was not against public policy, was one which, generally, could not be waived because of the possibility of abuse, and that the carrier could not be estopped from asserting non-compliance as a defense, otherwise the door would be opened to the possibility of widespread discrimination.

Aside from the question as to whether the statutory provisions were not more nearly aimed at discrimination by carriers against shippers, rather than in favor of the latter, it might be said, in answer to holdings of the character mentioned, that the fundamental reason for a stipulation requiring written notice of a claim for damages is not one to provide a carrier with an escape from a just liability, but to convey reasonable information to it that a shipment has been damaged, so as to give it a chance to examine and determine the extent of the injury.¹⁸ That idea is concisely expressed in the opinion in the first of the instant cases.¹⁹ The court there said: "Concededly, one of the principal evils at which the Act was aimed was discrimination by carriers. . . . But permitting knowledge to supply the written notice is not discrimination, nor is it a preference in favor of a particular shipper at the expense of the others. *It is a mode of proof, applicable alike to all railroads and in favor of all shippers.*"²⁰ It, therefore, permitted the presence of actual knowledge to override the failure to furnish written notice.

If the stipulation as to notice is "addressed to a practical exigency and is to be construed in a practical way,"²¹ and if it is not "to be the spirit or intention of the time-limiting clause that any formality or technical exactness be required, but that it is merely intended to give

¹⁷ 243 Wis. 161, 9 N. W. (2d) 616 (1943). See also *L. M. Kirkpatrick Co. v. I. C. Ry. Co.*, 190 Miss. 157, 195 So. 692, 135 A. L. R. 607 (1940). In the Illinois case of *Lewis v. Roth*, 328 Ill. App. 571, 66 N. E. (2d) 510 (1946), the court likewise held that no waiver of the provision could be considered.

¹⁸ *St. Louis, I. M. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917 (1916); *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1915); *Minot Beverage Co. v. Minneapolis & St. L. R. Co.*, 65 F. Supp. 293 (1946); *Cohen v. Southern Ry. Co.*, 358 Ill. 532, 193 N. E. 480 (1934); *Babbitt v. Grand Trunk Western R. Co.*, 285 Ill. 267, 120 N. E. 803 (1918).

¹⁹ *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F. (2d) 179 (1949).

²⁰ 178 F. (2d) 179 at 182.

²¹ *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190 at 198, 36 S. Ct. 541, 60 L. Ed. 948 at 953.

reasonable notice to the railroad company while the facts are still fresh, in order to permit a reasonable investigation and examination of the claim,"²² there is every reason why the extreme formalism observed in the cases mentioned, and insisted upon by the Illinois Supreme Court, should be rejected. Three fairly recent cases, in addition to the decision in the Hopper Paper Company case, seem to suggest a trend away from that view,²³ a trend which the Illinois court does not seem to have noticed²⁴ but one which ought to be followed where the carrier is conscious of the harm which has been inflicted.

M. J. GLINK

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER AN EMPLOYER'S PROMISE TO PAY HIS EMPLOYEES WHILE THEY WERE IN THE ARMED SERVICES BECAME A BINDING LEGAL OBLIGATION WHEN AN EMPLOYEE, RELYING UPON THE PROMISE, REMAINED ON THE JOB UNTIL HE ENTERED THE ARMED FORCES—The Superior Court of Pennsylvania recently considered and decided the problem expressed in the foregoing title when it passed on the case of *Mickshaw v. Coca Cola Bottling Company, Incorporated, of Sharon, Pennsylvania*.¹ The defendant corporation had publicly announced, at the start of conscription of men prior to World War II, that it would pay its employees the difference between the pay that they would receive while in the armed forces and the average monthly wage which they had received at the bottling plant before they were drafted. The plaintiff remained in the employ of the defendant for approximately two years before he received a notice to report for a physical examination prior to induction. He quickly joined the Coast Guard and spent thirty-seven months in active service. Upon his return, he resumed his job with the defendant and subsequently brought suit for the difference in wages as promised. The Pennsylvania court, after stating that it could find no cases in this country directly in point, affirmed a judgment of the trial court in favor of the plaintiff. In arriving at that holding, the court found that consideration for the promise was present. It said that it could take judicial notice of the fact that many new war industries sprang up in the early days of World War II and that there was great opportunity for the average worker to get a higher wage in a war production plant. By

²² *Cohen v. Southern Ry. Co.*, 358 Ill. 532 at 540, 193 N. E. 480 at 483.

²³ *Minot Beverage Co. v. Minneapolis & St. L. R. Co.*, 65 F. Supp. 293 (1946); *Louisville & N. R. Co. v. Patton*, 288 Ky. 450, 156 S. W. (2d) 474 (1941); *Indiana Harbor Belt R. Co. v. Alpirin*, 139 Neb. 14, 296 N. W. 158 (1941).

²⁴ The holding in *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F. (2d) 179 (1949), does not seem to have been brought to the attention of the Illinois Supreme Court at the hearing of the appeal in *Berg v. Schreiber*.

¹ 166 Pa. Super. 148, 70 A. (2d) 467 (1950).

remaining with the defendant company in reliance upon its promise, the plaintiff was said to have forborne a valuable right. As the defendant was said to have bargained for this forbearance and, in return, had secured the benefit of good will in the community, of better employee morale and loyalty, and of opportunity to keep operating during a period of scarcity of labor, the circle of consideration was said to be complete.

Having thus found consideration to be present, the Pennsylvania court went on to cite two English decisions to lend support for the position taken.² The two cited cases, along with a third,³ arose under somewhat similar circumstances during the first World War. They are not precisely the same, however, for the act there requested by the promisor was different. In each instance, the offer appears to have been made in patriotic haste to encourage voluntary enlistment in His Majesty's service rather than with an eye toward keeping men on the job. The consideration found to support those promises lay in the act of enlisting, even though, in one instance, the plaintiff had enlisted counter to the wishes of his managers, who wanted him to stay on the job for a while longer. It was said that an offer had been communicated to the employees, pursuant to a corporate resolution, which, being accepted by the plaintiff's act of enlisting, became binding upon the defendant and incapable of unilateral alteration.

Although the court in the principal case cited only English decisions, several excellent analogous situations dealt with in the United States would have added support to the court's finding, situations growing out of offers to pay extra benefits to employees over and above the regular wage paid for working. Those that primarily warrant consideration are the bonus, the pension, and the death benefit cases. Employers who have made such offers, and have later refused to perform, have defended against suits brought on such offers on the proposition that the offers concerned were for the payment of gratuities. Courts have, therefore, been faced with the problem of finding a binding consideration in order to be able to enforce such promises against the offerors.⁴

The first of these analogous examples which seems most appropriate to the instant case is the bonus situation. From a practical standpoint, it would be possible to say that what the ex-serviceman in the present case received was an offer of a bonus providing he would remain on the job until he was called into service. Where an employer, by the offer of a bonus, has sought to reserve the continuous faithful service of those of his

² *Davies v. Rhonda District Urban Council*, 87 L. J., K. B. 166 (1917); *Budgett v. Stratford Cooperative and Industrial Society, Ltd.*, 32 Times Law R. 378 (1916).

³ *Shipton v. Cardiff Corporation*, 87 L. J., K. B. 51, 116 L. T. 687, 1917 W. N. 175 (1917).

⁴ 56 C. J. S., *Master and Servant*, § 169, p. 828.

employees who are not bound by an employment contract for a definite term, courts have had little trouble in finding consideration present wherever the employee has relied on the promise and has continued to work for the promisor.⁵ A more difficult question is presented when the employee, to whom the offer of a bonus payable at the end of a certain period is made, is already under a binding contract to work for that period. As the employee is already under a pre-existing obligation to perform, he can hardly be said to give any consideration, hence the offer would be for a mere gratuity without binding effect.⁶

Akin to the bonus problem, is the pension question with its query as to whether or not continued service in reliance upon the offer of a pension amounts to good consideration to enforce such an offer. Pension promises of this type are generally held to amount to enforceable contracts.⁷ Perhaps the leading case in this field is that of *Schofield v. Zion's Co-operative Mercantile Institution*.⁸ The defendant company there set up a pension plan for its employees with the stated purpose to promote the welfare of the officers and employees of the institution and thereby to encourage long and faithful service. Retirement age under the plan was set at sixty-five and the pension rate was to be based on the salary and length of service, but the plan specifically provided that no employee was to obtain any legal right thereunder. After the plaintiffs had been pensioned at the rate originally provided, the defendant tried to reduce the monthly allotment. Plaintiffs' claim to a vested right to the original amount was met by defendant's

⁵ *Scott v. Duthie*, 125 Wash. 470, 216 P. 853, 28 A. L. R. 328 (1923). The defendant therein made the following offer: "For the purpose of inducing general department foremen of this company to continue their work with this company and to refrain from accepting work elsewhere until this company shall complete ships which it has contracted to build for the United States, J. F. Duthie & Co. promises the general department foremen now in its employment, that upon completion of the contracts, the company will divide one-half million dollars among the foremen who continue till completion of the contract."

⁶ *Hilde v. International Harvester Co. of America*, 166 Minn. 259, 207 N. W. 617 (1926), and annotation in 28 A. L. R. 331. But see contra *Black v. W. S. Tyler Co.*, 12 Ohio App. 27 (1917), and *Andrews v. Bellman*, 50 S. D. 21, 208 N. W. 175 (1926), where the court indicated that the employee would have stayed on the job anyway even if a bonus had not been offered, hence did nothing additional to form the basis of consideration. In the *Black* case, the employee was discharged because his department was discontinued before the dividend became payable. For a complete discussion on the point as to whether there is consideration for a change in the terms of employment, see 158 A. L. R. 231.

⁷ An extensive annotation in 96 A. L. R. 1093 covers the cases. In *Cowles v. Morris & Co.*, 330 Ill. 1, 161 N. E. 150 (1928), the court assumed that a pension scheme constituted an enforceable contract but held that the promisor was not obligated to stay in business until all pensions were fully paid.

⁸ 85 Utah 281, 39 P. (2d) 342, 96 A. L. R. 1083 (1934), noted in 34 Mich. L. Rev. 420. See also *Hunter v. Sparling*, 87 Cal. App. (2d) 711, 197 P. (2d) 807 (1948), in which the court stated that it is the general rule throughout the country that continued service after knowledge of a pension plan constitutes ample consideration for the employer's promise to pay.

assertion that there was no contractual relationship but only an offer for a mere gift which could be changed at will. The court said: "Clearly, such facts, circumstances, and history do not evidence an offer of a gratuity, but an offer to pay certain sums when plaintiffs shall have completely performed a certain set of acts, offered as an inducement to them to perform the acts, and given as a consideration for their complete performance. When the plaintiffs had completely performed their obligation and the board of pensions had determined their right to pension, made allowance thereof, and retired them, the contract was complete and binding, and not subject to modification by the company without consent of plaintiffs."⁹

Along with the bonus and pension situations, is another type of employee benefit plan which provides helpful analogy for the instant case. An employer may offer a death benefit plan by which he promises to pay the employee's designated beneficiary a fixed sum upon the death of the employee provided the employee shall remain in the service of the employer. Foremost among the cases involving that issue is *Tilbert v. Eagle Lock Company*.¹⁰ The corporate defendant there issued certificates to its employees which certificates were payable to the named beneficiary upon the death of the employee. The motive for issuance, as advertised, was to maintain efficiency and loyalty on the part of the employees but, by express wording, the certificates were not to confer any legal right. The plaintiff's husband, an employee, died a few hours before a notice of revocation of the plan was published. In a suit that followed upon refusal to honor the certificate, the company defended on the ground of an absence of consideration. Judgment was rendered for the beneficiary, however, when the court held that, regardless of the wording of the certificate, the same amounted to a promise which became binding when accepted inasmuch as the deceased employee, by forbearing the right to terminate his employment, had conferred a benefit upon the corporate defendant. It may, in fact, be said that courts appear to have little trouble in finding an executed consideration for the unilateral contracts involved in such cases despite the purported disclaimer of legal liability which typically accompanies the offer.¹¹

In all of the foregoing analogies, the courts have found that the servant or employee gave up a definite right by refraining from seeking employment elsewhere while feeling confident that each would receive additional remuneration for remaining on the job. It is, of course, hornbook law that either a benefit to the promisor or a detriment to the promisee

⁹ 85 Utah 281 at 288, 39 P. (2d) 342 at 345.

¹⁰ 116 Conn. 357, 165 A. 205 (1933).

¹¹ See, for example, *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N. E. 697 (1935), noted in 49 Harv. L. Rev. 148.

will be sufficient consideration for a contract,¹² hence the consideration is clearly sufficient where there is both a benefit to the promisor as well as a detriment to the promisee. That there was a detriment to the workman in the instant case when he gave up his right to find employment under better economic conditions cannot be doubted. He gave up a very valuable right when, under the conditions of wartime inflation, he remained at a bottling plant in a non-essential industry for only an average salary. He not only passed up the possibility of a higher paying job but also the chance at draft deferment as an employee in a war plant. Along with that detriment to the promisee, there was also a distinct benefit to the promisor in the fact that the corporation was getting what it desired, in return, by way of advertising and satisfactory service. As it bargained for this continued service, it is not unreasonable to suppose that what it received as a consequence of its undertaking must have been regarded as beneficial to the corporation.

There is also the possibility of going a step beyond the concept of acceptance of a unilateral offer, by act and forbearance, and finding a binding contract by making use of the doctrine of promissory estoppel.¹³ In *Hunter v. Sparling*,¹⁴ for example, the California Appellate Court used that doctrine as an alternative ground upon which to enforce a pension plan, and a lower court in Pennsylvania has done the same thing.¹⁵ Even though that doctrine seems to be firmly established in the law of Pennsylvania,¹⁶ the court in the instant case rightly based its decision on a consideration to be found in a bargained-for forbearance. Promissory estoppel, by contrast, is generally applicable to cases wherein one has suffered a detriment in reliance upon an unbargained-for promise.¹⁷

It may occasion some surprise that there have not been more cases in the nature of this one when it is remembered that no small number of civilians left their jobs to enter the armed services. Many firms undoubtedly made good on their promises. If some did not, it is possible that

¹² 12 Am. Jur., Contracts, § 79, p. 570.

¹³ Restatement, Contracts, Vol. 1, § 90, declares: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

¹⁴ 87 Cal. App. (2d) 711, 197 P. (2d) 807 (1948).

¹⁵ *Langner v. Superior Steel Corp.*, 105 Pa. Super. 579, 161 A. 571 (1932), reversed on other grounds in 318 Pa. 490, 178 A. 490 (1935). But compare with *Umshler v. Umshler*, 332 Ill. App. 494, 76 N. E. (2d) 231 (1947), and *Shear Co. v. Harrington*, 266 S. W. 554 (Tex. Civ. App., 1924).

¹⁶ In addition to the case cited in note 15, ante, see *Fried v. Fisher*, 328 Pa. 497, 196 A. 39, 115 A. L. R. 147 (1938).

¹⁷ Snyder, "Promissory Estoppel in New York," 15 Brooklyn L. Rev. 27 (1949).

returning servicemen did not wish to jeopardize steady jobs by bringing actions to recover the benefits offered. Many employers, of course, did not have to resort to the making of bonus offers as the government saw to it that essential man-power was kept in vital work until needed elsewhere. It is comforting to know, however, that established legal doctrines are adequate to deal with problems of this character should a recurrence thereof arise in the future.

J. A. STANEK

STATUTES—PLEADING AND EVIDENCE—WHETHER OF NOT A STATUTE MAY BE IMPEACHED BY EVIDENCE ALIUNDE THE LEGISLATIVE JOURNAL—It was recently held, in the Indiana case of *State of Indiana ex rel. Cline v. Schricker*,¹ though not without dissent, that acts passed by a state legislature, but passed after the date indicated in the state constitution for the final adjournment of that body had been reached,² were constitutional. The legislature accomplished the apparent impossibility of extending its existence by the simple and time-honored expedient of stopping the clock in the assembly room shortly before the constitutionally authorized time for the session had expired and by not starting the clock again until the acts in question had been passed. The presiding officers of both branches of the Indiana legislature attested and certified that the bills were genuine and correct, which fact also appeared, at least superficially, from the journals of the Senate and of the House. On suit by the state at the relation of a resident to challenge the validity of these acts, a majority of the Indiana Supreme Court affirmed the holding of a lower court that such authentication was substantially conclusive of the fact that the laws were passed in conformity with the state constitution. Justice Gilkinson dissented on the ground that the constitutional provision concerning adjournment was self-executing and necessarily rendered the acts void. He agreed, with the majority, that proper authentication of an enrolled act is conclusive, as a matter of law, but felt that the acts in question were not properly authenticated because the authority of those purporting to attest thereto had expired prior to the passage of the bills.

The decision achieved in the instant case is the result of an application of the principle of the separation of powers to a comparatively novel

¹ — Ind. —, 88 N. E. (2d) 746 (1950), rehearing denied 89 N. E. (2d) 547 (1950). Gilkison, J., wrote a dissenting opinion.

² Ind. Const. 1859, Art. IV, § 29, states: “. . . No session of the General Assembly, except the first under this constitution, shall extend beyond the term of sixty-one days, nor any special session beyond the term of forty days.”

set of facts. It is disputed by no one that each department of both the federal and the state government has certain fields in which its powers are without enforceable constitutional limitation. Arguments do arise, however, when it becomes necessary to define those fields, for certain aspects of legislative procedure lie beyond the realm of judicial review. In that regard, provisions may be found in every constitution governing the procedure of the legislature. Some of these provisions may be classified as being of mandatory character, enforceable by the judiciary, while others are directory only, hence unenforceable before the courts.³ The construction given to, and application of, a particular constitutional limitation will depend first upon the language used and secondly upon the ability of a given court to determine whether there has been a breach of that limitation.⁴

All courts feel that the ability to review legislative procedure is restricted to some extent. Most courts will not look behind an enrolled bill to determine whether proper legislative procedure has been followed for they consider the enrolled bill to be conclusive on the point.⁵ Justification for this majority view is said to be found in the fact that the legislative journals are frequently inaccurate, perhaps quite often falsely kept, and that an exercise of control by the judiciary over legislative procedures would require a violation of the principle of separation of powers leading to the assumption, by the judiciary, of ultimate control over all other departments of government.⁶ A substantial minority of jurisdictions, however, do allow resort to be made to the legislative journals, at least to some extent. Most of them will permit the journal to have control over the enrolled bill,⁷ but a few will consult the journal only to determine if there has been compliance with an affirmative constitutional requirement that certain matters be entered thereon.⁸ The reasoning

³ See Dodd, "Judicially Non-Enforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931).

⁴ *Ibid.*, particularly p. 80.

⁵ See *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892); *Allen v. State*, 14 Ariz. 458, 130 P. 1114 (1915); *State ex rel. Hammond v. Lynch*, 169 Iowa 148, 151 N. W. 81 (1915); *Weeks v. Smith*, 81 Me. 538, 18 A. 325 (1889); *Kelly v. Marron*, 21 N. M. 239, 153 P. 262 (1915); *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 P. 201 (1893).

⁶ Dodd, "Judicially Non-Enforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931), at p. 68.

⁷ *Freeman v. Simmons*, 107 Fla. 438, 145 So. 187 (1932); *Cahn v. Kingsly*, 5 Ida. 416, 49 P. 985 (1897); *Worthy v. Bush*, 262 Ill. 560, 104 N. E. 904 (1914); *Scott v. State Board of Assessment and Review*, 221 Iowa 1060, 267 N. W. 111 (1936); *City of Belleville v. Wells*, 74 Kas. 823, 88 P. 47 (1906); *Stetter v. State*, 77 Neb. 777, 110 N. W. 761 (1906); *Ritchie v. Richards*, 14 Utah 345, 47 P. 670 (1896); *State v. Swan*, 7 Wyo. 160, 51 P. 209 (1897).

⁸ *Amos v. Mosely*, 74 Fla. 555, 77 So. 619 (1917); *Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750 (1888); *Palatine Ins. Co. v. Northern Pac. Ry. Co.*, 34 Mont. 268,

of this minority has been well expressed, in its behalf, by Judge Cooley. He once wrote that “. . . courts tread upon very dangerous ground when they venture to apply rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done.”⁹

Irrespective of whichever of the above rules should be the one to follow, courts are practically unanimous in disallowing the impeachment of a bill by evidence *aliunde* the journal.¹⁰ They feel that the adoption of a contrary view would destroy the confidence people now have in legislative action, would put an insuperable burden on those attempting to live under the laws of the state, and would tend to validate a confusing welter of evidence of doubtful character. They have, therefore, rejected extrinsic evidence designed to disclose a failure to comply with constitutional provisions such as those which require that a certain number of readings be given to a bill, which call for publication of notice of consideration of special laws, or demand the taking of many other purely procedural steps.¹¹

To disallow evidence *aliunde* the journal to impeach a fraudulent bill would seem to be an extension of the rule beyond its logical bounds, but some courts have done just this and, in so doing, have closed their eyes to a variety of legislative legerdemain. In the case of *Clough v. Curtis*,¹² for example, the time allowed by a federal statute for the term of a territorial legislature had expired and the speaker had adjourned the legislature *sine die* without objection. After the speaker and some of the legislators had departed, those who remained behind destroyed the minutes, authorized an entry to the effect that the speaker had left the chair while the legislature was in session, elected a speaker *pro tem*,

85 P. 1032 (1906); *Rash v. Allen*, 1 Boyce (N. J.) 444, 76 A. 370 (1910); *Town of Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023 (1903); *Board of Com'rs v. Call*, 123 N. C. 308, 31 S. E. 481 (1898).

⁹ Cooley, *Const. Lim.*, 8th ed., p. 159.

¹⁰ *Byrd v. State*, 12 Ala. 266, 102 So. 223 (1924); *Road Improvement District v. Sale*, 154 Ark. 551, 243 S. W. 825 (1922); *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905); *State v. Carlen*, 89 Fla. 361, 104 So. 577 (1925); *Speer v. Mayor of Athens*, 85 Ga. 49, 11 S. E. 802 (1890); *Hoppel v. Brethaner*, 70 Ill. 166 (1873); *Wheeler v. Board of Com'rs*, 245 Ky. 388, 53 S. W. (2d) 740 (1932); *Bethlehem Supply Co. v. Pan. Southern Petroleum Corp.*, 207 La. 149, 20 So. (2d) 737 (1944); *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203 (1887); *Cox v. Mignery*, 126 Mo. App. 669, 105 S. W. 675 (1907); *State v. Armour Packing Co.*, 135 N. C. 62, 47 S. E. 411 (1904); *Ritzman v. Campbell*, 5 Ohio 358, 112 N. E. 591 (1915); *McNeal v. Ritterbusch*, 29 Okla. 233, 116 P. 778 (1911); *White v. Hinton*, 3 Wyo. 753, 30 P. 953 (1892).

¹¹ In general, see annotation in 40 L. R. A. (N. S.) 30.

¹² 134 U. S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

and proceeded to enact certain disputed legislation. In a suit by the speaker to compel the secretary of the territory to correct the minutes, the court held the legislative journal conclusive.¹³ In another case, that of *Capito v. Topping*,¹⁴ it was held that evidence could not be introduced to show that the legislature had actually adjourned two days later than the date recorded in the journal, the question there being one as to whether or not the governor had signed a certain bill within the constitutionally authorized time. Several other cases have disallowed extrinsic evidence tending to prove lack of a quorum,¹⁵ while the case of *Carr v. Coke*¹⁶ held the enrolled bill to be conclusive even in the face of evidence that the signatures thereon had been procured by fraud.¹⁷

There are, however, a few well-reasoned authorities which permit the use of evidence *aliunde* the legislative journal in cases such as those discussed in the preceding paragraphs.¹⁸ In the only other case directly in point with the instant case, that of *State ex rel. Landis v. Thompson*,¹⁹ the Florida legislature continued in session beyond the constitutional term and enacted certain legislation after the date fixed for the expiration thereof. On attack upon this legislation by the state, the court held the measures void, stating that any attempt by the state legislature to continue to act as such after the expiration of the date for adjournment designated in the constitution amounted to a fraud upon the people necessarily exposing such purported legislation to direct attack. Much the same view has been expressed in certain Nebraska cases²⁰

¹³ The court did point out, however, that the decision might have been different had private rights been involved.

¹⁴ 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089 (1909).

¹⁵ *Robertson v. State*, 130 Ala. 164, 30 So. 494 (1901); *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 116 So. 771 (1928); *Amos v. Gunn*, 84 Fla. 285, 94 So. 615 (1922); *Wade v. Atlantic Lumber Co.*, 51 Fla. 638, 41 So. 72 (1906); *Norman v. Kentucky Bd. Managers World's Columbian Exposition*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556 (1892).

¹⁶ 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737 (1895).

¹⁷ The decision would seem unsound in that the evidence went to deny the existence of an enrolled bill in much the same way as would be the case if the signatures on the enrolled bill had been forged.

¹⁸ See cases listed in Dodd, "Judicially Non-Enforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931), at p. 931. Not included among such cases is the decision in *Harbage v. Tracy*, 64 Ohio App. 151, 28 N. E. (2d) 520 (1939), where impeachment of the legislative journal was permitted, not for the purpose of ultimately impeaching the enrolled bill, but in order to invalidate the mileage claims of the general assemblymen which were based on false statements, contained in the journal, that the legislature had met a certain number of times in a stated period. But see contra: *Earnest v. Sargent*, 20 N. M. 429, 150 P. 1018 (1915).

¹⁹ 121 Fla. 550, 164 So. 192 (1935).

²⁰ *Hull v. City of Humboldt*, 107 Neb. 326, 186 N. W. 78 (1921); *State v. Junkin*, 79 Neb. 532, 113 N. W. 256 (1907); *State v. Frank*, 61 Neb. 679, 85 N. W. 956 (1901).

where it has been held that extrinsic evidence may be used to supply missing or ambiguous portions of the journal, so that if the specific point involved in the present case should arise in that jurisdiction there is fair reason to believe that Nebraska would follow the holding in the Florida case. Language in the Louisiana case of *State v. Mason*²¹ indicating that the legislative journal must be the repository of actual fact might also serve to indicate a possible course of holding there, although later cases to be found in that state are less positive.²² The Indiana case under discussion is the only one definitely to reject the right to show the true state of affairs and the only case to give validity to a doubtful expedient.

The cases considered would seem to be capable of division into two distinct classes, that is (a) those which question the validity of legislative procedure, and (b) those which dispute either the qualification of the legislature to act as a body or which challenge the existence of an enrolled bill. Presumptions in favor of proper action could well support the views expressed as to the first class, but not the second, for there the very existence of those things which some courts have conclusively presumed to be correct is the nub of the issue. Assaults of this type are not at war with either the rule as to enrolled bills nor that which presumes the correctness of the legislative journal. They go far deeper and attack the qualifications of the body which, purporting to sit as a legislature, actually usurps powers which the people have not delegated to their representatives. Realistically, as their acts are the acts of a nonentity, they should be declared void. Judicial failure to contain a conclusive presumption which attaches to an enrolled bill within the sphere dictated by logic opens the door to consequences which could prove to be far more serious than those projected by a few informal procedural lapses.

J. C. CARTER

²¹ 43 La. App. 919, 9 So. 776 (1891).

²² See, for example, *Bethlehem Supply Co. v. Pan. Southern Petroleum Corp.*, 207 La. 149, 20 So. (2d) 737 (1944).

RECENT ILLINOIS CASES

CRIMINAL LAW—VENUE—WHETHER OR NOT PROVISIONS OF STATUTE REGULATING CHANGE OF VENUE APPLY TO MOTION IN NATURE OF WRIT OF ERROR CORAM NOBIS—A procedural point of some slight interest, presented to the Illinois Supreme Court through the medium of the case of *People v. Sheppard*,¹ arose as the result of the filing of a motion in the nature of a writ of error coram nobis by a convicted defendant who was seeking a new trial. The defendant had been indicted, tried, convicted, and had had his conviction affirmed on writ of error.² He thereafter presented his motion in the nature of a writ of error coram nobis in the trial court, which motion was assigned to the same judge who had presided over the original trial. Defendant then sought a change of venue on the ground of prejudice on the part of the trial judge, asserting it to be a mandatory duty resting upon such judge to grant his request either by reason of Section 18 of the Venue Act, applicable to criminal proceedings, or under Section 1 of the same statute, if the proceeding was to be deemed civil in nature.³ Both the request for change of venue and the motion in the nature of a writ of error coram nobis were denied,⁴ and these rulings were sustained when the Supreme Court held that the provisions for change of venue were inapplicable to proceedings in the nature of error coram nobis. Although the precise question had not previously been decided in this state, the court had little trouble in attaining a solution without searching for precedent. As the purpose of both the common law writ of error coram nobis⁵ and of its modern counterpart under Section 72 of the Civil Practice Act⁶ was to present to the court which rendered judgment facts which were not placed in evidence at the original trial but which would have necessarily altered the decision if they had been presented, it would logically follow that only the court rendering the judgment should pass on the point as it alone would realize the full significance of such new facts. It was, therefore, said that to require the granting of a request for change of venue would

¹ 405 Ill. 79, 90 N. E. (2d) 78 (1950).

² See *People v. Sheppard*, 402 Ill. 411, 84 N. E. (2d) 377 (1949).

³ Ill. Rev. Stat. 1949, Vol. 2, Ch. 146, §§ 1 and 18.

⁴ The state moved to dismiss the motion, which had been filed pursuant to Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 196, on the ground that it did not state facts within the purview of the statute but more nearly sought a review of evidence previously introduced.

⁵ See *State ex rel. Emmert v. Gentry*, 223 Ind. 535, 62 N. E. (2d) 860, 161 A. L. R. 532 (1945); 49 C. J. S., Judgments, § 316; Black, Judgments, Vol. 1, § 300; Holdsworth, *Hist. Eng. Law*, Vol. 1, p. 224.

⁶ Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 196.

serve to defeat the very purpose for which the writ of error coram nobis was created. There may be some occasion to consider, however, that if a full assimilation has not occurred between Section 72 of the Civil Practice Act and other related statutes, further legislative action, at least in this instance, might be desirable.

EVIDENCE—WEIGHT AND SUFFICIENCY—DEGREE OF EVIDENCE CONCERNING SURVIVAL NECESSARY TO TAKE CASE OUT FROM OPERATION OF UNIFORM SIMULTANEOUS DEATH ACT—In the recent case of *Prudential Insurance Company of America v. Spain*,¹ the Appellate Court for the Fourth District delivered an opinion which required that interpretation be given to certain clauses of the Illinois statute modelled on the Uniform Simultaneous Death Act.² The suit was in the nature of an interpleader action brought by an insurance company to determine the rightful person entitled to receive the proceeds of four insurance policies. Two of the policies had been issued on the life of a man, the other two on the life of his wife, each insured naming the other as beneficiary. Both the husband and wife were killed as the result of a collision between their car and a train. Immediately following the collision, two members of the train crew, by observation and other lay investigation, came to the conclusion that the husband was dead, but that the wife, although dying, was still alive. The wife's estate claimed the proceeds of the four policies, while the husband's estate, asserting the applicability of the statute in question,³ argued that, as there was no "sufficient evidence" that the husband predeceased the wife, the funds should go severally to the estates of the insured parties.⁴ At the trial of the interpleader action, the wife's estate had the benefit of the train crew's testimony

¹ 339 Ill. App. 476, 90 N. E. (2d) 256 (1950).

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, §§ 192.1-4. The statute, first enacted in 1941, was based on a proposed Uniform Simultaneous Death Act: Unif. Laws Anno., Vol. 9, p. 659 et seq. Some thirty-eight states have adopted the uniform law or some variation thereof: Unif. Laws Anno., Vol. 9, 1950 supp., p. 252.

³ Section 1 of the uniform law, identical with Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 192.1, reads: "Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as otherwise provided in this article."

⁴ Section 4 of the uniform law, also enacted in Illinois, declares: "Where the insured and the beneficiary in a policy of life or accident insurance have died, and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policies shall be distributed as if the insured had survived the beneficiary." See Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 192.4. While the uniform statute generally was designed to abrogate certain artificial presumptions, the retention of an arbitrary presumption as to life insurance contracts was deemed appropriate as most nearly approximating the intention of the real party in interest, *i. e.* the insured: Commissioners' Prefatory Note, Unif. Laws Anno., Vol. 9, pp. 657-8.

while the husband's estate relied on expert testimony to the effect that death could be determined only by the use of a stethoscope. The judgment of the trial court awarded the proceeds of all four policies to the wife's estate and, on appeal, that judgment was affirmed.

The Appellate Court, when determining that the testimony of the members of the train crew was "sufficient evidence" to take the case out of the operation of the Simultaneous Death Act, reached that conclusion on the basis that the phrase "no sufficient evidence" appearing in the statute did not change the rule that a preponderance of evidence is usually enough to prove a particular fact, including the fact of the time of death. Since this would appear to be the first time that this particular phrase has been passed upon, in Illinois or elsewhere, the actual effect of this decision is of interest. Prior to the adoption of the statute, there was, in cases of common disaster, no presumption of survivorship in Illinois, so survivorship, like any other fact, had to be proven by a preponderance of competent evidence.⁵ Under the interpretation now given to the statute, the evidentiary requirements set forth in earlier decisions have not been changed in any respect. A mere preponderance of evidence tending to prove that one party survived the other will, therefore, suffice to by-pass the operation of the statute. That result would appear to be proper inasmuch as the statute was intended to operate, and by the instant case has been limited in its operation, to cases where there is no evidence whatever of survivorship.⁶

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER OR NOT EQUITY MAY GRANT INJUNCTIVE RELIEF AGAINST A PENDING CASE WHEN THE PETITIONER MIGHT HAVE ACCOMPLISHED THE SAME RESULT BY AN EQUITABLE DEFENSE ASSERTED IN THE PENDING ACTION—The plaintiff-lessee, in *Bartelstein v. Goodman*,¹ sought an injunction to prevent prosecution, by the defendant-lessor, of a forcible detainer action then pending in another court. The complaint charged an attempt by the lessor wrongfully to terminate the lease on the basis of an alleged default under a covenant to keep a theater building and its improvements in first class condition and to make special repairs. Plaintiff alleged that the true reason for default, if there was one, lay in the lessor's procrastination over approving certain proposed changes; that the lessor

⁵ *Modern Woodmen of America v. Parido*, 335 Ill. 239, 167 N. E. 52 (1929). Lay testimony concerning death is competent evidence, according to *In re Herrman*, 75 Misc. 599, 136 N. Y. S. 944 (1912), affirmed in *In re Laffargue's Estate*, 155 App. Div. 923, 140 N. Y. S. 743 (1913). The last mentioned case closely approximates the instant one in factual content, but no uniform statute had been proposed at the time of that decision.

⁶ See Commissioners' Prefatory Note, *Unif. Laws Anno.*, Vol. 9, p. 657.

¹ 340 Ill. App. 51, 90 N. E. (2d) 796 (1950).

had possession of a deposit more than ample to indemnify against any alleged injury; and that the only objective of the forcible detainer action was to accomplish a forfeiture of the lease. The defendant-lessor, by suitable motion to dismiss for lack of jurisdiction,² argued that since the plaintiff might have interposed an equitable defense to the forcible detainer action³ the remedy at law was "adequate" and there was no reason for equity to take jurisdiction. Upon denial of that motion, plaintiff obtained a temporary injunction against further prosecution of the law action. On appeal therefrom, the Appellate Court for the First District affirmed the holding.

While it has been held that an equitable defense may be submitted for consideration in a forcible detainer action,⁴ it does not necessarily follow that a court of equity is precluded from giving relief to prevent forfeitures when proper circumstances warrant equitable interference. The Civil Practice Act does not alter the equitable character of matters heretofore within the cognizance of a court of equity,⁵ nor have substantial distinctions between actions at law and suits in chancery been abolished.⁶ In two previous cases, decided since the adoption of the Civil Practice Act, appellate courts in Illinois have approved injunctions restraining the prosecution of forcible detainer suits,⁷ but it does not appear that the adequacy of the legal remedy was there put in issue. Now that the point has been directly raised, the present adjudication acknowledges the power of a court of equity to enjoin the prosecution of a forcible detainer action despite the fact that the plaintiff seeking equitable relief might have used the same matter as an equitable defense in the action restrained. Since Section 44 of the Civil Practice Act is cast in permissive terms rather than mandatory ones,⁸ the outcome of the instant case would seem to be eminently correct. The choice being one belonging to the defendant, the plaintiff in the law action should not be allowed to dictate how that choice is to be exercised.

² Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 172(b).

³ *Ibid.*, Vol. 2, Ch. 110, § 168. That section is applicable in forcible detainer actions, originally excluded from the operation of the Civil Practice Act under Ch. 110, § 125, by reason of Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 11, which calls for uniformity in procedure except where special statutory regulation exists.

⁴ See *Northern Trust Co. v. Watson*, 310 Ill. App. 263, 33 N. E. (2d) 897 (1941), and *Coyne v. South Shore DeLuxe Laundry*, 299 Ill. App. 275, 20 N. E. (2d) 117 (1939). But see *State Bank of St. Charles v. Burr*, 283 Ill. App. 337 (1936), criticized in 25 Ill. B. J. 79. The same rule applies to ejection actions according to *Horner v. Jamieson*, 394 Ill. 222, 68 N. E. (2d) 287 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 232.

⁵ Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.10.

⁶ See *Frank v. Salomon*, 376 Ill. 439, 34 N. E. (2d) 424 (1941).

⁷ *Kahn v. Loeffler*, 339 Ill. App. 276, 89 N. E. (2d) 749 (1950); *Waukegan Times Theater Corp. v. Conrad*, 324 Ill. App. 622, 59 N. E. (2d) 308 (1945).

⁸ Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 168, states: ". . . the defendant *may* set up in his answer any and all cross-demands whatever, whether in the nature of . . . cross-bill in equity or otherwise." Italics added.

INSURANCE—THE CONTRACT IN GENERAL—WHETHER IT IS POSSIBLE TO CONSTRUER AN EXTENDED COVERAGE ENDORSEMENT ON A FIRE POLICY SO AS TO ALLOW THE INSURED TO RECOVER THE FACE AMOUNT THEREOF FOR EACH PERIL COVERED WHEN TWO OR MORE LOSSES OCCUR INVOLVING DIFFERENT RISKS—Construction of an extended coverage endorsement on a fire policy became necessary in the case of *Oller v. New York Fire Insurance Company*,¹ a case which takes on significance in that it represents the first time that the highly standardized endorsement in question has been subject to construction in this state. The plaintiff there concerned took out a fire policy with the defendant on which he later obtained extended coverage by way of endorsement. The endorsement provided, among other things, for the additional perils covered, one of which was loss by windstorm; declared that the amount of the insurance was not increased; stipulated that the additional perils would be substituted for the word "fire" in the policy when the case required; and recited that the endorsement was to form part of the policy. While the policy was in effect, the plaintiff suffered a windstorm loss which amounted to a sum less than the face amount of the policy, and was paid for such loss. Subsequently, a fire loss occurred which exceeded the amount of the policy. Upon defendant's refusal to pay more than the difference between the face of the policy and the windstorm loss already paid, plaintiff brought action for the full amount of the policy. Plaintiff succeeded in the trial court, apparently on the theory that the policy and the endorsement constituted two severable contracts and for the additional reason that under the "substitution of terms" clause the plaintiff could substitute each added peril for the word "fire" in the policy itself, thereby insuring against each peril up to the face amount of the policy. On appeal, the Illinois Appellate Court for the Fourth District reversed on the ground that the endorsement prohibited increasing the amount of insurance, that there was but one contract, and that the endorsement did nothing more than extend its protection to the added perils. The court refused to apply the familiar rule of construction that ambiguities should be construed most favorably to the assured² because no ambiguity was said to exist. The rider in question must be understood to provide for no more than one sum of protection equivalent to the face of the policy, regardless of the peril or combination of perils which may cause loss, unless the policy be reinstated in full upon payment of an additional premium after compensation in part has been made.

¹ 339 Ill. App. 461, 90 N. E. (2d) 241 (1950).

² *Joseph v. New York Ins. Co.*, 308 Ill. 93, 139 N. E. 32 (1923).

JOINT STOCK COMPANIES AND BUSINESS TRUSTS—OFFICERS AND COMMITTEES—WHETHER OR NOT A LIQUIDATION TRUST MANAGER MAY BE COMPELLED TO ACCOUNT FOR PROFITS REALIZED FROM OPEN MARKET PURCHASES OF TRUST CERTIFICATES—The recent case of *Victor v. Hillebrecht*¹ represents the first enunciation in Illinois concerning the right of trust managers of liquidation trusts to purchase beneficial participation certificates of the trust and retain the profits realized by such purchases. The trust agreement there concerned had been executed pursuant to a plan of reorganization instituted under Section 77B of the Bankruptcy Act² and was designed to produce an orderly liquidation of the trust res, a large apartment hotel. The trust managers were, by the agreement, authorized to submit, within their discretion, suitable offers for the sale of the trust res to the certificate holders and such offers were to be considered as accepted unless the holders of at least one-third of the outstanding certificates filed a written dissent within a specified time. The trust agreement provided that the trust managers could be holders of beneficial certificates showing participation in the trust and recognized the right of other holders to deal freely with the trust managers. The trust managers, for their own account, accumulated about fourteen per cent. of the total of outstanding units, part being obtained in exchange for bonds at the time of reorganization, but the major portion being acquired by subsequent purchases from a brokerage house which maintained an active market in the certificates. The value of the trust certificates having become enhanced by reason of higher bids for the trust res, certain of the beneficial certificate holders, who had not disposed of any of their certificates, brought an equitable action against the trust manager seeking, among other things, to compel an accounting of the profits realized by the defendants by reason of such purchases. The chancellor dismissed the suit for want of equity. Upon appeal, the Appellate Court for the First District reversed. The Supreme Court, however, after granting leave to appeal, reversed the Appellate Court and reinstated the decree of the chancellor.

In arriving at that decision, the Supreme Court deemed it highly significant that none of the plaintiffs had sold any part of their original holdings, either to the trust managers directly or upon the open market,

¹ 405 Ill. 264, 90 N. E. (2d) 751 (1950), reversing 339 Ill. App. 254, 90 N. E. (2d) 270 (1950).

² 11 U. S. C. A. § 207.

for which reason it could not be claimed that they had been injured by the purchase transactions.³ On the contrary, it appeared that the plaintiffs were in a position to gain proportionately with the trust managers as the trust res appreciated in value. Plaintiffs, however, had relied on the familiar general rule which requires loyalty on the part of trustees and forbids secret dealing with the trust property.⁴ That rule was held inapplicable to the instant case as the defendants were said not to possess any control over the sale of the trust units and other certificate holders were under no disability regarding the disposition of their interests to the defendants. Although there is much to be said for the view adopted by the Supreme Court in the instant case, keeping in mind the provisions of the trust agreement, it should be recognized that such a holding could lead to dangerous consequences, particularly if the trust managers should, by purchase or consolidation with others, acquire enough strength to block a liquidation. If that situation ever developed, the court would probably be inclined to investigate the bona fides of purchases made by the trust managers despite the apparent sanction of the trust agreement.

MUNICIPAL CORPORATIONS—TORTS—WHETHER OR NOT GENERAL STATUTE REQUIRING THE GIVING OF NOTICE TO MUNICIPAL CORPORATION OF FACT OF INJURY APPLIES TO CLAIMS ARISING UNDER STATUTE FOR SUPPRESSION OF MOB VIOLENCE—A problem of statutory integration grew out of the recent case of *Kennedy v. City of Chicago*¹ wherein the plaintiff sought to recover damages, for injury suffered by mob violence, from the municipal corporation because of its failure to suppress a riot.² At the ensuing trial, plaintiff gave no proof of notice to the municipal corporation of the type customarily given as a condition precedent to other tort actions³ but, instead, took the position that no notice was required in mob violence cases since the particular statute imposed no such requirement.⁴

³ For an analogous situation wherein a selling shareholder was permitted to sue a purchasing director, see *Agatucci v. Corradi*, 327 Ill. App. 153, 63 N. E. (2d) 630 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 272.

⁴ *Kinney v. Lindgren*, 373 Ill. 415, 26 N. E. (2d) 471 (1940), reversing 300 Ill. App. 610, 21 N. E. (2d) 332 (1939).

¹ 340 Ill. App. 100, 91 N. E. (2d) 138 (1950).

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 512 et seq.

³ *Ibid.*, Vol. 1, Ch. 24, § 1—11. It appeared from the statement of the case that a notice had been served prior to suit but such notice was defective for failure to include the residence address of plaintiff. Another notice, served after suit had been begun but within six months of the injury, one designed to correct the omission in the first notice, was excluded under the authority of *City of Waukegan v. Sharański*, 135 Ill. App. 436 (1907).

⁴ It was argued that the legislature, by its silence on the point, had indicated a deliberate purpose to omit such requirement at the time of enacting the personal

The trial court ruled in plaintiff's favor as to such contention and granted plaintiff a judgment against the municipality. That judgment was reversed by the Appellate Court for the First District, and the cause was remanded with a direction to dismiss the suit, when it came to the conclusion that, by proper integration, it was necessary to read into the mob violence statute those provisions, noted above, to be found in the later general Cities and Villages Act, which provisions make notice an essential element in all personal injury cases.⁵ That conclusion was reached on the basis that (1) the general provision was all-inclusive, except as to cases coming under other special statutory regulation,⁶ and (2) the special provision in the property damage statute was necessary not so much to show an intention to excuse the giving of notice in personal injury cases growing out of riot as to conform the practice in property damage cases to that followed in other suits against municipalities. That rationale becomes the more evident when it is remembered that the general statute relates to cases based solely on injury to the person and has no application to property damage cases. As the later general provisions are so worded as to be all-inclusive, both as to notice and period of limitation,⁷ the result achieved would appear to be an inevitable consequence of the necessary integration of statutory materials. The fact that such materials are distributed between civil and criminal statutes was deemed to be a matter of no moment.⁸

injury by mob violence statute, Laws 1909, p. 190, Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 512 et seq., on the basis that specific provision for notice had been inserted in a prior law relating to damage to property caused by riot: Laws 1887, p. 237, Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 518 et seq., particularly § 523.

⁵ A motion by defendant for a directed verdict must be granted if there has been a failure to give notice: *McCarthy v. City of Chicago*, 312 Ill. App. 268, 38 N. E. (2d) 519 (1941). An interesting sidelight concerning the applicability of notice provisions to minor plaintiffs appears in *Martin v. School Board of Union Free Dist. No. 28*. — N. Y. —, 93 N. E. (2d) 655 (1950), affirming 275 App. Div. 1042, 91 N. Y. S. (2d) 924 (1949), where it was held that proper and timely notice was essential even though the minor, because of extreme youth, was incapable of giving notice.

⁶ It should be noted that the time permitted for notice under Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 523, in property damage by mob violence cases, is fixed at thirty days instead of the six-month period specified in the Cities and Villages Act for other cases.

⁷ The reasoning used in the instant case could be carried over so as to require that suits for personal injury caused by mob violence should be begun within one year, pursuant to Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 1—10, for no specific limitation period is fixed by Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 515.

⁸ The imposition of civil liability on the municipal corporation in mob violence cases bears evidence of a survival of the ancient penalties imposed for failure to raise the hue and cry or to produce the slayer of a Norman. See Holdsworth, *Hist. Eng. Law*, 3d Ed., Vol. 1, pp. 15 and 294; Pollock and Maitland, *Hist. Eng. Law*, Vol. 1, p. 88, and Vol. 2, p. 578.

TENDER—PRODUCTION AND OFFER OF MONEY OR EQUIVALENT—WHETHER TENDER OF PAYMENT BY A CERTIFIED CHECK IS LEGAL TENDER UNDER OPTION TO PURCHASE REAL ESTATE FOR CASH—The case of *Margulus v. Mathes*¹ presented the Appellate Court for the Fourth District with the necessity of ruling on a problem, resolved in many jurisdictions,² but one never before decided in Illinois. Mathes had there given Margulus an option to purchase certain real estate at a stipulated price payable “in cash.” Margulus decided to exercise the option, so the parties agreed to meet late on the last day of the option period to work out the details. At this meeting, Mathes tendered a deed and Margulus tendered two certified checks aggregating the total purchase price. Mathes rejected the tender, demanding cash as specified in the option and professing fear that the banks on which the checks were drawn might fail before the checks could be cashed. Margulus never tendered cash but instead, believing, that he had made legal tender, brought suit for breach of contract. The trial jury returned a verdict for the amount of plaintiff’s damages but a motion for judgment notwithstanding the verdict was allowed. The Appellate Court affirmed that action, holding that, in the absence of an agreement to the contrary, money is to be regarded as the sole medium of payment. It was said that an effective tender had to be made in money, or that which by law passes for money, and that the payee had a right to so demand, regardless of his motive. As a check, whether certified or not, is not the equivalent of money in law, even though it may be a commonly used means by which cash may be obtained, the objection that no legal tender had been made had to be sustained. The decision, as previously mentioned, finds no precedent in Illinois law but it is in harmony with the view established in *Harding v. Commercial Loan Company*.³ It was there decided that tender of an ordinary check would not be a legal tender and could be defeated by objection on the part of the creditor. The same view has now been taken as to a check which has been certified.

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—EFFECT OF WIDOW’S RENUNCIATION OF WILL UPON SPECIFIC AND RESIDUARY DEVISES—The facts in *Gowling v. Gowling*¹ disclose that the testator died leaving the plaintiff as widow and a large number of collateral relatives, defendants therein, as his heirs at law. The decedent left an estate con-

¹ 339 Ill. App. 497, 90 N. E. (2d) 254 (1950).

² See annotations in 51 A. L. R. 393 and 23 A. L. R. 1284.

³ 84 Ill. 251 (1876).

¹ 405 Ill. 165, 90 N. E. (2d) 188 (1950).

sisting of a substantial amount of personal property and three tracts of farm land. The testator's will provided that all of the real estate was to be placed in trust with his widow and one of his nephews as trustees, the widow to be entitled to receive the net income during her widowhood. Upon termination of the trust, one parcel of land was to go to the nephew who acted as trustee, a second was devised to a named grandnephew and grandniece in equal parts, and the third was to be divided among the remaining nephews and pieces, or their descendants, *per stirpes* and not *per capita*. The widow, apparently dissatisfied with the provisions of the will, filed her renunciation in proper time and elected to take her statutory share of the estate.² She later sought partition of all of the realty. The specific devisees, by way of defense as to their parcels, argued that the renunciation of the will by the widow should not operate to affect them in any way and that her lawful share, as widow, should be taken from the residuary estate. The lower court, however, following Section 16 of the present Probate Act,³ held that the widow was entitled to a one-half interest in each item of real estate owned by the testator, including therein the lands which had been specifically devised. On direct appeal to the Supreme Court, a freehold being involved, that decision was affirmed.

The specific devisees placed reliance upon the holding in *Pace v. Pace*⁴ wherein the court had held that, where legacies and devises had to be abated on account of a renunciation by the widow, legacies and devises of the same class were to be reduced proportionately, but if of different classes, residuary legacies and devises had to be abated before specific ones. The statute then in operation had provided that the widow, upon renunciation, was entitled to "one-half of *all* the real and personal estate."⁵ Since that decision, however, the legislature repealed the old statute⁶ and replaced it with the present provision, which uses the words "one-half of *each parcel* of real estate" of which the testator died seized.⁷ That section being clear and unambiguous and it being necessary to give effect to the legislative intent expressed therein, the court arrived at the only possible conclusion when it decided that prior cases were no longer controlling. The potential effect of the instant case should, however, be borne in mind, particularly since the case represents the first construction which has been given to the substituted section since its adoption.

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 169.

³ *Ibid.*, Vol. 1, Ch. 3, § 168(b).

⁴ 271 Ill. 114, 110 N. E. 878 (1915).

⁵ Smith-Hurd Ill. Rev. Stat. 1927, Ch. 41, § 12. *Italics added.*

⁶ Laws 1939, p. 4.

⁷ Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 168(b). *Italics added.*

WITNESSES—COMPETENCY—WHETHER OR NOT A PERSON NAMED AS A DEFENDANT BUT NOT SERVED WITH SUMMONS IS TO BE REGARDED AS A "PARTY" WITHIN THE PROVISIONS OF THE DEAD MAN'S RULE—In the case of *Sanky v. Interstate Dispatch, Inc.*,¹ the Appellate Court for the First District was again called upon to interpret the meaning of the word "party" as that term is contained in the so-called "Dead Man's" rule.² The plaintiff therein had sued, in his capacity as administrator, to recover for the wrongful death of his decedent arising out of a collision between the plaintiff's automobile, driven by the decedent with plaintiff's permission, and a truck owned by the corporate defendant and driven by one of its employees. The employee had been named as a co-defendant with the corporate employer, but both the original and alias summons had been returned "not found" as to him. Plaintiff proceeded to trial against the corporate defendant, at which time the employee was produced as an occurrence witness to controvert the testimony of plaintiff's sole eyewitness. The employee was permitted to testify over plaintiff's objection that, being a party to an action brought by an administrator and not having been dismissed from the cause, the employee's testimony was inadmissible under the aforementioned statute. From a verdict and judgment for the corporate defendant, plaintiff took an appeal, but the judgment was affirmed on the basis of the holding in *Webb v. Willett Company*.³

It had been there held that a co-defendant whose interest had been finally determined by an unreversed judgment in his favor was, thereafter, no longer a "party" at a subsequent retrial of the action as to his former co-defendant and could, accordingly, testify without objection. The reasoning leading to that result was based on the proposition that a person is not, in legal contemplation, a "party" to an action unless he has a right to be heard therein and to control the proceedings thereof,⁴ so that, once his interest has been determined, he ceases to have any right of control and therefore ceases to be a "party" to the action.⁵ Following that theory, the court in the instant case concluded that, as the employee in question had not been served nor had entered an appearance, he had no right to be heard or to control the case in any manner, hence

¹ 339 Ill. App. 420, 90 N. E. (2d) 265 (1950). Leave to appeal has been denied.

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 51, § 2, directs that no "party to any civil action, or person directly interested in the event, shall be allowed to testify therein of his own motion, or in his own behalf, . . . when an adverse party sues or defends as the . . . administrator . . . of any deceased person." The statute contains certain exceptions not here pertinent.

³ 309 Ill. App. 504, 33 N. E. (2d) 636 (1941).

⁴ The court quoted Greenleaf, Evidence, Vol. 1, § 535.

⁵ See also *Weaver v. Ritchie*, 152 Ill. App. 130 (1909).

was not a "party" within the provisions of the "Dead Man's" rule. It would seem, therefore, that merely naming a person as defendant is insufficient to disqualify him as a witness and that disqualification does not attach until there has been service of summons⁶ or appearance, which disqualification will cease when there has been a final determination of his interest.⁷

⁶ The plaintiff, in the instant case, made no attempt to serve the employee, with summons when he appeared as a witness. Had plaintiff done so, a postponement of the trial might have resulted but plaintiff's purpose would have been subserved.

⁷ Plaintiff also relied on the point that the employee was a person "directly interested" in the outcome of the case, so as to be disqualified, even if he was not to be considered a "party." That contention was rejected, except as to the point that the fact of employment might be shown to affect credibility, on the basis of the holding in *Feitl v. Chicago City R. Co.*, 211 Ill. 279, 71 N. E. 991 (1904).

BOOK REVIEWS

MANUAL OF PREVENTIVE LAW. Louis M. Brown. New York: Prentice-Hall, Inc., 1950. Pp. xix, 346.

Practicing lawyers and legally-trained book reviewers are prone to express adverse criticism over the publication of books designed to inform laymen, particularly the public at large, on how to cope with legal problems or to act as lawyers. Honest criticism of books bearing title such as "How to Draft Your Own Will," "How to Close a Real Estate Deal," or "How to be Your Own Lawyer," is not predicated on any selfish desire to garner fees for the members of the legal profession but rather rests on the fact that the ill, or partly, informed layman may, because of inadequate guidance, involve himself or his affairs in far more costly blunders and losses than any amount he would save by purchasing such books and acting on the basis of the contents thereof. The net effect of such reliance, as the author of this book aptly illustrates, more nearly tends to enhance the income of the legal profession for the cost of extricating a person from a deplorable mess is known, to the legal profession at least, to be higher than the cost of preventing the trouble from ever occurring. The day when the lawyer waited, with anticipation of fat fees, for the chance to probate the estate of the testator who drew his own will is passing. Every reputable lawyer today, just as every doctor or dentist, would rather serve society by preventing the rise of difficulties, than by acting to solve or cure them after they have arisen.

It is for this last reason that the book here considered deserves the notice of the practicing lawyer but, even more, deserves a widespread circulation among the members of the general public. The latter form the very class of people who prejudice their legal rights, who make the unnecessary mistakes, because they lack warning as to the precise moment when it would be appropriate to seek legal advice. By pointing out the risks involved in blundering into action in a wide variety of common legal transactions without competent advice, by illustrating the possible alternative courses of action a lawyer might have recommended, by depicting the relative cost of seeking that competent advice against the cost of passing up the opportunity of gaining it, and by re-inforcing these points through the use of a selection of actual cases, the author drives home the age-old lesson that a single ounce of prevention is worth many, many pounds of cure.

Do not mistake this book by believing it to be one which suggests that the client should live virtually in the lap of his lawyer; should not dare to move a finger without consulting him. It is far too realistic to take that approach, and no lawyer would want it otherwise. Doctors have long stressed the desirability of preventive medicine and have educated some patients, at least, to seek consultation when first symptoms of ailments occur. Radio broadcasts hammer home the fact that one should see a dentist at least twice a year. Here is a lawyer's effective exposition of how preventive law can be developed, how the client can come to recognize the need for securing competent legal advice, and how that advice, if followed, can prevent trouble by heading it off before it starts.

SELECTED ESSAYS ON FAMILY LAW. Compiled by a Committee of the Association of American Law Schools, Paul Sayre, Editor. Brooklyn, New York: The Foundation Press, Inc., 1950. Pp. xv, 1122.

Since the original authorization in 1941, three successive committees of the Association of American Law Schools have labored toward the publication of a volume of essays on Family Law which would not only be found to contain the best of materials already published but would also give adequate coverage to the many sub-areas in this broad field. To say that these committees have brought the effort to a successful culmination with the publication of this volume is but little praise for the hours of time and deep thought that have gone into its preparation. As it stands, the volume now provides the reader, be he layman, lawyer, or law teacher with an accurate exposition of the subject matter in a most convenient and understandable form. Designed with the thought in mind that these essays should complement a satisfactory casebook, the student will also find this work to be of inestimable value as it gives a larger insight into not only the legal but also the social aspects of the field.

It would not be desirable to list either the authors or the essays included in this selection, but the breadth of coverage may be indicated by noting the topical order of the arrangement. Four grand divisions deal with the place of the family in civilization, with the creation of the family unit, with the family as a going concern, and with family disorganization and its attendant consequences. Within each division, the essays reproduced are arranged without comment, critical or otherwise. Tables of additional articles, however, appear at the end of each unit pursuant to an effort to indicate that the selected materials are not the only, nor necessarily even the best, product of those who have written in the general field. Since the criterion for selection was based on a desired in-

terdependence of the several parts of the finished volume, the possibility of pointing direct criticism at what might be considered sins of omission is nullified. Measured in terms of the result sought to be achieved, the compilation is not simply effective, it is impressive.

THE LAW OF CADAVERS: Second Edition. Percival E. Jackson. New York: Prentice-Hall Inc., 1950. Pp. lxxxvii, 734.

At the time of the publication of the first edition of this work in 1936, the author expressed the belief that the law relating to cadavers, to burials, and to burial places should be dealt with as an independent topic inasmuch as the subject matter did not respond to development along conventional legal lines. That failure in systematic organization was attributed not only to lack of adequate precedent in the field but more directly to the fact that such matters of sentiment as are involved in the process of burying the dead do not respond readily to the application of legal principles developed in other fields of law as, for example, those of tort and property. He had found, in fact, that decisions which squared with social conscience in such matters did not square with common law rules, while those that did do the latter were inconsistent with enlightened thought. In the interim that has elapsed since that belief was justifiably expressed, there has been sufficient development, both judicial and legislative, to warrant bringing the topic up to date, hence the reason for the second edition. In format and arrangement, it builds upon the first but, as should be the case, the content of the new edition has been considerably enlarged by the addition of many new cases and by suitable reference to the wide variety of statutory developments made in recent years. If separate and specialized treatment is to be given to a topic such as this, the author's second edition properly becomes the starting point for any attempt to synthesize existing materials into a model system.

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