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COMPARATIVE NEGLIGENCE ON THE MARCH

Ernest A. Turk*

IT HAD REACHED the hour of dusk, one summer evening in 1808, time for the inhabitants of the town of Derby to light their candles, when a Mr. Butterfield left a public inn, mounted his horse, and rode violently off down the street. Near the end of the town, Mr. Forrester, about to make some repairs to his house, had shortly before placed a pole across part of the road, leaving a free passage in the same direction by another street. There was light enough left to discern the obstruction at a distance of one hundred feet but Butterfield riding as fast as his horse would go, did not observe the pole and rode against it. He was thrown down, along with his horse and was much hurt as a consequence. An action on the case followed in which the decision ran in favor of the defendant. These simple facts gave Lord Ellenborough the opportunity, on motion for a new trial, to say: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."¹

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¹ Butterfield v. Forrester, 11 East 60 at 61, 103 Eng. Rep. 926 at 927 (1809).

I. THE CONTRIBUTORY NEGLIGENCE DOCTRINE

The preceding paragraph tells, in brief, about the famous English case of *Butterfield v. Forrester*, generally regarded as being the earliest case to invoke the doctrine of contributory negligence.² In fact, it has been said that the entire doctrine of contributory negligence stems therefrom;³ that the idea of contributory fault as a bar to recovery would seem to be the product of a common-law attitude first displayed in the early nineteenth century.⁴ That well-known doctrine denies all recovery to the injured party if the injury complained of has been brought about by the concurrent negligence of the party concerning whose conduct complaint is made as well as that of the party injured.⁵ The application of the doctrine to the simple facts of the *Butterfield* case is clear. What is more striking are two queries generated by the decision. They are first: How could it be possible that a doctrine often regarded as "a rule from time immemorial"⁶ should originate so late? And second: If the decision is such a landmark in the law how could the court discuss the problem "with a glibness suggesting that it felt it was on familiar territory"⁷ without citing any authority?⁸ To find an answer to these two questions it is necessary to take a quick glance at the development of claims against inadvertent tort-feasors advanced under the early law. Although it is the purpose of this article

² Prosser, *Hornbook on the Law of Torts* (West Pub. Co., St. Paul, 1941), p. 376.

³ Bohlen, "Contributory Negligence," 21 *Harv. L. Rev.* 233 (1908); Campbell, "Wisconsin's Comparative Negligence Law," 7 *Wis. L. Rev.* 222 (1931-2); Green, "Illinois Negligence Law," 30 *Ill. L. Rev.* 36 (1944-5); Malone, "The Formative Era of Contributory Negligence," 41 *Ill. L. Rev.* 151 (1946); Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333, 604, and 645 (1932).

⁴ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 at 126 (1945).

⁵ Cooley, *Torts*, 4th Ed., Vol 3, § 482.

⁶ See *Penn. R. Co. v. Aspell*, 23 Pa. 147, 62 *Am. Dec.* 323 (1854).

⁷ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 at 126 (1945).

⁸ Two "traffic accident" cases have been cited as preceding the decision in *Butterfield v. Forrester*. They are *Cruden v. Fentham*, 2 *Esp.* 685, 170 *Eng. Rep.* 496 (1799), and *Clay v. Wood*, 5 *Esp.* 44, 170 *Eng. Rep.* 732 (1803). See Campbell, "Wisconsin's Comparative Negligence Law," 7 *Wis. L. Rev.* 222 (1931-3), and Bohlen, "Contributory Negligence," 21 *Harv. L. Rev.* 233 (1908).

to deal with comparative, rather than with contributory, negligence, such a short historical review would seem proper to round out the picture while, at the same time, divesting the doctrine of contributory negligence of some of its artificially acquired dignity.

A. DEVELOPMENT OF THE DOCTRINE

To anticipate the answer to the first question, it may be noted that the clarification of liability for negligence is itself a matter of relatively recent date. Any thought of a special grouping for negligent wrongs was quite alien to the early legal systems.⁹ Liability for wrongdoing, in Anglo-Saxon times, was the logical outcome of a system dominated by the blood feud. It became the main object of the law to suppress that blood feud by insuring the payment of compensation to the injured person or his kin.¹⁰ To that end, even though the act had been accidental or had been necessary in self-defense, compensation had to be paid to stop the feud which might otherwise break out. Only in cases where the person had slain himself, had but himself to thank, as where the defendant had been purely passive and the destructive act was solely the act of the injured person, was liability denied.¹¹ In all other cases, a man acted at his peril.¹² Holdsworth has pointed out that, in certain cases, a man may appear to have been made liable for the careless doing of acts which were obviously dangerous, but the liability was not predicated on the ground of negligence. Thus, where a man left his weapons stand about and another knocked them over, so that they killed a man, the owner was liable. But such liability was founded upon his act causing damage rather than upon his neglect. For these reasons, it is not wise to read modern ideas into ancient rules.

Even in these very early times, however, certain distinctions

⁹ A. H. Post, *Die Grundlage des Rechts und die Grundzuge seiner Entwicklungsgeschichte*, §§ 39-40, quoted in Wigmore, "Tortious Responsibility," 3 Sel. Essays in Anglo-American Leg. Hist., p. 479.

¹⁰ Holdsworth, *Hist. Eng. Law.*, 3d Ed., Vol. 3, p. 50.

¹¹ *Ibid.*, p. 51.

¹² *Ibid.*, p. 52.

were made between intentional and unintentional harms, at least as to the criminal side of the tortious act. The too broad a meaning which has been given to the notion that a man acted at his peril has been subjected to attack. It has been stressed¹³ that, as early as the laws of Cnut¹⁴ as well as those of Aethelred,¹⁵ distinctions as to liability appear. But such distinctions were made as matters of grace, motivated by the *pii regis misericordia*,¹⁶ for the king's pardon might protect the unintentional tort-feasor from severe criminal punishment. Even so, in those earlier days, the man who had killed another by misadventure, while deserving of a pardon, was guilty of a crime.¹⁷ Released though he might be from liability for the death, he still had to pay a fine. Later, when the blood feud had disappeared and a fixed payment became the regular form of indemnification for civil liability, he still had to pay a portion of the ordinary amount,¹⁸ for the law considered the feelings of the victim and his kin rather than the culpability of the actor.¹⁹

After the Norman conquest, the newly organized Anglo-Norman courts developed a form of civil tort liability separate and apart from the thought of criminal liability.²⁰ It is at this time that the distinction between intentional and unintentional harms gradually begins to take a more definite shape. The intentional wrong becomes the crime, for which the wrongdoer is made corporally responsible. The unintentional wrong creates

¹³ See Winfield, "The Myth of Absolute Liability," 42 L. Q. Rev. 37 (1926), particularly p. 42.

¹⁴ Section 69 thereof states: ". . . in many a deed, when anyone is an involuntary agent, then he is the better deserving of protection, because he did what he did from necessity; and if any one do a thing unwillingly, it is not at all like that which he does wilfully." See Ancient Laws and Institutes of England, Vol. 1, p. 413 (1840).

¹⁵ Aethelred's Laws, VI, § 52, recites: ". . . If . . . any one unwillingly or unintentionally do anything amiss, he shall not be like to him who misdoes intentionally and of his own will. . . ." Ancient Laws and Institutes of England, Vol. 1, p. 329 (1840).

¹⁶ Ancient Laws and Institutes of England, Vol. 1, p. 412 (1840).

¹⁷ Holdsworth, Hist. Eng. Law, Vol. 2, p. 52, and Vol. 3, p. 371.

¹⁸ Wigmore, "Tortious Responsibility," 3 Sel. Essays in Anglo-American Leg. Hist., p. 488.

¹⁹ Holdsworth, op. cit., Vol. 2, p. 52.

²⁰ Wigmore, "Tortious Responsibility," 3 Sel. Essays in Anglo-American Leg. Hist., p. 503.

only an obligation to provide redress, the property of the wrongdoer, rather than his person, being exposed to seizure.²¹ No distinctions over negligence and the like were yet made, for the act was either wilful, that is intentional, or it was "misadventure," that is "unwitting," hence unintentional.²² Unintentional acts included those which were negligent as well as those which were unavoidable, without any attempt to distinguish between them.²³ Up to Bracton's time, there is but slender evidence of liability for negligence, so slender in fact that one writer has raised the question as to whether or not a man then had an action against a drunken carter, a reckless rider, a careless workman; whether there were then no unfenced pits, no unsafe scaffoldings, no loose tiles, no blundering cows, no biting dogs, no ill-bottled poisons, no arrows that went astray.²⁴ His quite convincing answer was that, beside other reasons, the age was a rough one, stricken with poverty. It was a hard enough task to wrestle with the intentional evil-doer, so mere negligence, even though it inflicted bodily injury, was not taken into much account unless it resulted in death.

It would break up the scope of this small article on comparative negligence too much to describe at length how the concept of negligence gradually arose. Two main features which helped develop the concept of negligent fault, with its concomitant that lack of negligence was a good defense, should be briefly noted. One concerns the notion of unavoidable accident; the other, that proximate causation is essential. It was held, as early as the reign of Edward IV, that necessity caused by an "act of God" would be a good defense to an action, for the act causing the damage was not the act of the defendant.²⁵ Judges and lawyers im-

²¹ See quotation from A. H. Post, *Die Grundlage des Rechts und die Grundzuege seiner Entwicklungsgeschichte*, set out in Wigmore, "Tortious Responsibility," 3 *Sel. Essays in Anglo-American Leg. Hist.*, p. 478-9.

²² *Ibid.*, p. 504

²³ *Ibid.*, p. 479.

²⁴ Winfield, "The History of Negligence in the Law of Torts," 42 *L. Q. Rev.* 184 (1926).

²⁵ See Holdsworth, *Hist. Eng. Law*, 3d Ed., Vol. 3, pp. 375-6, citing and explaining the famous "thorns case" in *Year Book*, 6 Edw. IV, Mich. term, pl. 18.

proved upon this idea to the point where it was possible to excuse defendants not only in cases of necessity but also in cases where it would be more accurate to talk of a convenience amounting to necessity.²⁶ Expressions such as "inevitable necessity," "unavoidable accident," "could not act otherwise," seem indiscriminately to hit off, in judicial language, the reasons for exempting from liability those persons who were deemed not to be blamed for what would now be called negligence.²⁷ Much has been made of this fact in later cases, wherein the way was prepared for still later developments, in which may be found statements to the effect that if a defendant could prove inevitable necessity he is not to be held liable, because he is not negligent.²⁸ Phrases like *non potuit aliter facere* and "inevitable necessity" serve as leading catchwords for many centuries. Even as late as the nineteenth century, court and counsel may be found making constant interchange between inevitable accident and the absence of negligence and blame.²⁹

Again, since the reign of Edward IV, it has become clear that a man is not to be held liable unless his act can be said to be the proximate cause of the damage done.³⁰ But this question may be answered only by first asking whether an ordinarily prudent man would have foreseen that damage would probably result from his act.³¹ During the sixteenth and seventeenth centuries, this constant need to inquire whether, in any given case, the damage complained of by the plaintiff was sufficiently the proximate consequence of the act of the defendant, gradually familiarized the courts with the idea that, in a large number of cases, liability was being grounded upon negligence.³² By the beginning of the eighteenth century, the judges were coming to

²⁶ *Ibid.*, Vol. 3, p. 380, citing Year Book, 22 Edw. IV, Pasch. term, pl. 24.

²⁷ Wigmore, "Tortious Responsibility," 3 Sel. Essays in Anglo-American Leg. Hist., pp. 506-7.

²⁸ Holdsworth, Hist. Eng. Law, 3d Ed., Vol. 8, p. 455, citing Weaver v. Ward, Hob. 134, 136 Eng. Rep. 284 (1617).

²⁹ Wigmore, "Tortious Responsibility," 3 Sel. Essays in Anglo-American Leg. Hist., pp. 506-7.

³⁰ Holdsworth, Hist. Eng. Law, 3d Ed., Vol. 3, pp. 379-80.

³¹ *Ibid.*, Vol. 8, p. 449.

³² *Ibid.*, Vol. 8, pp. 450-1.

the conclusion that negligence could be regarded as a basis for liability and that, in the absence of negligence, no liability should, as a rule, be imputed.³³

These brief remarks may have served to throw some light on the fact that liability for acts which would now be termed "negligent," as distinguished from other unintentional acts, became established fairly late in Anglo-American jurisprudence. Until such had become established, and until it was possible to label such liability by the descriptive term "negligence," it could not be expected that courts would be able to conceive that there should be freedom from such liability under the doctrine of contributory negligence. There is, then, fair reason to understand why the decision in the *Butterfield* case had not been enunciated at an earlier point of time.

To find the answer to the second question as to why, when the time arrived, the doctrine of contributory negligence should be adopted so promptly and so willingly, without the citation of authority, it is necessary to turn back again to the formation of the doctrine of proximate causation for it is there that the first traces of that which, at the beginning of the nineteenth century, comes to be styled contributory negligence may be found. The lawyer of the fifteenth century was familiar with the fact that a man was not to be held liable if his acts were not the proximate cause of the injury.³⁴ It was also a truism, to him, that if the act which had caused the damage was the act of the plaintiff himself, there could be no cause of action.³⁵ That rule had been established by the case of *Godfrey v. Godfrey*,³⁶ one reported in the Yearbooks. The facts thereof disclose that the plaintiff had a close of land adjoining the king's highway. When the defendant drove his cattle along the highway, the animals entered and did damage. Defendant's plea to plaintiff's suit was directed to the point that the close had not been properly secured and that

³³ *Ibid.*, Vol. 8, p. 452.

³⁴ *Ibid.*, Vol. 3, pp. 379-80.

³⁵ *Ibid.*, Vol. 3, p. 378.

³⁶ Year Book, 10 Edw. IV, Pasch. term, pl. 19 (1470), reprinted in 47 *Selden Soc.* 67.

it was this defect in the enclosure which produced the damage. The plea was held to be good. Here, as Holdsworth points out, is exactly "the substance and meaning of that miscalled doctrine 'contributory negligence'," ³⁷ for it is according to that doctrine that a plaintiff is to be denied a recovery when the plaintiff's own act is the effective cause of the damage he has suffered.

The doctrine so conceived has been referred to as "miscalled" and as "misleading" because there is an unfortunate divergence between its real content and its name. ³⁸ The name, as Pollock once stressed, ³⁹ would suggest that the ground of the doctrine rests upon the fact that a man who does not take ordinary care for his own safety is to be, in a manner, punished for his carelessness by being denied the right to sue anyone else even though that other's carelessness is concerned in the production of damage. In content, however, the doctrine is posited on the fact that it was the plaintiff's act which was the proximate cause of the injury. ⁴⁰ His right to recover was not there denied because his negligence had contributed to the accident for, in those early days, the notion of negligence had not yet arisen. ⁴¹ Rather, he failed to recover because his own act had been the direct cause of the accident. ⁴²

The early doctrine of the Godfrey case might better have been styled as one of contributory causation rather than one of contributory negligence. But, when the conception of liability gradually changed and came to be based not so much on an act which had caused damage but more nearly on a wrongful or a negligent act, the mediaeval doctrine also changed its shape. ⁴³ Beginning in the seventeenth century, it came to be said that if a plaintiff had suffered damage by reason of his own neglect, he

³⁷ Holdsworth, *Hist. Eng. Law*, 3d Ed., Vol. 3, p. 378.

³⁸ *Ibid.*, Vol. 8, p. 460.

³⁹ See Pollock on Torts (First Amer. Ed. from Third Eng. Ed., 1894), p. 569. The text has been changed in later editions. Compare with Pollock on Torts, 14th Ed. (Stevens & Sons, Ltd., London, 1939), p. 367.

⁴⁰ Holdsworth, *Hist. Eng. Law*, 3d Ed., Vol. 3, p. 378, and Vol. 8, p. 460.

⁴¹ *Ibid.*, Vol. 8, p. 449.

⁴² *Ibid.*, Vol. 3, p. 378, and Vol. 8, pp. 447, 450 and 460.

⁴³ *Ibid.*, Vol. 8, p. 459.

could not recover. The statement was first made in the form of dictum only, and then it had been said with respect to a plaintiff who sued, not for injury to his person but for fraud and deceit. As the plaintiff could easily have found out the falsehood in the defendant's representations, the court said the damage, "being his own negligence, he is without remedy."⁴⁴ When liability came to be grounded more and more on the theory of negligence, this new method of statement gained ground.⁴⁵ The change from contributory causation to contributory negligence may have been facilitated by the fact that, as Holdsworth repeatedly mentions,⁴⁶ the conception of negligence had been latent within the mediaeval principle that a man is only liable for the damage which is the proximate consequence of his act. It may well be that this is the reason why the judges, when deciding the Butterfield case, discussed the problem with a glibness which suggests that they felt they were on familiar territory. It is reasonably certain, at least, that they did not feel they were charting any new paths in the law,⁴⁷ nor is there any evidence that the enunciation of the rule therein created any stir in legal circles.⁴⁸

B. RECEPTION OF THE DOCTRINE

Lord Ellenborough's rather casual remark, noted above, that "one person being at fault will not dispense with another's using ordinary care," may never have compelled respect were it not for the fact that his successors on the bench appear to have been kindly inclined toward the idea.⁴⁹ It is doubtful whether he intended to say any more than that the loss should fall on the shoulders of whichever of the parties as had the best opportunity

⁴⁴ *Bayley v. Merrel*, Cro. Jac. 386 at 387, 79 Eng. Rep. 331 (1606). See also Holdsworth, *Hist. Eng. Law*, 3d Ed., Vol. 8, p. 459, note 7.

⁴⁵ Holdsworth, *op. cit.*, Vol. 8, p. 449.

⁴⁶ See, for example, Holdsworth, *op. cit.*, Vol. 3, pp. 379-80, and Vol. 8, p. 449.

⁴⁷ See notes 7 and 8, *ante*.

⁴⁸ Neef, "Comparative Negligence," 27 Mich. State B. J. 34 (1948); Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944-5), at p. 40.

⁴⁹ Malone, "The Formative Era of Contributory Negligence," 41 Ill. L. Rev. 151 (1946).

to avoid the accident,⁵⁰ but one thing is certain, the expression obtained for itself an extremely friendly reception in England.⁵¹ One reason therefor may lie in the fact that, in the following decades, England experienced an expansion of its economy, bringing with it the development of many new industrial enterprises. Too liberal an attitude toward tort claims, at least as to those based on the negligent acts or omissions of these young and growing entities, might well have endangered their still precarious existence to say nothing of jeopardizing their profits.⁵² The doctrine, then, came to be a welcome means in the interest of the general economy, by which to protect industry against what, at best, may often have been negligence claims of doubtful merit.

Much the same type of condition favored the reception of the doctrine of the *Butterfield* case into the law of the United States. The date of 1824 A. D. would seem to be that of the first American case to apply the doctrine,⁵³ scarcely sixteen years after its enunciation. Thereafter, the rule developed rapidly,⁵⁴ so rapidly in fact that twenty-five years later a Pennsylvania court was found to say that it had been the "rule from time immemorial, and it is not likely to be changed in all time to come."⁵⁵ Malone has added, as an additional point for the willingness to adopt the doctrine in this country, that there was, about that time, a breakdown in the method of trial by jury. When simple disputes between neighbors had formed the bulk of tort litigation, as had been the case in the past, jurors had been able to dispose of such cases easily, fairly, and properly. When, however, big and remote corporate defendants, especially railroads,

⁵⁰ See Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944-5), at p. 40; Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1944), at p. 126.

⁵¹ Malone, "The Formative Era of Contributory Negligence," 41 Ill. L. Rev. 151 (1946).

⁵² Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1944), at p. 127.

⁵³ *Smith v. Smith*, 19 Mass. (2 Pick.) 621, 13 Am. Dec. 464 (1824). See also *Washburn v. Tracy*, 2 D. Chip. (Vt.) 128, 15 Am. Dec. 661 (1824); *Bush v. Brainard*, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513 (1823); *Noyes v. Town of Morris-town*, 1 Vt. 353 (1828).

⁵⁴ Neef, "Comparative Negligence," 27 Mich. State B. J. 34 (1948).

⁵⁵ *Penn. R. Co. v. Aspell*, 23 Pa. 147 at 149, 62 Am. Dec. 323 at 324 (1854).

entered the scene, the average juror, often regarding such defendants to be intruders as well as immensely rich, became plaintiff-minded.⁵⁶ By adoption of the doctrine of contributory negligence, a court could, in many cases, find a welcome means by which to control, or even to eliminate, the jury.⁵⁷ Specific features of plaintiff behavior, acts or omissions which would be apt to recur frequently in special types of cases, as for instance in railroad crossing accidents, could be handled by rule-of-thumb judgments, soon to be regarded as rules of law, leaving nothing to be considered by the jury.⁵⁸ Thus, the issue of contributory negligence came to be "an ingenious device which gave the court almost complete freedom to accept or reject jury participation at its pleasure."⁵⁹

C. CRITICISM OF THE DOCTRINE

The outstanding feature of the contributory negligence doctrine is that the fault of the plaintiff operates as a complete bar to his recovery, provided such negligence has, in any degree, contributed as a proximate cause to the damaging act. The law makes no attempt to measure the degree of plaintiff's contribution as it is no longer essential that his negligence should be the sole proximate cause of the injury, nor that it should have contributed "substantially," "materially," "to an appreciable extent," or even "essentially" to the injury complained of. It is sufficient if the fault forms a part of the efficient cause of the injury, or is a cause, or one of the causes without which the injury would not have occurred.⁶⁰ The plaintiff who has thus contributed, no matter how slightly, to his own injury may not recover for such injury, regardless how negligent the other party may have been.⁶¹ Being a complete defense, contributory negli-

⁵⁶ Malone, "The Formative Era of Contributory Negligence," 41 Ill. L. Rev. 151 (1946), particularly p. 155 et seq.

⁵⁷ *Ibid.*, at p. 164 et seq.

⁵⁸ *Ibid.*, at p. 167 et seq.

⁵⁹ *Ibid.*, at p. 169.

⁶⁰ 45 C. J., Negligence, § 531.

⁶¹ Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936).

gence does not go in by way of mitigation of the plaintiff's damage⁶² for the contributorily negligent plaintiff is forced to assume the entire loss, even though the defendant may have been, by far, the more negligent of the two.⁶³

A second startling feature of the rule is that, in some jurisdictions, contributory negligence is not treated as an affirmative defense to be pleaded and proved by the defendant. That last notion would, perhaps, be understandable. What is much worse, is that in these jurisdictions the plaintiff comes into court burdened with the duty to plead and to prove freedom from contributory negligence.⁶⁴ The situation is much the same as if, in every contract case, the plaintiff were required to plead and to prove his freedom from insanity!

Because of these and other similar irrationalities, there is small occasion to wonder that the principle of contributory negligence has been attacked for its extreme harshness.⁶⁵ True, the Common Law generally has often been regarded as a jurisprudential system of formal character bordering on strictness and harshness. But it does possess an immense sense for fairness. For this reason, it is all the more surprising to find such a rule being established shortly after the time when the Common Law had reached its prime. By their insistence that only the blameless shall find refuge in the law, courts have demonstrated a willingness to forgive wholly the transgressions of defendants who may, in fact, be far more at fault. Verily has it been said, none "but the pure in heart shall triumph, and the wicked do laugh exceedingly therefor."⁶⁶ Yet, even in the common law, there has been considerable dissatisfaction with the doctrine,⁶⁷ for a grow-

⁶² 25 C. J. S., Damages, § 98.

⁶³ Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at p. 123.

⁶⁴ Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944-5), at p. 125.

⁶⁵ Green, *op. cit.*, at p. 36, says it is "the harshest doctrine known to the common law of the 19th century."

⁶⁶ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1944), at p. 126.

⁶⁷ Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at p. 113, lists numerous citations.

ing feeling has come about that an injustice is being worked; that there are situations in which the plaintiff should not be denied a recovery merely because he has, to some appreciable degree, contributed to his own harm,⁶⁸ or that a plaintiff but slightly negligent, should not be defeated in his claim against another who is guilty of neglect of a greater degree.⁶⁹ There is real reason to believe, therefore, that the contributory negligence rule has ceased to conform to those fundamental ideals of justice which exist today.⁷⁰

The doctrine may have had its merits in the early days of the nineteenth century, when infant industry stood in need of judicial help against the ravages which might have been wrought by over-sympathetic juries.⁷¹ In an age where men are pitted against the power and speed of machines, however, the harshness of the doctrine becomes overwhelming.⁷² The advent of the private automobile has also done much to complicate the situation,⁷³ for the scales of justice do not hang evenly in the application of the doctrine to the relationships of motorists and pedestrians.⁷⁴ The scrambling of pedestrians, motor vehicles, streetcars, railroad trains and passengers in one pile of mechanized traffic, all in a hurry, presents an every-day occurrence.⁷⁵ Under such a circumstance, accidents are inevitable for negligence will never die. All human beings, because of their imperfections, are what the law would style "negligent" at some time or another; the one today, the other tomorrow. Why then, if an accident results from the negligence of two or more persons, should

⁶⁸ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932).

⁶⁹ Padway, "Comparative Negligence," 16 *Marq. L. Rev.* 1 (1931), particularly p. 4.

⁷⁰ Campbell, "Wisconsin's Comparative Negligence Law," 7 *Wis. L. Rev.* 222 (1931). See also MacMurchy, "Contributory Negligence—Should the Rule in Admiralty and the Civil Law be Adopted?" 1 *Can. B. Rev.* 844 (1923), at p. 856.

⁷¹ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1944), at p. 141.

⁷² Whelan, "Comparative Negligence," 1938 *Wis. L. Rev.* 465, at p. 466.

⁷³ Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1944), at p. 140.

⁷⁴ *Blashfield, Cyc. of Auto. Law*, Vol. 2, p. 1009 (1927).

⁷⁵ Green, "Illinois Negligence Law," 39 *Ill. L. Rev.* 36 (1944), at p. 123.

the noxal consequences be distributed so unevenly? Why should the mutilated victim have to suffer the sorrows of pain, tears, and sleepless nights while his opponent, perhaps guilty of fault to a higher degree, is free to leave a court of justice bearing a certificate that he is not to be deemed a tort-feasor? To call such a result "harsh" is to use a mild expression, to say the least!

Things are still worse in those few jurisdictions where contributory negligence is not even an affirmative defense to be pleaded and proved by the defendant, but where the plaintiff is required to plead and prove his freedom from such negligence.⁷⁶ Forcing him to negative his own negligence is an anomaly in law,⁷⁷ one which imposes an unfair and heavy burden on the victim. As it was the unexpected which happened, it is understandable how his opportunity to observe the circumstances of his injury should be limited. In contrast, the defendant is usually in at least as good, if not a better, position to know in what way the plaintiff's conduct may have contributed to the injury. It should be no hardship to require a concededly guilty defendant to plead and prove the negligence of his victim. It is enough that he, although a tort-feasor, is to go free under the substantive side of the doctrine.⁷⁸

What may be said in defense of the doctrine? One argument made in its favor is that it operates as a deterrent. But does it? The vast number of negligence cases would hardly seem to support such an assumption.⁷⁹ But supposing it did, why apply that deterrent against the victim who, too often, is already punished badly enough for his inadvertence? Why not, better, use it to deter the other tort-feasor by letting him know that he, too, will be liable for his negligent damnifying acts? It has

⁷⁶ *Ibid.*, at p. 125.

⁷⁷ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 651. See also *Fernet v. Stewart*, 163 *App. Div.* 112, 148 *N. Y. S.* 646 (1914).

⁷⁸ Green, "Illinois Negligence Law," 39 *Ill. L. Rev.* 36 (1944), at pp. 126-7.

⁷⁹ Mole and Wilson "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 644.

also been said, in defense of the doctrine, that it is a general principle of law that aid is to be refused whenever the contesting parties are *in pari delicto*. Admit the truth of that principle and it still does not help, for the victim and the other tort-feasor are not really equal wrongdoers. The latter has harmed another by interference with his personal rights; the former has merely failed to take care of his own sphere of rights. Again, that maxim, stemming from the Roman doctrine *in pari turpitudine melior est causa possidentis*, applies only to intentional tort-feasors. Such was the law in England, and contribution among tort-feasors was not disallowed in this country until 1825, if the tort was the product of negligence or of mistake.⁸⁰ In fact, the authorities are even now split on the question.⁸¹ It would seem, therefore, that a doubtful problem of contribution or non-contribution among tort-feasors provides but shaky support for the disallowance of distribution of loss between tort-feasor and victim. The best that can be said, in defense of the contributory negligence doctrine, is that it has the merit of simplicity beside being easy to administer.⁸² If these be regarded as advantages, they hardly serve to outweigh the crudeness inherent therein.

D. ATTEMPTS AT MITIGATION

Attempts have, of course, been made to mitigate the ultimate hardship of the rule. One generally accepted exception allows even the contributorily negligent victim the right to recover where the action is founded upon intentional violence or on wrongful acts done purposely.⁸³ Such is also the case where the defendant is charged with that aggravated form of negligence, approaching intent, which has been characterized variously as

⁸⁰ Prosser, *Hornbook on the Law of Torts* (West Pub. Co., St. Paul, 1941), p. 1113.

⁸¹ 18 C. J. S., *Contribution*, § 11(b)(3).

⁸² Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), p. 49. Gregory is, by no means, a defender of the doctrine.

⁸³ Prosser, *Hornbook on the Law of Torts* (West Pub. Co., St. Paul, 1941), pp. 393 and 402.

“wilful,” “wanton,” or “reckless.”⁸⁴ But the meaning of this exception is not clear for, while the Illinois Supreme Court has announced many times that “negligence and wilfulness are as unmixable as oil and water,”⁸⁵ attempts to define that aggravated form of negligence known as “wantonness” have produced the most contradictory of results.⁸⁶ It is likely that wantonness is more closely related to intent than it is to negligence for it partakes of the nature of the *dolus eventualis* of the Civil Law. The tort-feasor may not wish to perpetrate the wrongful act, but he realizes that his behavior might have a tortious effect. Nevertheless, he shrugs his shoulders and takes a devil-may-care attitude. In contrast, the negligent tort-feasor, despite the magnitude of his negligence, does not realize the potentiality for damage in his conduct and his failure so to do is but a part of his negligence. Despite this, there is difficulty in drawing an obvious line between a defendant who is grossly negligent even unto the highest degree, but who is nevertheless allowed to have the benefit of the doctrine of contributory negligence, on the one hand, and another who has entered upon the first stages of wantonness. That difficulty often makes this exception unworkable, hence insufficient to divest the general doctrine of its extreme harshness.⁸⁷

Another exception has been developed in the form of the “last clear chance” doctrine. Under it, a plaintiff may recover his full damage, in spite of his own contributory fault, if it can be shown that the defendant had the last clear chance to avoid the accident. The doctrine originated in the well known English case of *Davies v. Mann*.⁸⁸ There, the plaintiff, having fettered the forefeet of his ass, had left it to graze on the off-side of the road. The defendant’s servant, at a smartish pace, drove his waggon into the animal. It was held that, although the ass might have

⁸⁴ *Ibid.*, p. 402.

⁸⁵ Green, “Illinois Negligence Law,” 39 Ill. L. Rev. 36 (1944), at p. 209, lists the cases.

⁸⁶ See 44 Words and Phrases, Perm. Ed., p. 589.

⁸⁷ Gregory, Legislative Loss Distribution in Negligence Cases (University of Chicago Press, Chicago, 1936), p. 50; Malone, “Comparative Negligence—Louisiana’s Forgotten Heritage,” 6 La. L. Rev. 125 (1945), at p. 141.

⁸⁸ 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

been unlawfully on the highway, the defendant, by proper care, might have avoided the accident and was, therefore, liable. The rule itself seems clear and is based on the proposition that where the defendant has the better opportunity to prevent the hurt, even though the plaintiff may have been careless for his own safety, the defendant ought to bear the loss.⁸⁹ The United States Supreme Court once formulated the thought by saying that "a negligent defendant will be held liable to a negligent plaintiff, if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a better opportunity than the plaintiff to avoid the accident."⁹⁰

Again, this exception has been utilized in, as well as denied application to, varying situations wherein it is hard to draw distinctions⁹¹ so that its application has been attended with confusion.⁹² It is also open to other objections. In the first place, the rule is inapplicable to the many cases of contemporaneous negligence, for the defendant's negligence must be subsequent in point of time in order that he may have the "last" chance to avoid harm.⁹³ In the second place, the application of the rule is unsatisfactory in that it swings the pendulum too far to the other side. If it be regarded arbitrary to deny recovery to the careless plaintiff under the general doctrine, is it not equally arbitrary to allow full recovery in situations falling within the exception? The fact remains that the plaintiff was, to some extent, guilty of negligence.⁹⁴ Even more serious is the fact that the exception has not been adopted in all American jurisdictions

⁸⁹ Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944), at pp. 39-40 and 197, and 40 Ill. L. Rev. 5 (1945).

⁹⁰ *Kansas City S. Ry. v. Elzey*, 275 U. S. 236 at 241, 48 S. Ct. 80 at 81, 72 L. Ed. 259 at 261 (1927).

⁹¹ Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), p. 51; Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1945), at p. 141.

⁹² Prosser, *Hornbook on the Law of Torts* (West Pub. Co., St. Paul, 1941), p. 411, refers to an annotation on the subject in 92 A. L. R. 47.

⁹³ Prosser, *op. cit.*, p. 415.

⁹⁴ Gregory, *op. cit.* in note 91 ante, at p. 51.

for many states, especially Illinois,⁹⁵ deny its application. Little amelioration, therefore, has been provided by this exception.

Only one other remedy remains for consideration, one which has attained a fairly wide use in this country, and that is one which calls for the abolition of the contributory negligence rule and the substitution, in place thereof, of the comparative negligence doctrine. Actually, that doctrine is not just *one* rule of law, for it reflects a variety of features which have differed under mediaeval sea law, under common law, under Civil Law, and in admiralty, whether in this country or in England. The nature of the development of that doctrine under these systems will be disclosed hereafter, but to facilitate understanding, a short outline is presented at this point.

It should be noted, first, that an incomplete form of the doctrine of comparative negligence was, at one time, applied in a few American jurisdictions, particularly in Illinois. As so applied it meant nothing more than that, in cases where the negligence of both parties contributed to the injury, a comparison would be made between the degrees of their respective negligence. If plaintiff's negligence, when compared with the gross neglect of the defendant, turned out to be slight, the plaintiff recovered the full amount of his damage; if not, he failed completely. No mitigation of damages, no apportionment of loss was provided for under this somewhat primitive rule.⁹⁶ One step ahead of this view, now also outdated except as it is still followed in the admiralty law of the United States, is the one under which, if both parties are guilty of negligence, no comparison is made of the degrees of their respective negligence but the loss is divided equally between them. In any event, the plaintiff stands to recover one-half of his damage.⁹⁷

⁹⁵ *City of Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79 (1903); *West Chicago Street Ry. Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367 (1900); *Specht v. Chicago City Ry. Co.*, 233 Ill. App. 384 (1924). Green, "Illinois Negligence Law," 39 Ill. L. Rev. 36 (1944), at p. 208, has pointed out that the last clear chance doctrine was applied in *Moore v. Moss*, 14 Ill. 106 at 112 (1852). That case has never been expressly overruled.

⁹⁶ A more complete statement of the Illinois cases will appear in Part II of this article.

⁹⁷ This point is treated more elaborately hereafter.

Much more refined is the rule applied in most Civil Law jurisdictions,⁹⁸ expressed in the form of a number of American statutes, both state and federal,⁹⁹ and now followed in England.¹ Pursuant thereto, the negligence of both parties is compared and, according to the degree of the negligence displayed by each, the damage is apportioned. In accordance therewith, the plaintiff recovers a percentage or fraction of his loss in direct relation to the degree of his fault. He may, for example, recover four-fifth, two-thirds, one-tenth, or less, as the case may be.² The doctrine reaches its most perfect form in situations where both parties have been guilty of negligence and both have suffered damage. The aggregate amounts of both damage items go to establish the size of a pool to which each party makes contribution according to the degree of his own negligence and from which he draws his share of the loss.³ The rise and development of that doctrine will now be investigated. Styled a doctrine of comparative negligence, it has produced a much more equitable solution to the problem of adjusting the loss between the parties by preventing the burden from falling entirely on one or the other.

⁹⁸ See Section IIC hereof, under the title "Modern European Developments."

⁹⁹ A discussion thereof will appear in Part II of this article.

¹ See the closing paragraph of Part I hereof.

² A simple illustration of the application of this doctrine would be found in a case where plaintiff's damage totalled \$100, and 20% of the fault was apportioned to him, with the remaining 80% attributed to the act or omission of the defendant. Plaintiff would recover a judgment for \$80. See also *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 246 N. W. 420 and 247 N. W. 453 (1933).

³ Illustration No. 1: Plaintiff's damage is \$100, defendant's damage is \$50, making a total damage of \$150. 20% of the fault is apportioned to plaintiff and the remaining 80% to defendant. Plaintiff should suffer 20% of the total loss, or \$30. He actually suffered to the extent of \$100. He recovers \$70. Defendant should suffer 80% or \$120. He actually suffered only \$50 damage. He pays \$70.

Illustration No. 2: Plaintiff operating a car and defendant on a bicycle are in danger of collision. Plaintiff, trying to avoid the accident, drives his car across a sidewalk and into a lamp-post. Defendant is also upset. Plaintiff's damage amounts to \$250, while defendant's damage is \$30, making a total damage of \$280. It is determined that both parties were equally negligent. Plaintiff should suffer 50% or \$140. He actually suffered \$250, so is entitled to recover \$110. Defendant should suffer 50% or \$140, but he suffered only \$30. He should pay \$110.

Further illustrations of this view may be found in Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), p. 88 et seq. See also note in 17 *Temple L. Q.* 276 (1943), at p. 280.

II. THE COMPARATIVE NEGLIGENCE DOCTRINE

A. UNDER ANCIENT LAW

Little is known, in ancient legal systems, about that form of liability for conduct now called negligence, and still less is known about the distribution of damage resulting from negligent acts. There is reason to believe that the idea of distribution of loss was not entirely unfamiliar to the Mosaic Law, even though it cannot be said that negligence was the gist of the action. Marsden has pointed out, for example,⁴ that if an ox killed the ox of another, the live ox was to be sold and the proceeds thereof, as well as the proceeds of the dead ox, were then to be divided between the two owners.⁵ That rule was adopted later, in Anglo-Saxon England, by the laws of Alfred.⁶

In the earliest of Roman times, it is quite probable that *furtum* and *iniuria* exhausted the idea of wrongful conduct between man and man.⁷ The former involved a meddling with another's movable property and always required a deliberate intent.⁸ The latter possessed many meanings, but as a special delict it involved a trespass against the person of another.⁹ The Twelve Tables of 450 B. C. contained provision against certain forms of damage wrongfully done *de damno iniuria*,¹⁰ including provisions against certain forms of insult, but these were probably limited to assaults.¹¹ The rude system thus formulated later became superseded by a series of praetorian edicts which served to express a profound change in law.¹² Trespass, assault, battery, libel, slander,

⁴ Marsden, *A Treatise on the Law of Collisions at Sea* (Stevens & Sons, Ltd., London, 1923), 8th Ed., p. 135.

⁵ Exod., XXI, 35-6.

⁶ *Ancient Laws and Institutes of England*, Vol. 1, p. 51 (1840).

⁷ Radin, *Handbook of Roman Law* (West Pub. Co., St. Paul, 1927), p. 139.

⁸ *Ibid.*, p. 131. See also Buckland, *A Textbook of Roman Law from Augustus to Justinian* (University Press, Cambridge, 1921), p. 572.

⁹ Radin, *op. cit.*, p. 139; Buckland, *op. cit.*, pp. 584-5.

¹⁰ Buckland, *A Manual of Roman Private Law* (University Press, Cambridge, 1939), 2d Ed., p. 323; Sandars, *Institutes of Justinian* (Longmans, Green & Co., London, 1888), 8th Ed., p. 412.

¹¹ Buckland, *A Textbook of Roman Law from Augustus to Justinian* (University Press, Cambridge, 1921), pp. 584-5.

¹² *Ibid.*

and malicious prosecution became ground for use of an *actio iniuriarum*, but only if a malicious purpose was apparent,¹³ for intent was still the gist of the action.¹⁴ Gradually, however, other wrongs came into notice which were neither *furtum* nor *iniuria*, as where there was neither an apparent profit nor a malicious purpose. Such situations came to be covered by the Lex Aquilia of 286 B. C.,¹⁵ which practically served to supersede all earlier legislation.¹⁶

The Lex Aquilia declared that anyone who should unlawfully kill the slave or cattle of another, or who should otherwise unlawfully damage another's property, as by burning, breaking, or destroying should be liable to the owner for the value thereof.¹⁷ It was necessary that the damage be unlawful, but it did not have to be wilful for negligence was enough.¹⁸ It is in these provisions that there is first met the "concept of *culpa, improvidentia*, lack of that causation and circumspection which it behooves men, as social beings, to have."¹⁹ The law, as shown, only covered cases of property. But the praetor soon gave an *actio utilis* to a freeman who himself, or whose *filius familias*, had been injured,²⁰ hence it may be said that the Lex Aquilia did establish liability for negligence. This is a long way from saying, however, that the Roman Law contained a concept for what is now called contributory negligence. As to whether or not it established some other doctrine to meet the situation of fault on the part of both sides, it can only be said there is a great deal of confusion on the point.²¹ The writer

¹³ Radin, Handbook of Roman Law (West Pub. Co., St. Paul, 1927), p. 144.

¹⁴ Buckland, op. cit., note 11 ante, pp. 584-5.

¹⁵ Radin, op. cit., note 13 ante, p. 141.

¹⁶ Buckland, A Manual of Roman Private Law (University Press, Cambridge, 1939), 2d Ed., p. 323.

¹⁷ Buckland, A Textbook of Roman Law from Augustus to Justinian (University Press, Cambridge, 1921), pp. 580-1.

¹⁸ Ibid., p. 581. See also Buckland, A Manual of Roman Private Law (University Press, Cambridge, 1939), 2d Ed., p. 323.

¹⁹ Radin, Handbook of Roman Law (West Pub. Co., St. Paul, 1927), p. 146.

²⁰ Buckland, A Textbook of Roman Law from Augustus to Justinian (University Press, Cambridge, 1921), p. 584.

²¹ See Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at p. 119.

personally shares wholeheartedly in Malone's view that there is little in the Roman Law to support a belief in either contributory or comparative negligence.²²

Starting with contributory negligence, Hillyer stresses the point that the English authorities, in particular, seem to have interpreted the Lex Aquilia to intend a doctrine precisely like that generated by the common law, while the continental jurists have drawn, from the legislation of Justinian, a theory of *culpa-compensatio* to a similar effect.²³ It seems unnecessary to dwell on this point. The interpretation which the pertinent provisions of the Digest received after the reception of the Roman Law into Central and Western Europe will be discussed further on. This much can be shown here and that is that the Roman authorities chiefly relied on by proponents of the contributory negligence doctrine by no means force the conclusion that there was such a thing as a contributory negligence doctrine in the Roman Law, for the sources which may seem to support the doctrine can be explained on other grounds.²⁴

First, take the case mentioned in the Digest of a slave who was wounded, but not mortally, by a third person. He afterwards died because his master had negligently omitted to take proper care of the wound. Recovery by the master for the wounding was permitted but not for the killing.²⁵ No doctrine of contributory negligence is traceable therein for the decision can best be explained on the ground that the master broke the chain of causation. Conversely, the Institutes refer to the case of a defendant who, while pruning a tree by the side of the road, let a bough fall which killed the plaintiff's slave, then passing by. It was

²² Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1945), at p. 128.

²³ Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at pp. 119-20.

²⁴ *Ibid.*, at p. 120.

²⁵ *Dig. 9.2.30.4, Paulus libro XXII, ad Edictum*: ". . . *Si vulneratus fuerit servus non mortifere, negligentia autem perierit, de vulnerato actio erit, non de occiso.*" An English translation thereof may be found in Scott, *The Civil Law*, Translated from the original Latin (The Central Trust Co., Cincinnati, 1932), Vol. 3, p. 338. For brevity sake, this work will hereafter be cited as "Scott, *The Civil Law.*"

held that the defendant would not be to blame if he called out beforehand and the passer-by would not take care, just as would be the case if he was cutting far from a public road.²⁶ It was there expressly said that the defendant was "not to blame," that is, was free from negligence, for the only negligent person was the victim. Clearly no contributory negligence rule could arise from this quotation, since that rule requires the concurrence of fault on the part of at least two persons.

The problem is also put, in the Digest, of the case of persons who made pits in order to catch bears, but who dug them in a place where people commonly passed, so that another fell therein. It was said that they were to be held liable only if no warning was given but that relief was to be refused if it was within the plaintiff's power to avoid the danger.²⁷ The decision has been explained upon the theory of a last clear chance,²⁸ but an easier justification for the denial of recovery would seem to be that the defendants, by giving warning, had done everything which might be reasonably required of them, so that they were not negligent at all. The only negligent person being the plaintiff, there would be no room in which to erect a claim for a doctrine of contributory negligence.²⁹ Paralleling that illustration is another concerning several people who were hurling spears on an exercise ground. One spear so hurled hit and killed a slave who chanced to pass that way. It was said that the hurler was not liable "because the slave had no business making his way at

²⁶ *Inst.* 4.3.5: ". . . Si putator ex arbore dejecto ramo servum tuum transeundem occiderit, si prope viam publicam . . . id factum est neque praeclamavit, ut casus evitari possit, culpae reus est: si praeclamavit, neque ille curavit cavere, extra culpam est putator. Aequè extra culpam esse intelligitur, si seorsorum a via forte vel in medio fundo caedebat, licet non praeclamavit, quia ex loco nulli extraneo jus fuerat versandi." Scott, *The Civil Law*, Vol. 2, p. 141.

²⁷ *Dig.* 9.2.28, *Paulus libro X, ad Sabinum*: "Qui foveas ursorum cervorumque capiendorum causa faciunt, si in itineribus fererunt eoque aliquid decidit, factumque deterius est, *Lege Aquilia* obligati sunt; . . . *Sec. 1.* Haec tamen actio ex causa danda est; id est, si neque denunciatum est, neque scierit, aut providere potuerit; et multa huiusmodi deprehenduntur, quibus summovetur petitor, si evitare periculum potuerit." Scott, *The Civil Law*, Vol. 3, p. 336.

²⁸ Hillyer, "Comparative Negligence in Louisiana," 11 *Tul. L. Rev.* 112 (1936), at p. 120.

²⁹ To the same effect, see Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at p. 128.

an improper time across the ground used for hurling spears.’³⁰ An outstanding commentator on the Lex Aquilia would regard the hapless hurler as clearly negligent but would rest the absence of recovery on the fact that the victim contributed, by his own fault to the injury.³¹ He overlooks the fact, however, that there is nothing to indicate the presence of negligence on the part of the hurler. He was on the exercise ground set aside for the purpose. Only the slave was negligent. Why, then, is it necessary to justify the decision under the assumption of the risk rule?³² The same situation, but with some elaboration, also appears in the Institutes.³³

Take yet another illustration from the Digest, one growing out of the course of a ball game. It seems that one of the players struck the ball too violently, driving it against the hand of a nearby barber who was shaving a slave, thereby leading to cutting of the throat of the latter.³⁴ That attractive case appears to have caused the Roman jurists to suffer a substantial headache. Ulpian reports that it was Paulus’ opinion that the barber was liable, although he cautiously adds his own belief that it might “not improperly be held that where anyone seats himself in a barber’s chair in a dangerous place, he has only himself to

³⁰ *Dig. 9.2.9.4, Ulpianus libro XVII, ad Edictum*: “. . . si per lusum iaculantibus servus fuerit occisus, Aquiliae locus est. Sed si, quum alii in campo iacularentur, servus per eum locum transierit, Aquilia cessat, quia non debuit per campum iaculatorium iter intempestive facere; qui tamen data opera in eum iaculatus est, utique Aquilia tenebitur.” Scott, *The Civil Law*, Vol. 3, p. 327.

³¹ Grueber, *The Roman Law of Damage to Property, being a Commentary on the Title of the Digest Ad Legem Aquiliam (IX.2)* (Clarendon Press, Oxford, 1886), p. 229.

³² See Malone, “Comparative Negligence—Louisiana’s Forgotten Heritage,” 6 *La. L. Rev.* 125 (1945), at p. 128.

³³ *Inst. 4.3.4*: “. . . si quis, dum iaculis ludit, vel exercitatur, transeuntem servum tuum traecerit, distinguitur. Nam si id a milite in campo, eoque ubi solitum est exercitari, admissum est, nulla culpa eius intellegitur; si alius tale quid admisit, culpa reus est. Idem iuris est et de milite, si in alio loco, quam qui exercitandis militibus destinatus est, id admisit.” Scott, *The Civil Law*, Vol. 2, p. 141.

³⁴ *Dig. 9.2.11. pr., Ulpianus libro XVIII ad Edictum*: “Item Mela scribit, si, quum pila quidam luderunt, vehementius quis pila percussa in tonsoris manus eam detecerit, et sic servi, quem tonsor habebat, gula sit praecisa adiecto cultello, in quocumque eorum culpa sit, eum lege Aquilia teneri. Proculus, in tonsore esse culpam. Et sane si ibi tondebat, ubi ex consuetudine ludebatur, vel ubi transitus frequens erat, est quod ei imputetur; quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum se queri debere.” Scott, *The Civil Law*, Vol. 3, p. 327.

blame." This idea apparently shocked the commentators who wrote upon the *Basilica*,³⁵ for *Hagiotheodorites*³⁶ vehemently took the view that it would be more equitable, and the lesser evil, to hold only the barber liable,³⁷ quoting the well known maxim *cum sine damno fieri aliquid non potest, minus iniustum eligimus*.³⁸ Thayer infers, from this scholium, that the defense of contributory negligence was as much in disfavor in the later Greek empire as it came to be in modern times.³⁹

Disregard the *Basilica* and its commentator and go back to Ulpian. Notice that he is not absolutely definite in his view that the slave's owner should not recover. Even so, his doubt as to the decision can hardly be said to be sufficient authority for recognizing the existence of a doctrine of contributory negligence. It may well have been founded on the thought of assumption of the risk. In further refutation of any notation of a contributory negligence doctrine in the Roman Law, it may be noted that in all the cases mentioned disposition was made by insisting

³⁵ The *Basilica* is a Greek revision of the *Corpus Juris*. It was published about 900 A. D., in the reign of the emperor Leo Philosophus, but it had been begun by his predecessor Basiliscus Macedo. See Radin, *Handbook of Roman Law* (West Pub. Co., St. Paul, 1927), p. 98; Bruns-Lenel, *Geschichte und Quellen des römischen Rechts*, in Holtzendorff's *Enzyklopädie der Rechtswissenschaft* (Duncker & Humblot, Munich, 1915), 7th Ed., Vol. 1, p. 388; Zachariae von Lingenthal, *Geschichte des Griechisch-Römischen Rechts* (Weidmannsche Buchhandlung, Berlin, 1892), 3d Ed., p. 22 et seq.

³⁶ Probably the logothet or chancellor-secretary Michael H., who lived approximately at the middle of the 12th Century: Zachariae von Lingenthal, *op. cit.*, note 35 ante, p. 37.

³⁷ *Basilicorum Liber LX*, Tit. III.1.11, note 3 (Heimbach's Ed., Lipsiae, 1850), Vol. 5, p. 272. It seems expedient to quote the Latin translation rather than the Greek text, as follows: "*Hagiotheodor: Ex his duobus hominibus delinquentibus, [Ulpianus] inquit, tonsore qui in tali loco tondet, et eo, qui eiusmodi tonsori se committit, oporteret deterioris conditionis esse eum, qui tonsus est, et sibi imputare, neque actionem habere in tonsorem.—Verum tamen deterioris conditionis facimus tonsorem, et actioni subiicimus . . . aequis est ex duobus malis praeferre maioris mali prohibitionem, quam minus punire. Nam si tonsorem non puniverimus, plures alios hic tale modo laeserit . . . Punimus igitur tonsorem, multosque futuro damno liberamus, adiumento habentes regulam tit. 3 lib. 2 dicentem: Cum sine damno fieri aliquid non potest, minus iniustum eligimus.*" Scott, *The Civil Law*, Vol. 11, p. 317.

³⁸ *Basilicorum Liber II*, Tit. III.1.CC, adopted from Javolenus' statement in Dig. 50.17.200: "*Quotiens nihil sine captione investigari potest, quod minimum habeat iniquitatis.*" Scott, *The Civil Law*, Vol. 11, p. 317, translates the statement so as to read: "Whenever a decision cannot be rendered without causing injury, that course should be adopted which is productive of the least injustice."

³⁹ See Thayer's essay entitled "*Lex Aquilia*," Harvard University Press, Cambridge, 1929, p. 67.

that the fault was wholly on the side of the injured person.⁴⁰ As a German pandectist once styled it, "in effect: no guilty man escapes."⁴¹

Chief reliance for the view that the Roman Law on the subject was the same as the common law is placed most frequently⁴² on a statement made by Pomponius. In the last title of the Digest, under the heading of a collection of ancient maxims, appears the remark: "He who sustains any damage through his own fault is not considered to have been injured."⁴³ This statement, isolated and without the explanation usually provided by an illustrating text, can hardly stand for anything more than what it says, to-wit: nobody may recover the damage he has suffered by his own fault. Reading it, but without reading too much into it, one would think primarily of situations involving assumption of the risk, for example the prize fighter or the participant in a duel, neither of whom could recover from his opponent. There is nothing in the statement that requires that it be applied to situations where the damage has been caused partly by the negligence of the injured person and partly by the fault of another. Some scholars have interpreted Pomponius' quotation to amount to nothing more than the familiar principle of *damnum absque iniuria*.⁴⁴ Harm was suffered, but it did not result from any actionable wrong.

Is it not strange that the question as to whether something like the doctrine of contributory negligence was recognized in Roman Law has never been definitely settled, even though the Roman Law has been in force in Europe for centuries and, in a

⁴⁰ Radin, *Handbook of Roman Law* (West Pub. Co., St. Paul, 1927), p. 149.

⁴¹ Brinz, *Lehrbuch der Pandekten* (Verlag von Andreas Deichert, Erlangen, 1879), 2d Ed., Vol. 2, p. 354.

⁴² Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at p. 128.

⁴³ *Dig. 50.17.203*: "*Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*" Scott, *The Civil Law*, Vol. 11, p. 317, gives as a translation: "He who sustains any damage through his own fault is not considered to have been injured."

⁴⁴ See Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at p. 128; Radin, *Handbook of Roman Law* (West Pub. Co., St. Paul, 1927), p. 149.

substantial part of Germany, operated as late as 1900? During the sixteenth century, the Roman private law, in a form which had been modified and developed by the mediaeval legislation of the Church as well as by the theory and practice of the Italian lawyers, came to be "received" in Western and Central Europe, by far its largest part. After that reception, it was still further modified and developed, in Germany, by the Imperial legislature and by the theory and practice of the German lawyers.⁴⁵ In that form, it obtained the force of law throughout the entire German Empire to an extent that it came to be named the "Common German Law."⁴⁶ While codifications which will be discussed later served, during the eighteenth and nineteenth centuries, to end its authority in a part of this territory, a substantial part of the country was not subject to these territorial codifications, so the Roman Law, in its shape as the common law of Germany, remained in force and effect until the date mentioned. German courts repeatedly had opportunity to rule on the question whether, under the *Lex Aquilia*, the injured person's own negligence would serve to bar his recovery. While that question has been answered in the affirmative by other high German courts,⁴⁷ the German Supreme Court, as late as 1900, held that, under the *Lex Aquilia*, the failure of a plaintiff to avert the damage would serve to bar his recovery only if he was required so to do. It expressly left unanswered the question whether plaintiff's recovery would also be barred, where he could have averted the damage but had failed to do so.⁴⁸

Jurisprudential writers of the eighteenth and nineteenth centuries were split in their view, although a majority construed

⁴⁵ Sohm, *The Institutes* (Ledlie trans. Clarendon Press, Oxford, 1907), 3d Ed., p. 3.

⁴⁶ *Ibid.*, pp. 2 and 27.

⁴⁷ *Württembergische Eisenbahndirektion c. Kaltenbach*, 19 R. O. H. G. 295 (German Supreme Court of Commerce, 1876); *Weber c. Oberschles. Eisenb.-Ges.*, 20 R. O. H. G. 155 (1876); 35 *Seufferts Archiv* No. 285 (Supreme Court, Bavaria, 1880); *Giffhorn c. Luther*, 44 *Seufferts Archiv* No. 86 (Appellate Court, Braunschweig, 1887); 47 *Seufferts Archiv* No. 184 (Appellate Court, Rostock, 1889).

⁴⁸ 46 R. G. Z. 203 and 207 (German Supreme Court, 1900). A different senate of the same court, in 1885, left the matter undecided, 41 *Seufferts Archiv* No. 89, but it decided against the plaintiff some years later, without giving reasons or citing any authority: 48 *Seufferts Archiv* No. 30 (1891).

the Pandects so as to reach a result similar to the one developed in the Anglo-American law after the decision in *Butterfield v. Forrester*.⁴⁹ But even prior to 1900 the question possessed lesser significance in Germany than it did in England or in this country for the railroads there had, in 1871, been placed under the control of a strict statute.⁵⁰ That statute made the carrier liable for any personal injury or for any damage done to property, growing out of the operation of the railroad, unless the railroad could prove that the accident was caused by *vis major* or by the victim's sole fault. If both railroad and victim were negligent, recovery was to be denied only if the victim's negligence prevailed.⁵¹ If, for example, the victim was negligent to the extent of causing three-fifths of the damage, he could not recover at all.⁵²

While the doctrine of contributory negligence cannot, therefore, be traced with certainty from the Roman Law, it likewise cannot be said that the latter is the source of the rival doctrine of comparative negligence. There are a few quotations from which some scholars⁵³ have attempted to draw the conclusion that it is Roman in origin, but they are weak evidence at best. One illustration from the Digest deals with the case of a defendant who, on his own land, found a mare belonging to the plaintiff,

⁴⁹ Windscheid-Kipp, *Lehrbuch des Pandektenrechts* (Literarische Anstalt Rütten & Loening, Frankfurt am Main, 1906), 9th Ed., Vol. 2, p. 64, with many references; Enneccerus-Lehmann, *Lehrbuch des Bürgerlichen Rechts* (N. G. Elvert'sche Verlagsbuchhandlung, G. Braun, Marburg, 1932), 12th Ed., Vol. 2, p. 76; Endemann, *Lehrbuch des Bürgerlichen Rechts* (Carl Heymanns Verlag, Berlin, 1903), 8th Ed., Vol. 1, p. 755, with many references. See also Wendt, "Eigenes Verschulden," and Demelius, "Ueber Kompensation der Kulpa," in Iherings Jahrbücher, Vol. 31, p. 137, and Vol. 5, p. 52, respectively and Pernice, *Labeo* (Max Niemeyer, Halle, 1895), 2d Ed., Vol. 2, p. 97. But see contra: Dernburg, *Pandekten* (Verlag von H. W. Müller, Berlin, 1903), 7th Ed., Vol. 2, p. 127, with many references, and Brinz, *Lehrbuch der Pandekten* (Verlag von Andreas Deichert, Erlangen, 1879), 2d Ed., Vol. 2, p. 354.

⁵⁰ Reichs-Haftpflichtgesetz vom 7. Juni 1871 (Reichs-Gesetzblatt, 1871) p. 207, § 1. See also Eger, *Das Reichs-Haftpflichtgesetz*: (I. Guttentag, Berlin, 1903), p. 46, and Pietsch, *Eisenbahngesetzgebung* (1902), p. 228.

⁵¹ Scheffel c. Berlin-Görlitzer Eisenbahn, 47 Seufferts Archiv No. 306 (Reichsgericht, 1882).

⁵² This anomalous result was set aside by the Civil Code of 1900; *Bürgerliches Gesetzbuch*, § 254. See also 114 R. G. Z. 291.

⁵³ Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at p. 121, cites Zachariae, *III Droit civil francais* 195 No. 446 (2d Ed., 1844), and 6 Aubry and Rau, *Cours de droit civil francais* 368 No. 446 (5th Ed., 1920).

which plaintiff had, without right, placed there to graze, and which defendant struck forcibly. It was held that plaintiff could recover.⁵⁴ If the decision could be said to be based on a balancing of the faults of both of the parties, it should be noted that negligence is entirely lacking and the defendant, at least, acted intentionally.⁵⁵

Negligence on both sides was found in another case where two partners were guilty of the same type of neglect in the conduct of the partnership affairs. Neither was allowed to recover on the ground that compensation for the negligence of each took place by operation of law.⁵⁶ By construing this provision together with another to be found in the Codex, an attempt has been made to infer that, where partners are guilty of differing amounts of negligence, the partner who is in the greater fault is liable for that excess.⁵⁷ It should be observed, however, that the last-mentioned law, under the title concerning set-off, makes provision for cases where the amounts of the two claims have been established.⁵⁸ It does not, in any way, state a principle concerning the manner in which the amounts of the claims are to be determined. Again, only a general rule is given and no illustrations showing its application to cases of mutual negligence are provided.

Scarcely any more in point, in an effort to trace the doctrine of comparative negligence in the Corpus Juris, is Pomponius' quotation mentioned above to the effect that he who sustains any

⁵⁴ *Dig. 9.2.39*: ". . . *Equa cum in alieno pasceretur, in cogendo, quod preagnans erat, eiecit. Quaerebatur, dominus eius possetne cum eo, qui coegisset, lege Aquilia agere? . . . Pomponius: Quamvis alienum pecus in agro suo quis deprehendit, sic illud expellere debet, quomodo si suum deprehendisset, . . . Non iure id includit, nec agre illud aliter debet quam quasi suum, sed vel abigere debet sine damno, vel admonere dominum ut suum recipiat.*" Scott, *The Civil Law*, Vol. 3, p. 340.

⁵⁵ Hillyer, "Comparative Negligence in Louisiana," 11 *Tul. L. Rev.* 112 (1936), at p. 120, disregards this provision on the ground that it is ambiguous.

⁵⁶ *Dig. 16.2.10*: "*Si ambo socii parem negligentiam societate adhibuimus, dicendum est, desinere nos invicem esse obligatos, ipso iure compensatione negligentiae facta. . . .*" Scott, *The Civil Law*, Vol. 4, p. 285.

⁵⁷ See *Codex 4.31.4*, and comment thereon by Hillyer, "Comparative Negligence in Louisiana," 11 *Tul. L. Rev.* 112 (1936), at p. 121.

⁵⁸ *Codex 4.31.4*: "*Si constat, pecuniam invicem deberi, ipso iure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, eiusque solius, quod amplius apud alterum est, usurae debentur, si modo petito earum subsistit.*" Scott, *The Civil Law*, Vol. 13, p. 75.

damage through his own fault is not considered to be injured.⁵⁹ Those who rely on this maxim as an indication for the existence of a doctrine of comparative negligence stress the fact that the application of the text is limited to damage received through the fault of the injured person. They argue that, if defendant's fault is greater, a part of the damage must be attributed to the defendant's fault rather than to the fault of the plaintiff,⁶⁰ Granted that the text does deny recovery for damage suffered because of the injured person's own fault, still does the conclusion drawn therefrom merit attention? Is it not more likely that the framer of the maxim had in mind a situation where only the victim's conduct was involved? The text, to say the least, is far too meager to support a belief that the framer had in mind the possibility of a concurrence of fault on the part of the victim and on the part of a third person. It can only be assumed that Roman Law does not provide the source of a doctrine of comparative negligence, so the search must be turned in another direction, to the mediaeval sea law with its rules concerning liability in case of a collision between two vessels.

B. DEVELOPMENTS IN ADMIRALTY

1. *Under Mediaeval Sea Law*

While it may be said that the doctrine of comparative negligence can be traced back to the old mediaeval norms regarding collisions at sea, there is no reasonable basis in known authority as to the state of the law at any time prior to approximately 1200 A. D. It is not now known whether the old Rhodian code of maritime law contained any provision at all as to collisions. That code, dating from the third or second century B. C. and once of great authority in the ancient Mediterranean world, has now practically disappeared. It still obtained and was well understood in Cicero's time, but only one provision is still extant and

⁵⁹ Scott, *The Civil Law*, Vol. 11, p. 317, discussed ante at note 43.

⁶⁰ See Hillyer, "Comparative Negligence in Louisiana," 11 *Tul. L. Rev.* 112 (1936), at p. 121.

it is not pertinent here.⁶¹ For that matter, the *Corpus Juris Justiniani* contains no special law concerning collisions, so they were probably governed by the ordinary rules. Thus, if A's ship was injured by B's, the only question would be whether there was *culpa* or *dolus* on the part of those who were navigating B's ship; for, if there was, an action could be maintained under the *Lex Aquilia*. If, on the other hand, the collision was the result of inevitable accident, A had no remedy.⁶² Certainly, there is nothing to be found therein dealing with collisions resulting from common fault of both parties.

The later Rhodian Sea Law which, incidentally, has nothing to do with the Isle of Rhodes,⁶³ consisted of a collection of the maritime laws of the later Eastern Empire apparently compiled during the seventh or eighth century from some earlier materials. It is the earliest code of sea laws still in existence, but only one chapter thereof deals with collisions.⁶⁴ That chapter⁶⁵ takes the case of a ship in sail which runs against another ship at anchor. The text, as Ashburner explains it,⁶⁶ deals with three possibilities: (1) the former strikes the latter ship in broad daylight; (2) the collision occurs at night; and (3) the collision occurs at night but both the navigator of the former and the watchman of the latter are negligent. Interest is, of course, directed to the third contingency only. The result, according to the code

⁶¹ Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co., New York, 1930), p. 5.

⁶² Ashburner, *The Rhodian Sea Law* (Clarendon Press, Oxford, 1909), p. cclxxxv.

⁶³ Wagner and Pappenheim, *Handbuch des Seerechts* (Binding's Handbuch, Germany, 1906), pp. 59-60, is quoted in Sanborn, *op. cit.*, p. 35.

⁶⁴ Sanborn, *op. cit.*, pp. 5, 35 and 37; Ashburner, *op. cit.*, pp. lxxv and cclxxxv.

⁶⁵ Ashburner, *op. cit.*, p. 110, contains a translation thereof taken from the Greek. It reads: "If a ship in sail runs against another ship which is lying at anchor or has slackened sail, and it is day, all the collision and the damage regards the captain and those who are on board. Moreover let the cargo too come into contribution. If this happens at night, let the man who slackened sail light a fire. If he has no fire let him shout. If he neglects to do this and a disaster takes place, he has himself to thank for it, if the evidence goes to this. If the sailman was negligent and the watchman dozed off, the man who was sailing perished as if he ran on shallows and let him keep harmless him whom he strikes." See Chapter 36, *Sea Law of Rhodes*. A Latin translation appears in Pardessus, *Collection de Lois Maritimes* (Paris, 1828), Vol. 1, p. 253.

⁶⁶ Ashburner, *The Rhodian Sea Law* (Clarendon Press, Oxford, 1909), p. cclxxxv.

is that the owner of the second ship is to recover in full.⁶⁷ Certainly, no trace of apportionment of damage, of the comparative negligence doctrine, can be found here. But the case is important in another respect. If there really be any basis for saying that the doctrine of contributory negligence ever had any root or meaning in the Roman law, the Rhodian Sea Law, at least on its maritime field, did away with such doctrine or, as Ashburner says, operated to modify the Roman Law.⁶⁸ One thing is certain and that is that the approach was not followed in the *Basilica*⁶⁹ for it does nothing more than repeat the substance⁷⁰ of the pertinent provision of the *Corpus Juris*.⁷¹

It is in the sea laws of the later middle ages that the first trace of a division of damage is to be found. Several provisions dealing with the problem are included in the Laws or Rolls of Oleron. That place was a small island off the west coast of France where the Prud'hommes of the Commune had the privilege of exercising jurisdiction in maritime matters according to the usages of the sea and the customs of merchants and mariners.⁷² The collection of the Rolls of Oleron, which originated between the end of the eleventh and the second half of the twelfth century,⁷³ is ranked in importance by Holdsworth, along with the *Consolato* and the Wisby town laws, as being one of the three leading maritime and mercantile codes of Europe.⁷⁴ Article 15 of the Rolls⁷⁵ declares that if a ship, coming from the high sea,

⁶⁷ *Ibid.*, pp. cclxxxvi and 111.

⁶⁸ *Ibid.*, p. cclxxxvi.

⁶⁹ The nature of this publication is explained in note 35, page 213 ante.

⁷⁰ *Basilicorum Liber LIII*, Tit. 2 (Heimach's Ed., Lipsiae, 1850).

⁷¹ See *Dig. 9.2.2-5*.

⁷² Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co., New York, 1930), p. 64.

⁷³ *Ibid.*

⁷⁴ Holdsworth, *Hist. Eng. Law*, 3d Ed., Vol. 1, p. 528.

⁷⁵ Pardessus, *Collection de Lois Maritimes* (Paris, 1828), Vol. 1, p. 334, sets out a modern translation thereof into French as follows: "Si un navire est ancré dans un port, et qu'avec la marée un autre venant du dehors se heurte contre le premier, de manière à l'endommager, et que, dans l'un et dans l'autre, il y ait des tonneaux de vin enfoncés, le dommage total est supporté par moitié par chacun des navires et leur chargement, pourvu que le patron et l'équipage du navire qui a heurté l'autre, jurent sur les saints évangiles que l'accident est arrivé sans leur faute et volonté. . . ."

should collide with another ship at anchor, the total damage should be halved between both ships and their cargoes, provided the master and the mariners of the ship under way are willing to swear that the accident occurred without their fault and intent. Ashburner has stressed the point⁷⁶ that, while general provisions in the earlier Mediterranean codes⁷⁷ would imply that it is easy to determine wherein lies the blame for a collision, and that it is always on one side, the Rolls of Oleron appear to be the first code which contains anything like a rule covering collisions where it is impossible to fix the liability. For that matter, both Sanborn⁷⁸ and Marsden⁷⁹ indicate that, in the Rolls of Oleron, the conception of negligence, or that a collision might have been caused by negligence, does not seem to be present.

The notion of negligence does, however, enter the picture in a provision of the later *Grand Coutumier d'Oleron*.⁸⁰ Chapter 82 thereof provides that, where two ships are at anchor and, due to negligence, one breaks loose and collides with the other, the offending ship is to pay all of the damage.⁸¹ If this rule of liability for negligence is coupled with the notion, taken from the older Article 15 of the Rolls of Oleron, *i. e.*, that the damage is to be halved wherever it is impossible to determine where the blame lies, then it requires only the taking of a small step to

⁷⁶ Ashburner, *The Rhodian Sea Law* (Clarendon Press, Oxford, 1909), p. cclxxxvii.

⁷⁷ As to the Statutes of Ancona and *Constitutum Usus* of Pisa, see Ashburner, *op. cit.*, p. cclxxxvi.

⁷⁸ Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co., New York, 1930), pp. 66 and 73.

⁷⁹ Marsden, *A Treatise on the Law of Collisions at Sea* (Stevens & Sons, Ltd., London, 1923), 8th Ed., p. 134.

⁸⁰ The maritime court in Oleron became quite famous and its important judgments were placed on record in this *Coutumier*, compiled in 1344 A. D. It also contains a collection of customs and usages. See Sanborn, *op. cit.*, pp. 70-1; Pardessus, *Collection de Lois Maritimes* (Paris, 1828), Vol. 4, p. 229.

⁸¹ The following English translation, taken from the old French text of the *Grand Coutumier d'Oleron*, is to be found in *The Black Book of the Admiralty* (Longman & Co., London, 1873), Vol. 2, p. 373. It reads: "If two ships are at anchor, and by tempest one of them drives from her anchorage and strikes . . . and damages . . . the other, the ship which has driven from her anchorage shall pay half the damage, and the other . . . shall pay the other half, . . . for this is a case of accident. If, however, the ship which has remained well anchored can prove . . . that by default of the tackle of said ship, the said ship drove from her anchorage, the ship which is well anchored is not liable to render any part of the damages."

reach the result that the damage should also be halved where the blame for the collision lies on both sides. This step in fact was taken by the *Consulato del Mare*, although whether it was based upon the Rolls and the *Coutumier d'Oleron* or was made independently is unknown.

The *Consulato del Mare*, generally believed to date from about the year 1340, consists of a compilation and a digest of the decisions made by the prud'hommes of Barcelona but, in all probability, it is preceded by an older collection dating from somewhere near the middle of the thirteenth century⁸² and some of its provisions regarding collisions would seem to have been borrowed from the *Constitutum Usus* of Pisa.⁸³ The *Consulato* devotes some four chapters, with "its usual diffuseness,"⁸⁴ to situations apparently popular with the lawyers of that day, that is with collisions between ships coming in from the high seas and those already anchored in port. Chapter 155 thereof,⁸⁵ for example, directs that a ship entering the port shall moor herself in such form and manner that she cause no damage to the vessel which has been moored first or otherwise she shall be required to make compensation. This, of course, merely fixes the liability resulting from negligence. The same chapter further provides, however, that if the collision is the consequence of misfortune the entering ship need not make compensation for all of the damage, perhaps indicating an application of the same rule for dividing dam-

⁸² Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co., New York, 1930), p. 83.

⁸³ *Ibid.*, at p. 118. See also Ashburner, *The Rhodian Sea Law* (Clarendon Press, Oxford, 1909), p. cclxxxvii.

⁸⁴ Ashburner, *op. cit.*, p. cclxxxvii.

⁸⁵ An English translation of the Spanish text thereof appears in *The Black Book of the Admiralty* (Longman & Co., London, 1873), Vol. 3, p. 283. It reads: "If a ship or vessel shall be moored first in a port or off a beach, or off a coast, or in a roadstead, every ship and every vessel which shall come in after her ought to moor herself in such a form and manner that she cause no damage to that vessel which shall have been first moored. And if she causes damage, she ought to compensate and make it good without dispute. Saving however, if the vessel or the ship, which entered after the other, meets with the misfortune of bad weather so that she cannot moor, and she does some damage to the vessel which has first moored, she is not bound to compensate all the damage, which she may have done . . . for it was not her fault. And accordingly such loss, which has been caused for such reason, ought to be submitted to the judgment of Prudhommes, who are skilled and well versed in the art of the sea."

ages to be found in Article 15 of the Rolls of Oleron,⁸⁶ although the question concerning the loss is to be submitted to the judgment of the prud'hommes.⁸⁷

Another chapter of the *Consolato*, being Chapter 157 thereof,⁸⁸ after having partly restated the content of the chapter mentioned above, proceeds to discuss the problem that would arise when a ship at anchor, by the shifting or changing of her anchors and cables, contributed to the accident. It directs that the entering ship should compensate for only a part of the other vessel's damage, namely such part as the experts might determine would be proper. This provision, recognizing negligence on the part of the ship damaged, seems to be the first code provision authorizing the distribution of the damage, according to the conscience of the experts, in cases of mutual fault. The damage is no longer to be halved, as was the case under the Rolls of Oleron which, as mentioned, did not contemplate the possibility of mutual negligence, but rather the damage is to be "divided"⁸⁹ in accordance with the opinion of experts. In that way a door was open to permit the comparing of negligence and the distribution of damage proportionate to the degree of fault shown by each vessel. The doctrine of comparative negligence was born.

⁸⁶ *Ibid.*, p. 283.

⁸⁷ These men would appear to be certain magistrates with jurisdiction in maritime matters under whose direction the skilful navigators assessed the damages. See *The Black Book of the Admiralty*, p. 287.

⁸⁸ *The Black Book of the Admiralty* (Longman & Co., London, 1873), Vol. 3, p. 285, provides the following English translation of the Spanish text: "If a ship or vessel shall be moored first in any place, the ship or vessel which shall arrive and enter after her, ought to moor in form and manner that it may cause no damage, and if it does damage, it is bound to make full compensation according to what is contained, declared and made clear in the preceding chapter. But . . . if [the ship which has been the first moored shall have shifted or changed her anchors or cables by which it rides] after the other ship has moored behind her, and the ship which was the first moored shall suffer any damages, the ship which shall have entered last, is not bound to compensate all the damages, but only a part, because the other ship has shifted her anchors or cables within or without. And the damage which that vessel which shall have been moored last, has caused to the vessel which was the first moored ought to be submitted to the judgment of skilled and experienced men, who are well and accurately versed in the art of sea; and they according to their conscience and according to the counsel which they shall obtain from the Prudhommes of the Sea, are bound to divide the damage well and diligently. . . ."

⁸⁹ The Spanish text uses the word "*partir*."

While the *Consulato del Mare*, despite its many defects,⁹⁰ became introduced to the chief maritime ports of the Mediterranean, so as eventually to possess a tremendous influence in Italy and in France,⁹¹ the Rolls of Oleron, by contrast, became known in the ports of the Atlantic and the North Sea⁹² and, as modified and amplified, came to speak the common law of those seas. Not only were the principles of the Rolls of Oleron adopted in Northern France, in Flanders, and in the Low Countries⁹³ but they were also embodied into the famous Sea Laws of Wisby,⁹⁴ so as to become the "Hogheste Water-Recht" and of supreme influence over the foreign commerce of northern Europe and the Baltic.⁹⁵ In that way, the rule of Article 15 of the Rolls, to the effect that a ship which entered port and damaged a moored vessel, but where the master and crew were willing to swear that the collision was accidental, was to pay only one-half of the loss,⁹⁶ found entrance into the numerous sea laws enacted in that area.⁹⁷ In some of these codes the rule for halving the loss was not confined to the situation where one of the ships was at anchor.⁹⁸ Under others, experts took part in all decisions, either to determine the amount of the damage, which amount was then apportioned according to

⁹⁰ Ashburner, *the Rhodian Sea Law* (Clarendon Press, Oxford, 1909), p. cxx.

⁹¹ Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co., New York, 1930), p. 86; *The Black Book of the Admiralty* (Longman & Co., London, 1873), Vol. 3, p. lxxiii.

⁹² *The Black Book of the Admiralty*, Vol. 3, p. lxxiii.

⁹³ Sanborn, *op. cit.*, p. 74.

⁹⁴ Wisby was an important center of commerce, flourishing during the 13th and 14th centuries, located on the Island of Gotland, now a part of Sweden.

⁹⁵ Sanborn, *op. cit.*, p. 76.

⁹⁶ See Pardessus, *Collection de Lois Maritimes* (Paris, 1828), Vol. 1, p. 334. The text of Article 15 is set out in note 75, page 220 ante.

⁹⁷ Codifications thereof appear in Art. 15, Judgments of Damme; Art. 65, Laws of Wisby (Hogheste Water-Recht); Tit. 10, §§ 1-2, Sea Laws of the Hanseatic League, *Recess de 1614*; Art. 21, Statutes of Hamburg, under dates of 1270, 1276 and 1292; Art. 2, Statute of Hamburg, 1306; Art. 131, Code of Lubeck, 1240; Art. 161, Statute of Riga, 1270; and in Tit. 5, §§ 1 and 3, Sea Laws of the Netherlands, *Ordonnance de 1549*; cited in Pardessus, *Collection de Lois Maritimes* (Paris, 1828), Vol. 1, p. 379; Vol. 1, p. 501; Vol. 2, p. 551; Vol. 3, p. 345; Vol. 3, p. 348; Vol. 3, p. 402; Vol. 3, p. 402; and Vol. 4, p. 85, respectively. Art. 15, Sea Laws of Flanders (Bruges), is set out in *The Black Book of the Admiralty*, Vol. 4, p. 435. See also Marsden, *A Treatise on the Law of Collisions at Sea* (Stevens & Sons, Ltd., London, 1923), 8th Ed., p. 149.

⁹⁸ See, for example, the sea laws of Hamburg, Hanseatic League, Lubeck, Netherlands, Riga, and Wisby, referred to in the preceding note.

a quota provided for in the code,⁹⁹ or to determine both the amount of the damage and the quota which each vessel should bear.¹

The vague language to be found in some of these Northern codes concerning the manner in which, in cases of accidental collision, the loss was to be distributed, gave rise to a difference of judicial opinion in the seventeenth century. Marsden has stressed² the strong resistance Bynkershoek³ met from his colleagues on the bench of the Supreme Court of the Netherlands when he tried to persuade them to assent to a proportionate rather than to an equal division of the loss. In much the same way, the principle of equal division, at least as to accidental collisions, prevailed in 1681 at the time of the adoption of the *Ordonnance de la Marine* of Louis XIV in France.⁴ While division of loss in case of accident eventually became quite common, the extension of that notion to cases where negligence was involved is to be traced to some of the later codes.⁵

⁹⁹ The Code Maritime of Denmark, 1508, Art. 9, quoted in Pardessus, op. cit., Vol. 3, p. 237, states that the injuring vessel ". . . doit en payer le tiers d'après l'estimation d'experts . . ." Tit. 15, § 2. See Laws of Netherlands, *Ordonnance de 1549*, set out in Pardessus, op. cit., Vol. 4, p. 85, says the ship entering the harbor shall ". . . supportera la moitié des pertes arbitrées par gens experts. . . ."

¹ Tit. 10, § 2, Sea Laws of the Hanseatic League, *Recess de 1614*, as reported in Pardessus, op. cit., Vol. 2, p. 551, directs: "*les deux navires répareront le dommage, d'après la décision d'arbitres.*" Art. 56 of the Code Maritime of Denmark, 1561, and Ch. 3, Art. 4, of the same code under date of 1683, according to Pardessus, op. cit., Vol. 3, pp. 261 and 289, reads: "*Si . . . l'accident a été causé par une force majeure, le dommage doit être payé par les deux navires, selon la décision d'arbitres.*"

² Marsden, *A Treatise on the Law of Collisions at Sea* (Stevens & Sons, Ltd., London, 1923), 8th Ed., p. 155.

³ Bynkershoek, in his *Quaestiones juris Privati*, liber iv, c. 20, wrote: "*Memini me senatore et de geometrica proportione perorante reliquos senatores (23 Nov. 1629) obstipuisse atque si Jovis ignibus icti essent.*" The extract is copied from Marsden, op. cit., p. 155.

⁴ Marsden, op. cit. p. 155. Valin & Becane, *Sur l'Ordonnance de la Marine* (Poitiers, 1829), Liv. 3, Tit. 7, gives the text of Article 10 as being: "*En cas d'abordage de vaisseaux, le dommage sera payé également par les navires qui l'auront fait et souffert, soit en route, en rade ou au port.*" It also states that Article 11 thereof read as follows: "*Si toutefois l'abordage avoit été fait par la faute de l'un des maîtres, le dommage sera réparé par celui que l'aura causé.*"

⁵ Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co., New York, 1930), p. 118. The Swedish Maritime Law of 1667, Ch. 8, § 2, according to Pardessus, op. cit., Vol. 3, pp. 129 and 173, stated: "*Tout navire à l'ancre doit avoir une bouée bien attachée avec un cordage, de manière qu'elle flotte précisément au-dessus de l'ancre. Si un patron a négligé cette précaution, il paiera tout le dommage qui en sera résulté.*" Section 3 thereof read: "*Si une bouée a été mise, et si ensuite elle est enlevée par les flots avant qu'il en soit résulté un dommage, le patron, qui ne la rétablirait pas paiera la moitié du tout*"

2. *Modern European Admiralty Law*

England had recognized the authoritative effect of the Rolls of Oleron at least as early as the fourteenth century,⁶ but the provisions of Article 15 thereof were not applied, so far as can be seen, for more than two hundred years thereafter, either full damage being given or none.⁷ The first evidence of an admiralty sentence dividing the loss appears in the record during the early part of the seventeenth century, about the time when the question of negligence was coming into prominence in common law actions.⁸ It is in the year 1614 A. D. that the first sentence for half damage occurs.⁹ The defendant there, being alone at fault, was condemned to pay half of the loss to cargo on board the other ship but to pay the whole of the loss to the ship itself.¹⁰ Other cases exist, wherein the defending ship was alone at fault, in which the judge gave judgment for half the damages.¹¹ But other decisions may be found wherein the plaintiff vessel was allowed to recover a moiety of the damage where fault was lacking or, because of an unexplained reason, was awarded some other portion of the damage,¹² and many judgments handed down in the seventeenth century provided for a division or apportionment of the loss.¹³ These decisions fluctuate between equal division on the one hand and

qu'il causé." Article 51 of the Dantzic Sea Laws, set out in the Black Book of the Admiralty, Vol. 4, p. 349, declares: "A ship that comes into a haven shall place a buoy over her anchor, and should it be that it has not done so, and damage results, it shall make good half the damage."

⁶ Marsden, *A Treatise on the Law of Collisions at Sea* (Stevens & Sons, Ltd., London, 1923), 8th Ed., p. 135.

⁷ Marsden, *op. cit.*, p. 155, provides many details.

⁸ *Ibid.*, pp. 136 and 155-6.

⁹ The case of *Ruckton v. Lambton*, Ad. Ct. Rec. Libels, File 66, No. 33, Miscell. Bundles, Ser. II, bde. 227, is noted by Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 342.

¹⁰ Marsden, *op. cit.*, p. 156.

¹¹ See cases listed in Marsden, *op. cit.*, p. 156.

¹² In *Belitha v. Burwood*, File 106, No. 194, plaintiff was given one-half. In *Kinge v. Johnson*, File 106, No. 121 (1642), plaintiff recovered but £400 out of an £1800 loss, and in *Blowers v. Starlinge*, File 106, No. 227, the award was for £320 on a claim for £680: Marsden, *op. cit.*, p. 157.

¹³ Marsden, *op. cit.*, pp. 136-7.

some form of apportionment on the other,¹⁴ but toward the end of the century it came to be the rule to award half damage.¹⁵

The reasons advanced in the English cases for dividing the loss were varied and inconsistent; some judges in admiralty being at a loss to find any reason for applying the rule when negligence was proved against one or both of the ships involved. At times, the explanation for dividing the loss was that the collision was not wilful; on other occasions, it was because of the difficulty of proving negligence, or of apportioning the loss to the degree of fault.¹⁶ The rule of division appears to have been applied for the first time, in 1695 A. D., to a case of mutual fault, for the defendant's negligence was there determined and the plaintiff's negligence could, at least, be implied.¹⁷ Any doubt on the point was resolved, in 1706, in a case where fault was expressly found on the part of both ships and the loss was divided equally. The reason assigned, similar to the one given in the preceding case, was that it would be difficult to prove the loss properly attributable to the fault of each.¹⁸ Throughout the eighteenth century, the English court of Admiralty leaned in favor of the rule of equal division,¹⁹ apparently because the doctrine of apportionment of damage according to the degree of fault had not yet met with approval. There were some, however, who felt that equal division was arbitrary, deeming its application to be a matter of *judicium rusticum*.²⁰

Despite this, the *judicium rusticum* was applied, in 1789, to the well known case of *The Petersfield and The Judith Randolph*²¹

¹⁴ Mole and Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932), at p. 342.

¹⁵ Marsden, *op. cit.*, p. 137, with details at p. 159.

¹⁶ Marsden, *op. cit.*, p. 137.

¹⁷ See *Beckham v. Chapman*, Ad. Ct. Ass. Book, Jan. 20, 1695, noted in Marsden, *op. cit.*, p. 159.

¹⁸ *Noden v. Ashton*, Libels, File 128, No. 250, Ass. Book, June 20, 1706, noted in Marsden, *op. cit.*, p. 160.

¹⁹ Mole and Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932), at p. 342.

²⁰ Cleirac, *Us et Coustumes de la Mer*, p. 68. The phrase is quoted in Marsden, *op. cit.*, p. 137.

²¹ Sub. nom. *Widman v. Blakes*, Miscell. Bundles, Ser. III, No. 18. The case is reported in Marsden, *op. cit.*, p. 161, note (f).

where both ships were at fault although there was an express finding that the fault of one ship was greater than the fault of the other.²² The opportunity was there presented for the adoption of a doctrine equivalent to one on comparative negligence, but it was permitted to pass in favor of the rule of equal division. Some limitation on the applicability of the equal division rule was, however, brought about by the decision in the case of *The Woodrup Sims*.²³ Lord Stowell there divided collision at sea into four classes, to-wit: (1) where the collision is caused by the fault of the defendant ship; (2) by the fault of the plaintiff ship; (3) by the fault of both ships; and (4) without the fault of either ship. He declared the rule of division of loss to be applicable only to the third case, namely, where the collision was caused by the fault of both.²⁴

The trial court in *Hay v. LeNeve*,²⁵ perhaps misled by Lord Stowell's dictum to the effect that where both parties were to blame the loss had to be apportioned, achieved the result that the loss there involved was to be apportioned in unequal shares. The House of Lords, however, modified the decision and directed the division of the loss in equal shares.²⁶ That holding remained the rule in England until 1911 A. D.²⁷ It was once summed up by a court which stated:

Until the case of *Hay v. LeNeve* . . . there was a question

²² Marsden, *op. cit.*, p. 161.

²³ 2 Dodson Adm. 83, 165 Eng. Rep. 1422 (1815).

²⁴ 2 Dodson Adm. 83 at 85, 165 Eng. Rep. 1422 at 1423. The case of *The Lord Melville* (1816), referred to in *Hay v. LeNeve*, 2 Shaw Sc. App. Cas. 395 (1824), at p. 402, is to the same effect. Under the dictum of these cases, that where the collision occurs without fault on the part of either vessel the loss should rest where it falls, the *judicium rusticum* has been held inapplicable to collisions of this type. A long series of decisions ending with the holding in *The Resolution* and *The Langton* (1789), noted in Marsden, *op. cit.*, p. 161, under the name of *Nelson v. Fawcett*, in which the *judicium rusticum* had been applied to cases of doubt and accident, were simply disregarded. Marsden, *op. cit.*, p. 165, assigns as a reason the fact that these cases not "having been reported, they appear to have altogether escaped observation." Whatever the reason, the rule of division of loss was never thereafter applied again, except in cases where both ships were at fault: Marsden, *op. cit.*, p. 164.

²⁵ 2 Shaw, Sc. App. Cas. 395.

²⁶ *Ibid.*, at pp. 399 and 405.

²⁷ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 343.

whether you were not to apportion it [the loss] according to the degree in which they [the two ships] were to blame; but now . . . the rule of Admiralty is, that, if there is blame causing the accident on both sides they are to divide the loss equally; just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.²⁸

In contrast, it should be noted that, during this period, the common law rule denying recovery was applied, even to cases arising out of collisions at sea, if the action was instituted in a law court rather than begun as an admiralty proceeding.²⁹

The remainder of the history of the English rule of equal division of loss in case of mutual fault is not free from surprises. When the Judicature Act was enacted in the year 1873, the rule was almost abolished, for the original draft of that statute directed that the common law principle as to contributory negligence should prevail in maritime cases. In the passage of the measure through the House of Commons, however, the admiralty rule was reinstated and even extended to apply to maritime cases coming before the common law courts,³⁰ the statute, directing that the latter rule was to be applied to all cases arising out of collisions between two ships where both were to blame.³¹ Marsden has pointed out that the reasons for preferring the admiralty rather than the common law rule are not apparent,³² but it is possible that the former was thought to be more in accord with the rule of law applied in foreign countries. Although the admiralty concept had successfully overthrown the challenge thus afforded by the contributory negligence doctrine, it was to collapse a few decades later when, the pendulum having swung the other way, the rule of equal division was to be dethroned by a rule calling

²⁸ *Cayzer v. Carron Co.*, 9 App. Cas. 873 (1883), at p. 881.

²⁹ Marsden, *op. cit.*, p. 139; Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at p. 128.

³⁰ Marsden, *op. cit.*, p. 139, note (b).

³¹ 36 & 37 *Vict. c.* 66, § 25(9).

³² Marsden, *op. cit.*, p. 139, note (b).

for the apportionment of damage, one known today as the rule of comparative negligence.

The end of the nineteenth century was marked by strong agitation on the part of English lawyers, judges, and shippers for the adoption of a method calling for proportional division of damages. A majority of the leading nations on the Continent engaged in shipping activities had, by then, adopted a rule for such proportional division. Not only had no complaint been heard directed against the satisfactory manner of its operation but, even more striking, no country adopting it had returned to the rule of equal division of loss. International meetings had been called, beginning in 1885, in an effort to persuade other nations to adopt the new rule. The Brussels conference of the International Law Association, held in 1895, pointed out that the British-American rule of equal division was, at best, a rule of thumb which often produced injustice. It indicated that, while achievement of mathematical accuracy was impracticable if not impossible of attainment, the rule of apportionment came closer to justice in all cases than was true where equal division was applied. The British Diplomatic Conference, holding its first meeting in 1905, threw its weight in that direction, as was also true of the International Maritime Committee which, on the occasion of its many conferences, consistently strived to make the proportionate rule one of universal application.³³ The end result of this agitation was that the Brussels Maritime Convention of 1909-10 adopted the rule in the form of a convention which has since been ratified by nearly all important nations.³⁴ England, to the surprise of the maritime

³³ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 344. See also Scott, "Collisions at Sea," 13 *L. Q.* 17 (1897), at p. 23.

³⁴ According to Benedict, *American Admiralty* (Matthew Bender & Co., New York, 1941), 6th Ed., Vol. 6, p. 4, the convention had, by 1940, been put into effect between thirty-two states and nations, as well as throughout the British, French, Portuguese, and former German colonies. Ratification has been accorded to the convention by Austria, Belgium, Brazil, Denmark, France, Germany, Great Britain, Greece, Hungary, Italy, Japan, Mexico, Netherlands, Nicaragua, Norway, Portugal, Rumania, Russia, and Sweden, while adherence has been noted on behalf of Argentina, Australia, Canada, Estonia, Germany for all colonies, Great Britain for certain colonies, India, Italy for all colonies, Latvia, New Zealand, Newfoundland, Poland and the Free City of Danzig, Portugal for all colonies, Spain, Union of Soviet Socialist Republics, Uruguay, and Yugoslavia. Egypt, as late as 1943, also noted adherence.

world, decided to follow suit and, in 1911, enacted the English Maritime Convention Act, a statute based upon the theory of apportionment of loss according to the proportion of fault displayed by each of the ships involved in the events leading to damage.³⁵ The door for further development in the field of comparative negligence was thereby opened the wider.

3. *American Admiralty Law*

The pattern of American admiralty law reflects an early adherence to English doctrines but is marked by a later unwillingness to adopt modern concepts relating to comparative negligence except in a few isolated instances.³⁶ The first reported American collision case involving fault of both parties appears to have been that of *The Ralston v. The States Rights*³⁷ wherein it was said that, in case of mutual fault, the damages had to be shared unless the fault of the parties was "egregiously" unequal. A few years later the Louisiana Supreme Court, although not a court of admiralty, also stated the rule in collision cases to be that where both parties were at fault the damage was to be divided, but it cited no precedent to support the rule.³⁸ Following the settlement of the English rule by means of the House of Lords decision in *Hay v. LeNeve*,³⁹ federal courts in the New England area, as could be expected, likewise divided the damages equally.⁴⁰ It was

³⁵ The English Maritime Conventions, Act of 1911, 1 & 2 Geo. V, c. 57, § 1, in part declares: "(1) Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault: Provided that (a) if, having regard to all the 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 so as to render any vessel liable for any loss or damage to which her fault has not contributed . . ."

³⁶ Mole and Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932), at p. 346; Robinson, Handbook of Admiralty Law in the United States (West Pub. Co., St. Paul, 1939), pp. 90 et seq., 313, 853 et seq., and 857.

³⁷ 20 Fed. Cas. 201 and 208, No. 11,540 (1836).

³⁸ *Brickell v. Frisby*, 2 Rob. (La.) 204 (1842).

³⁹ 2 Shaw Sc. App. Cas. 395 (1824).

⁴⁰ *The Rival*, 1 Sprague 128, 20 Fed. Cas. 845, No. 11,867 (D. C. Mass., 1846); *The Scioto*, 21 Fed. Cas. 774, No. 12,508 (D. C. Maine, 1847); *The Bay State*, Abb. Adm. 239, 2 Fed. Cas. No. 1,148 (D. C. N. Y., 1848); *Lenox v. Winisimet*, 15 Fed. Cas. 323, No. 8,248 (D. C. Mass., 1848).

not until 1854 that the question came, for the first time, before the Supreme Court of the United States. That court, in the well known case of *The Schooner Catherine*,⁴¹ followed the English rule of equal division without expressing any comment as to what might have happened had the negligence of both ships been strikingly unequal. For that matter, it did not even mention the proportionate damage rule or indicate any recognition of a possibility that there might be doubt as to the validity of the rule for equal division.

In the decades that followed, the court adhered to the equal division rule⁴² but, by the end of the century, decisions were beginning to appear wherein the lower courts were apportioning the loss unequally according to the disparity of fault.⁴³ There may have been some sign, in 1890, that the Supreme Court was less definite than it had been forty years earlier. When reviewing the decision in the case of *The Steamer Max Morris*, not a collision case, it said:

Whether in a case [of mutual fault] the decree should be for exactly one-half of the damages sustained, or might in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination . . . and we express no opinion on it.⁴⁴

But the intimation, if there was one, was not followed up and no

⁴¹ 58 U. S. (17 How.) 170, 15 L. Ed. 233 (1854). In *Steinbeck v. Rae*, 55 U. S. (14 How.) 532, 14 L. Ed. 530 (1852), some two years earlier, the Supreme Court had denied division and had left each vessel to bear its own loss, but the collision there had resulted from inevitable accident rather than from mutual fault. The decision followed the English case of *The Woodrup Sims*, 2 Dodson Adm. 83, 165 Eng. Rep. 1422 (1815).

⁴² *The Alabama*, 92 U. S. (2 Otto) 695, 23 L. Ed. 763 (1875); *The Phoenix*, 93 U. S. (3 Otto) 302, 23 L. Ed. 863 (1876); *The North Star*, 106 U. S. (16 Otto) 17, 1 S. Ct. 41, 27 L. Ed. 91 (1882). The last mentioned case discusses the history of the equal division rule. In *Thompson v. The Great Republic*, 90 U. S. (23 Wall.) 20, 23 L. Ed. 55 (1874), the court acknowledged the existence of a different view by saying: "We are aware of the rule that, if one vessel's fault bears little proportion to many faults of the other vessel, the former should not share the consequences of the collision." See also cases cited in 11 C. J., *Collision*, § 316, note 22, and in 15 C. J. S., *Collision*, § 186, note 18.

⁴³ In the *Mary Ida*, 20 F. 741 (1884), the loss was apportioned in the ratio of one-fourth to three-fourths. See also *The Victory*, 68 F. 395 (1895), and *The Chattahoochee*, 74 F. 899 (1896).

⁴⁴ 137 U. S. 1 at 15, 11 S. Ct. 29 at 33, 34 L. Ed. 587 at 590 (1890).

collision case decided during the last fifty years has attempted to apply the proportionate damage rule.

Instead, the federal courts have been adhering to the rule calling for equal division, even in cases where there is evidence of a disparity in fault,⁴⁵ but not without signs of deep reluctance. One reads with discomfort the resigned remarks of certain judges, such as the one who wrote: “. . . although it is true that, as between the two vessels the [one] was far more gravely at fault, we have no power to apportion the damages.”⁴⁶ Another judge expressed his reaction by stating: “The court, wholly aside from whatever views it may have on the subject, is constrained to follow the rule and [divide] the damage equally.”⁴⁷ Still another writes: “It is . . . unfortunate that the faults cannot be apportioned, for that of the libellant’s steamer was so gross. . . . Nevertheless . . . we have no alternative but to decree half damages.”⁴⁸ One is forced to sympathize with a judge who feels compelled to declare: “We reach this conclusion with regret. The [libellant’s] fault was far more egregious. This is a case where the Continental rule of comparative negligence would produce a more just result.”⁴⁹ Despite such laments, the tenor of the decisions leaves no room for doubt that, under the present state of the law, the damage will be divided equally even in cases where there is a striking disparity of fault.

Is the rule as immutable as it would seem to be? True, there is a long line of decisions, rendered by the highest court, declaring

⁴⁵ To avoid unnecessary documentation, reference is made to only a few recent cases. See, for example, *The Marian*, 66 F. (2d) 354 (1933), cert. den. 290 U. S. 687, 54 S. Ct. 123, 78 L. Ed. 592 (1933); *Otto Marmet Coal & Min. Co. v. Fieger-Austin Dredge Co.*, 259 F. 435 (1919), cert. den. 250 U. S. 666, 40 S. Ct. 13, 63 L. Ed. 1197 (1919); *Jacobsen v. Dalles*, 106 F. 428 (1901), affirmed in 114 F. 705 (1902), cert. den. 191 U. S. 575, 24 S. Ct. 847, 48 L. Ed. 308 (1903); *U. S. v. The Horace E. Horton*, 77 F. Supp. 701 (1947); *The Dumore*, 61 F. Supp. 258 (1945); *The Kiddoo*, 39 F. Supp. 735 (1941); *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. (2d) 365, 159 P. (2d) 1 (1945).

⁴⁶ *Learned Hand, J.*, in *Postal S. S. Corporation v. Southern Pac. Co.*, 112 F. (2d) 297 at 298 (1940), cert. den. 311 U. S. 655, 61 S. Ct. 50, 85 L. Ed. 419 (1940).

⁴⁷ See *The Margaret*, 30 F. (2d) 923 at 928 (1929), cert. den. 279 U. S. 862, 49 S. Ct. 479, 73 L. Ed. 1001 (1929).

⁴⁸ *The Chattanooga*, 79 F. (2d) 23 at 24 (1935).

⁴⁹ *The Matthew Luckenbach*, 157 F. (2d) 250 at 252 (1946).

that the damage, in case of mutual fault, must be divided equally.⁵⁰ In none of them, however, can be found any discussion on the point as to whether the equal division must be made under all circumstances and without regard to degrees of fault. The Supreme Court has never emphatically expressed the rule to be one without exception. It has, on the other hand, intimated that the question may be an open one⁵¹ or, if not open, that it might be reopened should the facts warrant it.⁵² A long-standing custom and practice of denying certiorari whenever the question has been brought to the attention of the court⁵³ militates against the belief that any change is apt to come in the near future. But the time may yet come when the court will take the opportunity to reconsider the problem. If it does, there is little in the past course of decisions to embarrass it and much to recommend the change, particularly in view of the adoption of the apportionment rule nearly everywhere else and the evident reluctance of some of the Court of Appeals judges to follow the old pattern.

Since the admiralty courts, in collision cases, have uniformly followed the equal division rule, there has been a strong undercurrent of movement going on for many years to bring about a switch to the apportionment doctrine by means of legislation, although so far without success.⁵⁴ At the time the texts of the

⁵⁰ In addition to the cases listed in note 42 ante, see *Aktieselskabet Cuzco v. The Suaresco*, 294 U. S. 394, 55 S. Ct. 467, 79 L. Ed. 942 (1934); *Luckenbach S. S. Co. v. Norwegian Barque Thekla*, 226 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313 (1924); *White Oak Transp. Co. v. Boston, Cape Cod & N. Y. C. Co.*, 258 U. S. 341, 42 S. Ct. 338, 66 L. Ed. 649 (1921); *The Eugene Moran*, 212 U. S. 466, 29 S. Ct. 339, 53 L. Ed. 600 (1908); *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U. S. 220, 27 S. Ct. 246, 51 L. Ed. 450 (1906); *The Albert Dumois*, 177 U. S. 240, 20 S. Ct. 595, 44 L. Ed. 751 (1899); *The New York*, 175 U. S. 187, 20 S. Ct. 67, 44 L. Ed. 126 (1899); *The Chattahoochee*, 173 U. S. 540, 19 S. Ct. 491, 43 L. Ed. 801 (1898); *Ralli v. Troop*, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742 (1894); *Belden v. Chase*, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218 (1893).

⁵¹ *The Steamer Max Morris*, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 587 (1890).

⁵² Intimation, in a collision case, that apportionment according to the degree of fault might not be quite impossible may be found in the opinion of Holmes, J., in the case of *The Eugene Moran*, 212 U. S. 466 at 476, 29 S. Ct. 339 at 341, 53 L. Ed. 600 at 604 (1908). He wrote: "There is *nothing stated sufficient to reopen the question*, if there is one, as to changing the apportionment when there are different degrees of blame." Italics added.

⁵³ See notes 45, 46 and 47, ante.

⁵⁴ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 341.

Maritime Convention were adopted in Brussels in 1910, the American delegation signed the final draft⁵⁵ and followed up that action, in 1911, by making an official report to the State Department. The President and the Secretary of State undertook to formulate proposed legislation similar to the English Maritime Convention Act of 1911, but discontinued their efforts when many protests were raised.⁵⁶ Following World War I, the Maritime Law Association of the United States, in 1922, appears to have favored the adoption of the apportionment rule but later, in 1927, reversed its stand. In 1925, the American Bar Association directed its Committee on Commerce and on Admiralty, respectively, to prepare a bill providing for the adoption of the proportionate rule of damages. A bill was prepared by the second of these committees and recommended for approval by the other. The Executive Committee of the Association suggested a return thereof to the Committee on Admiralty which, in 1927, was then unable to come to a unanimous decision on the point. In 1929, however, it reported that as the then existing law calling for equal division of damages had operated satisfactorily for a number of years, no change should be made.⁵⁷ The matter seems to have rested for several years, but was revived in April of 1937, when the President sent the Convention to the Senate, for the purpose of securing its advice and consent, together with a message and supporting reports.⁵⁸ The Senate Committee on Foreign Relations held hearings and reported favorably on the Convention,⁵⁹ particularly insofar as it was intended to produce a reform on the question of apportionment of liability where both vessels shared the blame instead of the view which required equal division of loss.⁶⁰ Before any action was taken on the report, the country

⁵⁵ Benedict, *American Admiralty* (Matthew Bender & Co., New York, 1941), 6th Ed., Vol. 6, p. 4.

⁵⁶ Mole and Wilson, *op. cit.*, p. 348.

⁵⁷ See A. B. A. Reports, Vol. 54 (1929), pp. 103 and 279; Vol. 52 (1927), pp. 96 and 228; Vol. 50 (1925), pp. 124 and 332.

⁵⁸ Benedict, *op. cit.*, Vol. 4, p. 262, refers to Executive K, 75th Cong., 1st sess.

⁵⁹ See Executive Report No. 4, Senate, 76th Cong., 1st sess., cited in Benedict, *op. cit.*, Vol. 6, p. 4.

⁶⁰ Benedict, *op. cit.*, Vol. 4, p. 262.

was plunged into World War II. The President then, in 1947, withdrew the Convention from further consideration,⁶¹ so the status quo remains unchanged.

Something must be said as to the subject of mutual fault in maritime torts other than collisions for, in general, the rule for division of loss has been extended to such other torts, at least in admiralty,⁶² where the negligence of the plaintiff has concurred with that of the defendant.⁶³ The application of the rule, outside of the field of collisions, has played an important part in connection with the claims advanced by seamen to recover for injuries attributable to defective equipment. In such cases, even before the enactment of the Merchant Marine or Jones Act of 1920,⁶⁴ the employee's contributory negligence was held insufficient to bar recovery, being ground only for mitigation of damage.⁶⁵ When used as mitigation, the presence of contributory negligence did not result in allowing the libellant one-half of his claim for, in case of mutual fault, the court apportioned the damages according to the equity and the justice of the case. In one case, for example, the libellant claimed to have suffered a loss of more than \$1,400 in damages and wages but recovery was limited to a mere \$200 only.⁶⁶ In another case, the libellant was allowed \$125, that amount being said to be "some compensation" for the actual pecuniary loss.⁶⁷ Again, where a libellant had spent forty days in hospital and had sustained an injury rendering his arm permanently crippled, he was allowed to recover only \$280 for his lost labor and \$40 for hospital expenses.⁶⁸ In still another case, an instruction was held proper which charged the jury to reduce

⁶¹ U. S. State Dept. Bulletin, Vol. 16, p. 726, cited in Benedict, *op. cit.*, Vol. 4, 1948 *supp.*, p. 49.

⁶² *The Steamer Max Morris*, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 587 (1890).

⁶³ *The Scandinavian*, 156 F. 403 (1907).

⁶⁴ 41 Stat. 938 and 1007; 46 U. S. C. § 746.

⁶⁵ *The Arizona v. Anelich*, 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075 (1935), lists many citations. See also *The H. A. Scandret*, 87 F. (2d) 708 (1937), and *The Themistocles*, 235 F. 81 (1916). Cases are also tabulated in Benedict, *op. cit.*, Vol. 1, pp. 257 and 363.

⁶⁶ *Olson v. Flavel*, 34 F. 477 (1888).

⁶⁷ *The Mystic*, 44 F. 398 (1890).

⁶⁸ *The Explorer*, 20 F. 135 (1884).

the recovery to an extent proportionate with the extent of the plaintiff's fault.⁶⁹ It may well be said, therefore, that "comparative negligence is not unknown to our maritime law,"⁷⁰ particularly since the principle has been incorporated into the Merchant Marine or Jone Act of 1920 and into the Death on the High Seas by Wrongful Act statute.⁷¹

There has been some confusion as to the extent to which, in cases of mutual fault, the admiralty principles concerning distribution of damage are to apply in suits brought as at common law. The federal judicial code, in determining the exclusiveness of the jurisdiction of the federal courts, has saved "to suitors in all cases the right of a common law remedy where the common law is competent" to give one.⁷² At one time the weight of authority was to the effect that the admiralty rule for division of damage did not apply to, and that contributory negligence was a good defense in, any common law action brought in a state court even though based on a maritime tort. That view had been predicated on the holding in *Belden v. Chase*,⁷³ a case which had been decided by the Supreme Court of the United States in 1893. Later decisions questioned the ruling therein and, in 1942, the *Belden* case was repudiated by the decision in *Garret v. Moore-McCormack Company*.⁷⁴ Unfortunately, the scope of the repudiation has itself raised considerable doubt on the subject. Derby, in a clear-cut article on the point,⁷⁵ has boiled down a rather complicated situation to the effect that state courts are obliged to apply the federal law in cases "involving (1) burden of proof in cases

⁶⁹ *Cricket S. S. Co. v. Parry*, 263 F. 523 (1920). See also *Storgard v. France & Canada S. S. Co.*, 263 F. 545 (1920), and *Carter v. Brown*, 212 F. 393 (1914).

⁷⁰ *American Stevedores v. Porello*, 330 U. S. 446 at 458, 67 S. Ct. 847 at 853, 91 L. Ed. 1011 at 1020 (1946).

⁷¹ 41 Stat. 988 and 1007, 46 U. S. C. § 688; 41 Stat. 537, 46 U. S. C. § 766.

⁷² What was formerly 28 U. S. C. § 371 was amended by an act approved June 25, 1948, and was transferred to 28 U. S. C. § 1333. It now reads as follows: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil cases of admiralty or maritime jurisdiction, saving to the libellant . . . in every case any other remedy to which he is otherwise entitled."

⁷³ 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218 (1893).

⁷⁴ 317 U. S. 242, 63 S. Ct. 250, 87 L. Ed. 239 (1942).

⁷⁵ Derby, "Divided Damages in Maritime Cases," 33 Va. L. Rev. 289 (1947), particularly pp. 294 and 298.

of seamen; (2) assumption of risk in cases under the Jones Act; and (3) contributory negligence" in similar cases. A conflict of authority still remains as to whether the state courts, in collision cases where mutual fault is involved, must follow the admiralty rule concerning the division of damages. The Supreme Court of California, in the recent past, has held to the affirmative of that proposition,⁷⁶ while the Supreme Court of Washington has reached an opposite result.⁷⁷ The commentators have dealt with the problem at length,⁷⁸ and a clarifying decision from the Supreme Court of the United States has been expected for a long time. Summing up the American admiralty law on the point, it can only be said that it provides little evidence of a clear-cut desire to move in the direction of a comprehensive system for distribution of loss on a comparative basis.

C. MODERN EUROPEAN DEVELOPMENTS

When the European nations, in 1911, adopted the doctrine of apportionment of damage in cases growing out of collisions at sea,⁷⁹ they were following a course of development which had been started, in the general field of negligence, by the great continental codifications adopted approximately one hundred years earlier. It would be a mistake, however, to assume that such development and the growth of the comparative negligence doctrine has been a rapid one. The 1794 Prussian Code,⁸⁰ one which may rightfully be called the first comprehensive codification of law since the time of Justinian,⁸¹ contained very complicated pro-

⁷⁶ *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. (2d) 365, 159 P. (2d) 1 (1945), with numerous citations.

⁷⁷ *Wilkins v. Foss Launch & Tug Co.*, 20 Wash. (2d) 422, 147 P. (2d) 524 (1944).

⁷⁸ See Benedict, *American Admiralty* (Matthew Bender & Co., New York, 1941), 6th Ed., Vol. 6, p. 55; Robinson, *Handbook of Admiralty Law in the United States* (West Pub. Co., St. Paul, 1939), § 115; Derby, "Divided Damages in Maritime Cases," 33 Va. L. Rev. 289 (1947), at p. 300; Dickinson and Andrews, "A Decade of Admiralty," 36 Cal. L. Rev. 169 (1948), at p. 215 et seq.; Mole and Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932), at p. 354; Sprague, "Divided Damages," 6 N. Y. U. L. Q. 15 (1928).

⁷⁹ See discussion of this point above.

⁸⁰ *Allgemeines Landrecht fuer die Preussischen Staaten* (1794), hereafter cited as A. L. R.

⁸¹ Rabel, "Private Laws of Western Civilization," 10 La. L. Rev. 107 (1950), at p. 109.

visions designed to apply to cases involving the contributory negligence of the victim. It attempted to draw distinctions based on whether the negligence of the plaintiff or of defendant, respectively, was gross, moderate, or slight and also on the point as to whether the damage was directly or indirectly inflicted.⁸² If, for example, plaintiff was only slightly negligent and the defendant was guilty of gross negligence, the plaintiff was to be permitted to recover; a situation reminiscent of the state of the law in Illinois in the period from 1858 until 1894. If, however, the negligence of the parties was balanced, the plaintiff recovered nothing. The main element of a comparative negligence doctrine, apportionment of the damage according to the relative fault of both parties, was missing from the Prussian Code except in one instance. If both parties caused injury or damage to each other, each was to be held responsible according to the degree of his own negligence.⁸³

The Code Napoleon, adopted in France in 1804, on the other hand, simply stated that each person was to be held liable for the damage which he did, whether by his wilful acts or by his negligence.⁸⁴ Although no express provision appeared therein to cover the case of a victim guilty of contributory negligence, jurisprudential writers as well as authority have since construed that code so as to permit apportionment of the damage. The extent to which this may be done has been said to lie in the court's discretion,⁸⁵ and for a while, during the middle of the last century, there was a tendency to apply something like the common law rule.⁸⁶ The few cases which did so hold⁸⁷ were never extensively

⁸² A. L. R., I, 6, §§ 18-22. See also Demelius, "*Ueber Kompensation der Kulpa*," *Iherings Jahrbücher* (Jena, 1861), Vol. 5, p. 85.

⁸³ A. L. R., I, 6, § 22. See also A. L. R., I, 5, § 362.

⁸⁴ Section 1382 thereof states: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*" It is followed by Section 1383 which reads: "*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.*"

⁸⁵ Zachariae, *Cours de Droit Civil Français, traduit de l'allemand par Aubry* (F. Lagier, Strasbourg, 1839), Vol. 3, p. 195.

⁸⁶ Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit Civil* (Larose & Tenin, Paris, 1905), 2d Ed., Vol. 13, Part 2, § 2881, with many references.

followed. A short time later, similar cases were decided in a contrary fashion.⁸⁸ The Cours de Cassation, when it had opportunity in 1879 to speak on the subject, did not expressly overrule, in fact did not even mention, the earlier decisions. For that matter, the highest court did not enter into any elaborate discussion of either contributory or comparative negligence. As to the former, its silence may have been because the doctrine appeared so obviously wrong to the court that it was satisfied simply to say that the carelessness of the victim did not operate to relieve the person without whose fault the accident could not have happened. Instead, it held that the contributory negligence of the injured person took effect only for the purpose of reducing the damages.⁸⁹ Since then, the notion of "faute commune" has been firmly rooted in the French law.⁹⁰ It was not until 1915, however, that the doctrine became a part of the codified law. At that time, Article 407 of the French *Code de Commerce* was amended so as to make it harmonize with the provisions of the Maritime Convention adopted at Brussels in 1911.⁹¹

⁸⁷ Belval v. Warin, Douai, 14 dec. 1846, Sivey's Recueil 1848, p. 542: "*Celui qui a éprouvé un dommage par le fait d'autrui, est sans droit pour en demander la réparation, lorsqu'il a s'imputer lui-même une négligence, qui peut avoir occasionné ce fait.*" See also Seguin v. Brossier, Lyon, 17 janv. 1844, Sivey's Recueil, 1844, p. 400.

⁸⁸ Cour de Riom, 11 mars 1851, Dalloz, *Jurisprudence Générale* (Bureau de la Jurisprudence Generale, Paris, 1853), pp. 2-76; Cour de Lyon, 16 juill. 1862, Dalloz, op. cit., Vol. 1863, pp. 5-329. See also Dalloz, *Nouveau Code Civil Annoté* (Bureau de la Jurisprudence Generale, Paris, 1903-5), Vol. 3, Art. 1382, No. 276 et seq.

⁸⁹ Marquant v. Tramways du Département du Nord, Aug. 20, 1879, Recueil de Sivey, 1880. 1. 55.

⁹⁰ Planiol and Ripert, *Droit Civil Français* (Librarie Generale de Droit et de Jurisprudence, Paris, 1930), Vol. 6, p. 778 § 570, states: "*La faute de la victime n'écarte pas la responsabilité de l'auteur du dommage si celui-ci a également commis une faute causale. Elle a seulement pur effet d'entraîner un partage de responsabilité.—Le Cour de Cassation laisse au juges du fond la libre appréciation de la part de dommage qui doit être laissée à la charge de la victime . . . Les tribunaux s'inspirent dans la répartition du dommage, de la plus ou moins grande proximité du fait faut if par rapport au dommage, mais surtout de la gravité respective des fautes.*" Many cases are cited. See also Aubry and Rau, *Droit Civil Français* (Marchal et Billard, Paris, 1920), Vol. 6, p. 368, § 446; Baudry-Lacantinerie, *Traite Théorique et Pratique de Droit Civil* (Larose & Tenin, Paris, 1905), 2d Ed., Vol. 13, Part 2, § 2881; Demolombe, *Code Civil* (A. Lahure, Paris, 1882), Vol. 31, p. 435, § 503; Planiol, *Droit Civil* (Paris, 1912), 7th Ed., Vol. 2, p. 296; Savatier, *Droit Civil* (Librarie Generale du Droit et de Jurisprudence, Paris, 1944), Vol. 2, p. 1125; Amos & Walton, *Introduction to French Law* (Clarendon Press, Oxford, 1905), p. 240.

⁹¹ Planiol and Ripert, op. cit., Vol. 6, p. 779.

Although it took France many decades to construe the doctrine of "faute commune" into Sections 1382 and 1383 of its Civil Code, the Austrian Civil Code had, as early as 1811, solved the problem by one short sentence. That sentence, after translation, read: "If the damage is caused also by the victim's fault, he and the injuring party suffer the damage proportionately; if such proportion cannot be determined, the damage will be divided equally."⁹² Such an early, courageous, and resolute solution of the problem will, perhaps, tend to surprise those who are inclined to think that the civil servants of the Habsburg monarchy were inefficient and unprogressive. It well may be that the spirit of this great code, most modern for its time, reflected the last rays of a setting sun of enlightenment which had shone so brightly over parts of Western and Central Europe throughout the last half of the eighteenth century.

It cannot be said that other continental codifications, adopting the proportionate damage rule, followed fast in the Austrian train. One reason for delay may lie in the fact that European lawmaking lacks the prolificacy displayed by American legislatures. On that continent, once a law has been enacted, and especially after a codification has been made, change is not favored.⁹³ Instead, the language of the typical provision is most concise, being but a frame which is to be filled in by court decisions. It should not excite wonder, therefore, that it was not until 1867 that Portugal incorporated into its code a provision corresponding to the Austrian example.⁹⁴ Switzerland followed in 1881,⁹⁵ and then Ger-

⁹² See Austrian Code of 1811, § 1304, which states: "*Wenn bei einer Beschädigung zugleich ein Verschulden von Seite des Beschädigten eintritt, so traegt er mit dem Beschädiger den Schaden verhaeltmismassig; und wenn sich das Verhaeltnis nicht bestimmen laesst, zu gleichen Teilen.*"

⁹³ By way of illustration, it may be noted that the Austrian Code of 1811 went without amendment until 1914: Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* (Oesterreichische Staatsdruckerei, Wien, 1933), Vol. 1, p. 19. Few American constitutional documents have gone as long without some revision.

⁹⁴ The Code of Portugal, 1867, Art. 2398, § 2, stated: "If in the case of damages there was fault or negligence on the part of the person injured or on the part of someone else, the indemnification shall be reduced in the first case, and in the second case it shall be apportioned to such fault or negligence as provided in paragraphs 1 and 2 of Section 2372." The translation is taken from Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 La. L. Rev. 125 (1945), at p. 130.

⁹⁵ The Swiss Code of 1881, § 51, read: "*Art und Groesse des Schadensersatzes wird durch richterliches Ermessen bestimmt in Wuerdigung sowohl der Umstaende*

many, with its "massive and highly refined" German Civil Code of 1896.⁹⁶ Other nations, except for Italy and Spain, have followed suit. No good purpose will be served by providing a complete chronological table showing the respective dates of the adoption of the comparative negligence doctrine, but a footnote will make it sufficiently clear that large areas of the earth, in Europe and elsewhere, now operate under the apportionment rule.⁹⁷

Insofar as Italy is concerned, neither the Code of 1865 nor the one adopted in 1942 speak precisely on the point. The first copied the corresponding provisions of the Code Napoleon mentioned above, and these, in turn, were carried over into the more

als der Groesse der Verschuldung. Ist auch dem Beschaeedigten ein Verschulden beizumessen, so kann der Richter die Ersatzpflicht nach Verhaeltnis ermaessigen oder gaenzlich von derselben entbinden." In substitution therefor, Section 44 of the Swiss Code of Obligations was adopted in 1911. An English translation thereof reads as follows: "The court may reduce or refuse compensation where the damaged party has assented to the injury, or where circumstances for which he is responsible have contributed to the origin or the aggravation of the damage or otherwise prejudiced the position of the party liable. Where enforcement of the compensation would cause economic distress to the party liable, the court may equitably reduce the compensation, provided the damage was not caused wilfully, or by gross negligence or imprudence." See Wettstein, *The Swiss Federal Code of Obligations* (Zurich, 1928), p. 34.

⁹⁶ The adjectives are attributable to Rabel, "Private Laws of Western Civilization," 10 *La. L. Rev.* 107 (1950), at p. 110. Section 254, paragraph 1 of the Code of 1896 reads: "*Hat bei der Entstehung des Schadens ein Verschulden des Beschaeedigten mitgewirkt, so haengt die Verpflichtung zum Ersatze sowie der Umfang des zu leistenden Ersatzes von den Umstaenden, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teile verursacht worden ist.*" Gregory, *Legislative Loss Distribution in Negligence Cases* (University of Chicago Press, Chicago, 1936), p. 175, provides an English translation credited to Professor Max Rheinstein of the faculty of the University of Chicago School of Law. That translation reads: "If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party."

⁹⁷ China: Civil Code, § 217. Japan: Civil Code 1898, Art. 722, para. 2. In DeBecker, *Annotated Civil Code of Japan* (Butterworth & Co., London, 1909), Vol. 1, p. 284, the text of the Japanese provision is translated as follows: "If the injured person is in fault, the Court may take this fact into consideration when determining the amount of compensation." Persia: Code, Arts. 2199 and 2202. Poland: Code of Obligations, § 158, para. 2. Russia: Code Civil, § 401 et seq., particularly §§ 403-4. The situation was the same in Imperial Russia. See also Gsovski, *Sowjet Civil Law* (Ann Arbor, Michigan, 1948), Vol. 1, p. 518 et seq. Siam: Code Civil, §§ 223 and 442. Turkey: Code of Obligations, § 44. A discussion of the provisions adopted in China, Japan, Poland, Siam and Turkey may be found in Schlegelberger, *Rechtsvergleichendes Handwörterbuch* (Berlin, 1938), Vol. 6, p. 131.

recent document.⁹⁸ As in France, the Italian doctrine of proportionate damage in cases of mutual fault would seem to be the product of judicial interpretation for, while the specific provisions speak more nearly of persons who, in this country, would be designated as joint tort-feasors, the courts have held that a plaintiff's contributory negligence serves only to mitigate the damage.⁹⁹ There is some cause to doubt whether the comparative negligence doctrine has been adopted in Spain. It has been said that Article 1902 of the Spanish Civil Code of 1889 authorizes the use of the doctrine¹ but the text thereof does not necessarily support that conclusion.² The misunderstanding may result from the fact that no Spanish cases appear available and considerable reliance has been placed on the leading case of *Rakes v. Atlantic, Gulf & Pacific Company*,³ decided by the Supreme Court of the Philippine Islands, wherein the court approved a trial judge's diminution of damage in proportion to the fault shown by each party, not so much because of any doctrine firmly adopted in

⁹⁸ The Italian Code of 1865 copied the corresponding provisions of the Code Napoleon set out above. With slight changes, these provisions were transferred to the new Italian Civil Code of 1942: *Codice Civile* (Edizione 1946, Milano), Arts. 2043 and 2055. They now read: "Art. 2043 (formerly Arts. 1151 and 1152)—*Risarcimento per fatto illecito—Qualunque fatto doloso o colposo, che cagiona ad altri un danno ungiusto, obbliga colui che ha commesso il fatto a risarcire il danno.*" It may be translated: "Indemnification for torts: Whoever by an intentional or negligent act, unlawfully causes damage to another person is required to grant indemnification." Article 2055, paragraph 1 (formerly Art. 1156), states: "*Responsabilità solida—Se il fatto dannoso è imputabile a più persone, tutte sono obbligate in solido al risarcimento del danno.*" Translated into English, that article directs: "Joint liability—If the noxal act is imputable to several persons, they are jointly liable for the indemnification."

⁹⁹ *Brusa c. Soc. Gen. Immobiliare*, Sez. II, Novembre 17, 1928 (citing *Banca di Sicilia e Banca d'Italia*, Gennaio 23, 1928), quoted from *Annuario de Diritto Comparativo e di Studi Legislativi* (Rome, 1930), Vols. 4 and 5, part 3.

¹ Mole and Wilson, "A Study of Comparative Negligence," 17 *Corn. L. Q.* 333 (1932), at p. 337; and see note in 12 *N. Y. U. L. Q.* 321.

² The *Código Civil* (Madrid, 1943), states: "*El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia está obligado a reparar el daño causado.*" An English translation thereof, in Fisher, *Civil Code of Spain with Philippine Notes*, 4th Ed., reads as follows: "Any person who by an act or omission causes damage to another by his fault or negligence shall be liable for the damage so done." Malone, "Comparative Negligence—Louisiana's Forgotten Heritage," 6 *La. L. Rev.* 125 (1945), at p. 113, hesitates to read the comparative negligence notion into the provision on the ground that there is not sufficient case law to justify that view.

³ 7 *Phil. Rep.* 359 (1907).

Spain⁴ but because the theory was "the most consistent with the history and the principles of law in these Islands and its legal development."⁵ If Spain has not adopted the proportionate damage doctrine, it has been following the view of *Las Siete Partidas*, a comprehensive compilation dating back to 1263 A. D. Hillyer seems to be inclined to find sources of the doctrine therein,⁶ a view one would be glad to follow in an effort to find a bridge over to the *Consolato del Mare*, but the indications are too weak.⁷

No such uncertainty exists as to areas on the North American continent outside the United States.⁸ The Province of Quebec, in Canada, with its civil law heritage, has been able to develop an apportionment rule without any express statutory provision,⁹ but other Canadian provinces have been led to the doctrine of comparative negligence only by statutes enacted during the second quarter of the present century.¹⁰

⁴ In that regard, the court, at 7 Phil. Rep. 359 at 370, noted that: "There are many cases in the Supreme Court of Spain in which the defendant was exonerated, but when analyzed either . . . he was not negligent . . . or . . . the negligence of the plaintiff was the immediate cause of the casualty . . . or the accident was due to *casus fortuitus*."

⁵ 7 Phil. Rep. 359 at 374. The decision was apparently misunderstood by the court deciding the Puerto Rico case of *Ubeda y Salazar v. San Juan Light & T. Co.*, 4 P. R. Fed. 533 (1909), for, partly based on the *Rakes* case, it uttered dictum to the effect that apportionment was the rule even under the Spanish Code.

⁶ Hillyer, "Comparative Negligence in Louisiana," 11 Tul. L. Rev. 112 (1936), at p. 121.

⁷ Hillyer relies on *Las Siete Partidas* 5.14.22 and 7.34.22, provisions adopted from the Justinian Code already discussed: Dig. 16.2.10 and Dig. 50.17.203. Further reference is made to *Part.* 3.10.14. It provides only that, where both parties bring claims for ". . . the redress of wrongs or injuries, the judge shall hear both and decide them together." It is a rule of procedure rather than of substantive law.

⁸ Examination into the state of the American law is reserved for a separate and more detailed discussion, which will appear in Part II hereof.

⁹ Sections 1053-4, Civil Code of Lower Canada, 1866, patterned on Sections 1382-3 of the Code Napoleon, do not make provision for indemnification in cases of mutual fault: McIntyre, "The Rationale of Last Clear Chance," 53 Harv. L. Rev. 1225 (1940), at p. 1236. The civil law background of the judges of Quebec has, however, gradually established the "faute commune" doctrine: *Nichols Chemical Co. v. Lefebvre*, 42 Can. S. C. R. 402 (1909); *Can. Pac. Ry. v. Frechette*, 24 Que. K. B. 459 (1915). In the latter case, the Privy Council acknowledged the apportionment rule of Quebec although it also stressed the last-opportunity doctrine: [1915] App. Cas. 871 at 878. See also Williams, "The Law Reform (Contributory Negligence) Act of 1945," 9 Mod. L. Rev. 105 (1946), particularly p. 121; McIntyre, "The Rationale of Last Clear Chance," 53 Harv. L. Rev. 1225 (1940), p. 1237; MacDonald, "The Negligence Action and the Legislature," 13 Can. Bar Rev. 535 (1935), at p. 560.

¹⁰ Ontario and Nova Scotia were the first provinces to act. See Ontario, Contributory Negligence Act of 1924, c. 32, and Nova Scotia, Contributory Negligence

The whole development reached its climax when, in 1945, the motherland of the common law moved to abandon the doctrine of contributory negligence. The English Law Reform Act of 1945 provides that, in case of mutual fault, a claim for damage shall not be defeated by the presence of fault on the part of the victim but that the damage shall be apportioned as the court shall think just and equitable having regard to the claimant's share in the responsibility.¹¹ The doctrine of *Butterfield v. Forester*,¹² therefore, may be said to have been laid to rest, at least in the country where it originated.

To be continued.

Act of 1925, c. 5. A model act conforming closely to the Maritime Conventions Act of 1911 was enacted for British Columbia (B. C. Stat. 1925, c. 8) and New Brunswick (N. B. Stat. 1925, c. 41) in 1925, and Nova Scotia followed suit in 1926: MacDonald, "The Negligence Action and the Legislature," 13 Can. Bar Rev. 535 (1935), at p. 553. The Ontario statute of 1924 was replaced, six years later, by a more detailed law: Ont. Stat. 1930, c. 21, and Ont. Rev. Stat. 1937, c. 115. Comprehensive statutes were also enacted by British Columbia in 1936 (B. C. Rev. Stat. 1936, c. 52, and B. C. Rev. Stat. 1948, c. 68) and by Alberta in 1937 (R. S. 1937, c. 18, and R. S. 1942, c. 116). Prince Edward Island adopted the doctrine in 1938 by its Statute of 1938, c. 8. Manitoba acted in 1939 (Stat. 1939, c. 75, and R. S. 1940, c. 215), and Saskatchewan completed the Canadian story in 1944 with an act based partly on the Alberta and British Columbia patterns: Sask. Stat. 1944, c. 23.

¹¹ The decisive part of the Law Reform (Contributory Negligence) Act of 1945, 8 & 9 Geo. VI, c. 28, reads as follows: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respects thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." See also Charlesworth, *The Law of Negligence* (Sweet & Maxwell, Ltd., London, 1947), 2d Ed., p. 491.

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

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DISCUSSION OF RECENT DECISIONS

COURTS—COURTS OF LIMITED OR INFERIOR JURISDICTION—WHETHER THE MUNICIPAL COURT OF THE CITY OF CHICAGO HAS JURISDICTION OVER A TRANSITORY TORT CAUSE OF ACTION WHICH AROSE OUTSIDE OF THE CITY LIMITS—In the case of *United Biscuit Company of America v. Voss Truck Lines, Inc.*,¹ the plaintiff sued the defendant to recover damages resulting

¹ 340 Ill. App. 503, 92 N. E. (2d) 478 (1950). Hirsch E. Soble, Esq., of the Chicago bar, appeared as *amicus curiae*.

from a collision between two trucks. The trucks were driven by the servants of the litigants and the accident occurred near Braidwood, Will County, Illinois. The case went to trial without a jury before a judge of the Municipal Court of Chicago. That judge, on learning that the cause of action arose outside of the city limits of the City of Chicago, decided that the court had no jurisdiction over the subject matter of the suit and entered a judgment dismissing the action. It was stipulated on appeal from that judgment that there was no question as to the jurisdiction of the court over the person of the defendant and that the sole question was one as to whether or not the Municipal Court of Chicago had jurisdiction over the subject matter of the case. The Appellate Court for the First District affirmed the judgment of the lower court, thereby deciding that the court in question did not have jurisdiction over a transitory tort cause of action based upon events occurring outside of the city limits.²

The solution to the problem of whether or not the Municipal Court of Chicago possesses jurisdiction to hear and determine transitory causes of action originating elsewhere depends on whichever of two constitutional provisions is to be considered the basis for the establishment of that tribunal. The two possibilities are Section 1 of Article VI of the Constitution of 1870 on the one hand, and Section 34 of Article IV, the so-called "home rule" amendment, on the other. The first of these³ confers judicial power on certain specified constitutional courts but goes on to provide for the exercise thereof by other local tribunals which may be created by the legislature.⁴ It has been held to be the sole basis for the existence of city courts⁵ and, as these courts have been determined to possess only city-wide

² A certificate of importance has been issued and the Supreme Court of Illinois is expected to hear the case at the September term. The issue in the case has become increasingly important since the decision in the case of *Werner v. Illinois Central Railroad Co.*, 379 Ill. 559, 42 N. E. (2d) 82 (1942), which held that a city court has no jurisdiction over a tort cause of action which arises outside of the city limits.

³ Ill. Const. 1870, Art. VI, § 1, states: "The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, Justices of the Peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns."

⁴ Provisions for the creation of local or inferior courts have appeared in each of the Illinois constitutions. The earliest provision was Ill. Const. 1818, Art. IV, § 1, which reads: "The judicial power shall be vested in . . . such inferior courts as the general assembly shall, from time to time, ordain and establish." It was followed by Ill. Const. 1848, Art. V, § 1, which then read: "The judicial power shall be and is hereby vested in one supreme court . . . *Provided*, that the inferior local courts, of civil and criminal jurisdiction, may be established by the general assembly in the cities of this state, but such courts shall have a uniform organization and jurisdiction in such cities." The absence of a requirement for uniformity in the 1818 constitution had resulted in the creation of a series of local courts with varying jurisdiction. The present constitutional provision is set out in note 3, ante.

⁵ *People ex rel. Beebe v. Evans*, 18 Ill. 362 (1857).

jurisdiction,⁶ it follows that, because of the requirement for uniformity and the prohibition against local legislation,⁷ only city-wide jurisdiction could be given to local courts created thereunder. If, therefore, this constitutional provision controls, it comes as a necessary conclusion that the Municipal Court of Chicago can have only city-wide jurisdiction and may not hear transitory causes originating elsewhere.

If, however, the second constitutional provision forms the sole basis for the existence of the court in question, a different conclusion could well be reached. That provision allows the legislature to pass local laws for the City of Chicago in connection with a variety of subjects⁸ including the establishment of a municipal court, the jurisdiction of which was left to be determined by the general assembly. Nowhere in that provision is there any restriction on the nature of the jurisdiction which the general assembly might confer on the court so to be created. For that matter, there is nothing in the provision to indicate that it is to be subject to restraints contained in any other constitutional provision. As a state constitution is a limitation on the powers of a state legislature and not, generally, a delegation of powers to that body,⁹ the legislature is free to do anything not

⁶ *City of Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237 (1906). In spite of this, the legislature by an amendment of the City Court Act adopted in 1943, set out in *Laws 1943*, Vol. 1, p. 578, deleted the words "arising in said city," in an obvious attempt to give to the city courts a jurisdiction wider than the city limits. In the case of *Govan v. Govan*, 331 Ill. App. 372, 73 N. E. (2d) 163 (1947), tried before a city court subsequent to the amendment, a judgment based on a transitory cause of action was affirmed but the constitutionality of the amendment was not passed upon. It is understood that the Illinois Supreme Court, in a case entitled *Turnbaugh v. Dunlop*, No. 31539, not yet reported, held the present City Court Act, as so amended, to be valid and broad enough to permit a city court to entertain a transitory action in tort based on events arising outside of the city limits.

⁷ See Ill. Const. 1870, Art. VI, § 29, for the requirement as to uniformity, and Art. IV, § 22, for the prohibition against special legislation.

⁸ Ill. Const. 1870, Art. IV, § 34, added by amendment in 1904, states in part: "The General Assembly shall have power, subject to the conditions and limitations hereinafter contained, to pass any law (local, special or general) providing for a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the city of Chicago . . . and in case the General Assembly shall create municipal courts in the city of Chicago it may abolish the offices of Justices of the Peace, Police Magistrates and Constables in and for the territory within said city . . . and in such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe; and the General Assembly may pass all laws which it may deem requisite to effectually provide for a complete system of local municipal government in and for the city of Chicago. No law based upon this amendment . . . shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election. . . ." The purpose of the referendum has been said to be one designed to provide protection for the citizens of Chicago while, at the same time, replacing the necessity for uniformity and overcoming the prohibition against special legislation: *City of Chicago v. Cook County*, 370 Ill. 301, 18 N. E. (2d) 890 (1939).

⁹ *Herb v. Pitcairn*, 392 Ill. 138, 64 N. E. (2d) 519 (1946); *City of Chicago v. County of Cook*, 370 Ill. 301, 18 N. E. (2d) 890 (1939); *Hunt v. Rosenbaum Grain Corp.*, 355 Ill. 504, 189 N. E. 907 (1934).

restricted by the constitution. One does not, therefore, have to look to that document so much to find authority for the creation of a Municipal Court for the City of Chicago as one must look to see to it that no limitation is placed therein on the powers of the legislature. For this, and other reasons, when the general assembly has concluded that a law is requisite, its conclusion should not be the subject of judicial review.¹⁰

Another indication that the "home rule" amendment, later in point of time than the first of these provisions, was not designed to restrict the territorial jurisdiction which the general assembly could confer on the Municipal Court exists in the historical situation which gave rise to the adoption of that amendment. At the turn of the century, as now, the population of Chicago was greater in number than that of all the rest of the state when combined. It had problems unlike those of any other section of the state, and was constantly hampered in its actions by the restriction against special legislation. The justice of the peace system had proved its inadequacy while the creation of a typical city court, such as those which existed in other parts of the state, would not serve its need. The circumstance of the times dictates the belief that the framers of the "home rule" amendment contemplated a marked change in the local court system for Chicago. It can, therefore, be logically argued that it was the intention of the public, by amending the state constitution, to allow the legislature to confer that type of jurisdiction which it could well feel was necessary.

If the intention was merely to create a court similar to a city court, with territorial limitations necessarily imposed on its jurisdiction, there was no need for the judicial portion of the amendment as it was already within the power of the general assembly to create such a court. It is likewise difficult to become reconciled to the idea that the whole amendment, with its clauses allowing the setting up of a municipal court, was intended merely to give to the legislature the power to determine jurisdiction in other than territorial terms,¹¹ particularly since there is no mention of such a restriction in the amendment. Knowing, as the framers did, that a tribunal of the character of a city court would prove as inadequate as the justice of the peace system had proved itself to be in the administration of justice for Chicago, they must have had something different in mind. The "home rule" amendment having been adopted to meet a new situation, one never before encountered in the judicial history of the state, is it not logical to suppose that the proposed municipal court was to possess a

¹⁰ *People v. LaSalle Street Bank*, 269 Ill. 518, 110 N. E. 38 (1915); *Hirschback v. Kaskaskia Sanitary District*, 265 Ill. 388, 106 N. E. 942 (1914); *City v. Evans*, 204 Ill. 32, 68 N. E. 208 (1903); *Sanitary District v. Ray*, 199 Ill. 63, 64 N. E. 1048 (1902).

¹¹ But see *Wilcox v. Conklin*, 255 Ill. 604, 99 N. E. 669 (1912).

jurisdiction, and follow a practice, unlike that of any court theretofore existing?¹²

But the matter need not rest entirely on inference. Impelling reason against a jurisdictional limitation of city-wide scope is to be found in the sections of the amendment relating to the assumption, by the new court, of the unfinished business being handled by the justices of the peace located in the city. The latter had exercised at least county-wide jurisdiction without question¹³ so the new court, authorized by the amendment, necessarily had to possess an equivalent jurisdiction at the start in order to take over the work of the justices of the peace. There being no language indicating a desire to deny the exercise of such power after these cases were concluded, it can only be supposed the new court was to retain such jurisdiction. Why, then, should it be given jurisdiction for one purpose and not another?

The only really basic argument against the exercise of an extra-territorial jurisdiction by the Municipal Court of Chicago is the wording of the amendment making it possible to establish a court "*in* the city of Chicago."¹⁴ It has been said that the word "*in*," as used in the phrase "*in and for*" as it relates to the creation of city courts,¹⁵ is a word of art necessarily designed to confine the territorial jurisdiction to city limits.¹⁶ But other cases do not treat the phrase as being one of art sufficient by itself to fix a territorial jurisdiction.¹⁷ For example, in the recent case of *Moffett v. Green*,¹⁸ the Illinois Supreme Court held that, although a justice of the peace is to serve "*in and for*" the township in which he was elected, yet he has county-wide jurisdiction. If the meaning of the phrase "*in and for*" as it relates to the jurisdiction of a justice of the peace is to be so extended, it is only fair to conclude that the court should reach the same result as to the identical word in the amendment relating to the Municipal Court of Chicago.

If, as has been pointed out, Section 34 of Article IV of the Illinois Constitution of 1870 is the only constitutional authority for the establish-

¹² *People v. Board of County Commissioners*, 355 Ill. 244, 189 N. E. 26 (1934); *Lott v. Davis*, 264 Ill. 272, 106 N. E. 215 (1914).

¹³ *Moffett v. Green*, 386 Ill. 318, 53 N. E. (2d) 941 (1944); *Tissler v. Rhein*, 130 Ill. 110, 22 N. E. 848 (1889).

¹⁴ Ill. Const. 1870, Art. IV, § 34. Italics added.

¹⁵ *Ibid.*, Art. VI, § 1. The text thereof is set forth in note 3, ante.

¹⁶ *Conrad v. Conrad*, 396 Ill. 101, 71 N. E. (2d) 54 (1947); *McFarland v. McFarland*, 384 Ill. 428, 51 N. E. (2d) 520 (1943); *Werner v. Illinois Central Railroad Co.*, 379 Ill. 559, 42 N. E. (2d) 82 (1942).

¹⁷ *Herb v. Pitcairn*, 392 Ill. 138, 64 N. E. (2d) 519 (1946); *Moffett v. Green*, 386 Ill. 318, 53 N. E. (2d) 941 (1944).

¹⁸ 386 Ill. 318, 53 N. E. (2d) 941 (1944).

ment of the Municipal Court of Chicago, logic would dictate that the legislature must be regarded as empowered to confer upon that court whatever jurisdiction it may please, subject to ratification by the people of Chicago, without limitation as to the type of action or the place of its origin, so long as the case be one of transitory character.¹⁹ Any attempt to resolve the problem, then, necessarily results in a return to the fundamental one of choosing between the two constitutional provisions aforementioned. There is little assistance to be gleaned from statements made by the Illinois Supreme Court in the past which may have bearing on the point. On various occasions, but in relation to totally different problems than the one which will now confront it, that court has stated that Section 1 of Article VI of the constitution is the sole basis for the legislative power to create local courts.²⁰ If these statements are to control, the jurisdiction of the Municipal Court of Chicago would necessarily be limited. Other cases declare in no uncertain terms that Section 34 of Article IV, the "home rule" amendment, is the basis for the existence of the Municipal Court of Chicago.²¹ To add to the confusion, however, other conflicting statements have been made regarding its jurisdiction,²² so it is not possible to predict how the Supreme Court will eventually decide the issue. Despite this conflict and the apparent uncertainty existing in the mind of the Supreme Court, it would appear logical to believe that the inclusion of a

¹⁹ Care should be taken to distinguish the statute relating to the Municipal Court of Chicago, Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, §§ 356-426, from the general statute as to other municipal courts, *ibid.*, Ch. 37, §§ 442-504. The constitutional basis for the latter is necessarily to be found in Ill. Const. 1870, Art. VI, § 1, with its confining limitation that the legislature may create such inferior courts only "in and for" cities and incorporated towns. While the legislature may, and has, created municipal courts in other cities, the territorial jurisdiction thereof is confined by the constitutional language in much the same way as is true of the city courts. Arguments which may be advanced relating to the Municipal Court of Chicago are, therefore, generally inapplicable to other municipal courts located in Illinois.

²⁰ *Werner v. Illinois Central Railroad Co.*, 379 Ill. 559, 42 N. E. (2d) 82 (1942); *City of Chicago v. Cook County*, 370 Ill. 301, 18 N. E. (2d) 890 (1939); *Wilcox v. Conklin*, 255 Ill. 604, 99 N. E. 669 (1912); *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, 92 N. E. 922 (1910); *People ex rel. Sadler v. Olson*, 245 Ill. 288, 92 N. E. 157 (1910); *Miller v. People*, 230 Ill. 65, 82 N. E. 521 (1907); *Rowe v. Bowen*, 28 Ill. 116 (1862); *People ex rel. Beebe v. Evans*, 18 Ill. 362 (1857); *Galpin v. City of Chicago*, 159 Ill. App. 135 (1910), affirmed in 249 Ill. 554, 94 N. E. 961 (1910).

²¹ *City of Chicago v. Cook County*, 370 Ill. 301, 18 N. E. (2d) 890 (1939); *People ex rel. Soble v. Gill*, 358 Ill. 261, 192 N. E. 193 (1934); *Swigart v. City of Chicago*, 223 Ill. 371, 79 N. E. 48 (1906).

²² Language in *People v. City Court of East St. Louis*, 338 Ill. 363, 170 N. E. 210 (1930); *Israelstam v. U. S. Casualty Co.*, 272 Ill. 161, 111 N. E. 602 (1916); *Morton v. Pusey*, 237 Ill. 26, 86 N. E. 610 (1908); and in *Miller v. People*, 230 Ill. 65, 82 N. E. 521 (1907), would indicate that the Municipal Court of Chicago possess no more than city court jurisdiction. It has been said to have the same jurisdiction as a justice of the peace, according to *Weil v. Federal Life Ins. Co.*, 264 Ill. 425, 106 N. E. 246 (1914), but in *Lott v. Davis*, 264 Ill. 272, 106 N. E. 215 (1914), it was held to have a composite jurisdiction.

specific provision in the "home rule" amendment for the establishment of a Municipal Court of Chicago evidences an intention by the framers thereof that this authority should replace the earlier provision at least so far as a local court for Chicago is concerned.

Assuming, for the moment, that the legislature was granted the power to give to the Municipal Court of Chicago a jurisdiction not confined by territorial limits, the question then arises as to whether it has exercised that power and passed a statute which does confer extra-territorial jurisdiction.²³ It would be well, in this regard, to give brief consideration to the Municipal Court Act itself²⁴ and the construction which has been given to it. Passed in 1905 and submitted to the voters of Chicago during the same year,²⁵ the statute makes no mention of the fact that civil actions must arise within the city limits in order for the court to possess jurisdiction over them. There is significance in the contrast provided by the fact that the City Court Act, at that time, included a definite limitation in the phrase "arising in said city."²⁶ If it was the intention of the legislature to so limit the jurisdiction of the Municipal Court of Chicago, what explanation is there for the failure to include these important words? Is it not more reasonable to infer that it deliberately omitted the phrase because it did not mean to restrict such jurisdiction but, more nearly, considered the court it was creating to be one having general jurisdiction over transitory causes of action?

Probably the most conclusive argument of all is that the court itself has felt, throughout the years, that it did possess, and has exercised, such a jurisdiction. Actions often speak louder than words and at least two cases

²³ There is dicta in a line of earlier cases to the effect that the Municipal Court Act did not extend jurisdiction beyond the city limits, which might lead to the inference that the legislature did not exercise to the fullest the authority given to it by the amendment. See *Wieboldt Stores v. Sturdy*, 384 Ill. 271, 51 N. E. (2d) 268 (1943); *People ex rel. Sokall v. Municipal Court of Chicago*, 359 Ill. 102, 194 N. E. 242 (1935); *Wilcox v. Conklin*, 255 Ill. 604, 99 N. E. 669 (1912); *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, 92 N. E. 992 (1910); *People ex rel. Sadler v. Olson*, 245 Ill. 288, 92 N. E. 157 (1910); *Miller v. People*, 230 Ill. 65, 82 N. E. 521 (1907); *Galpin v. City of Chicago*, 159 Ill. App. 135 (1910), affirmed in 249 Ill. 554, 94 N. E. 961 (1910). The later cases would tend to indicate the opposite: *City of Chicago v. Cook County*, 370 Ill. 301, 18 N. E. (2d) 890 (1939); *People ex rel. Soble v. Gill*, 358 Ill. 261, 192 N. E. 193 (1934).

²⁴ Ill. Rev. Stat. 1949, Vol. 1, Ch. 37, § 356 et seq. Section 357 thereof describes the subjects of action which the Municipal Court of Chicago is empowered to hear and determine. It may be noted, for example, that the court does not possess a general equity jurisdiction, nor may it grant divorces. A city court, by contrast, may deal with such matters, subject to the territorial limitations imposed upon it.

²⁵ Both the statute and the constitutional amendment relating to it were held valid in *City of Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237 (1906), and in *People ex rel. Soble v. Gill*, 358 Ill. 261, 192 N. E. 193 (1934).

²⁶ Ill. Rev. Stat. 1941, Ch. 37, § 333 to § 355a, but particularly § 333. That statute had been enacted on May 10, 1901.

exist²⁷ in which the Municipal Court of Chicago has taken jurisdiction over tort and contract actions arising outside of the city and in which judgments have been reviewed on appeal without any mention of a possible jurisdictional question. Unquestionably, jurisdiction to hear and determine a cause of action cannot be given either by the consent of the parties or by their failure to raise the issue, so that a case decided by a court without jurisdiction over the subject matter results only in a judgment that is null and void.²⁸ It being the well understood duty of a court, if it finds it lacks jurisdiction, to dismiss the case, can it be said that the judgments in the two cases mentioned were null and void and that both the Municipal Court of Chicago and the Appellate Court were derelict in their duty by passing on the matters brought before them without raising the jurisdictional issue? The answer would seem to be an obvious and a resounding "No!"

There are practical, as well as legal, reasons why the decision in the instant case should be reversed. No small matter of expense to residents of Chicago is at stake. If they may not, in cases of this kind, turn to their own relatively inexpensive tribunal, they will be forced to use the more costly services of the Circuit, Superior or County Courts of Cook County.²⁹ Even more harmful would be the time-consuming delays which would be forced upon them by the over-crowded calendars of these other and understaffed state courts. Delayed justice being, at best, an inferior brand of relief, it is to be hoped that the Illinois Supreme Court will not force Chicagoans to tread again the road to constitutional revision in order to obtain that which is already their constitutional right.³⁰

R. T. NELSON

INFANTS—PROPERTY AND CONVEYANCES—WHETHER A BONA FIDE PURCHASER FROM AN INFANT'S TRANSFEREE IS TO BE PROTECTED IN CASE OF DISAFFIRMANCE BY THE INFANT OF HIS CONTRACT OF SALE—In the Arkansas case of *Jones v. Caldwell*,¹ a minor, by his next friend, brought an action

²⁷ In *Rapers v. Holmes*, 292 Ill. App. 116, 10 N. E. (2d) 707 (1937), the court dealt with a tort cause of action arising in Indiana. The earlier case of *Israel v. Selman*, 263 Ill. App. 351 (1931), involved a contract cause of action based upon a contract made, and to be performed, in Ohio.

²⁸ *Smith v. Louisville & Nashville R. R. Co.*, 381 Ill. 55, 44 N. E. (2d) 841 (1942); *Riddlesbarger v. Riddlesbarger*, 324 Ill. App. 176, 57 N. E. (2d) 901 (1944).

²⁹ A press release issued by the Chief Justice of the Municipal Court of Chicago indicates that there has already been a decline of from 10 to 15 per cent. in the filing of civil tort and contract cases by reason of the decision in the instant case. The release estimates that the Municipal Court will lose from 15,000 to 20,000 such cases a year if the decision is affirmed.

³⁰ Ill. Const. 1870, Art. II, § 19, promises to all citizens the right to obtain "justice freely, and without . . . delay."

¹ — Ark. —, 225 S. W. (2d) 323 (1949).

to recover possession of an automobile which he had sold to a third party who had, in turn, sold it to the defendant. The latter had purchased in good faith, for value, and without notice of the incapacity of the vendor's transferor. Despite a jury verdict for the defendant, the trial court, on plaintiff's motion for judgment *non obstante veredicto*, set the general verdict aside and entered judgment for plaintiff. Upon appeal, the Supreme Court of Arkansas reversed, holding that the defendant was entitled to an instruction that if the jury found that the defendant had purchased the automobile in good faith, for value, and without notice of the seller's defect in title by reason of the original purchase from a minor, the verdict should be for the defendant. The court specifically relied on Section 24 of the Uniform Sales Act² as the basis for refusing to follow what had previously been the acknowledged common-law rule followed in that state.³

The common-law rule had clearly allowed an infant not only to disaffirm his contract, even though the rights of innocent third parties had intervened, but also permitted him to act to regain his property. Other jurisdictions as well as Arkansas have followed this principle.⁴ In *Hovey v. Hobson*,⁵ for example, the Supreme Court of Maine, in a case concerning the disaffirmance of a deed of an insane person, after declaring that the acts of lunatics and infants were to be treated as analogous and subject to the same rules, went on to state that the rights of an infant and of an insane person to avoid a deed or contract was an absolute right, was superior to all equities of other persons, and could be exercised against bona fide purchasers from the grantee. Massachusetts had likewise held, at least as to transfers of realty, that the absolute and paramount right of the infant or the insane person to avoid a contract could be exercised against even an innocent purchaser for value from the incompetent person's grantee.⁶

It is true that the aforementioned cases specifically dealt with transfers of realty, but the courts concerned did not limit the principle expressed to such circumstances. A reading of the cases would disclose that the attitude expressed therein was, ostensibly at least, intended to apply as a general rule based upon social, economic, and moral concepts concerning infants, and not upon the nature of the subject matter involved. Application of

² Unif. Laws Anno., Vol. 1, § 24. A comparable provision may be found in Ill. Rev. Stat. 1949, Vol. 2, Ch. 121½, § 24.

³ *Rowe v. Allison*, 87 Ark. 206, 112 S. W. 395 (1908); *Tobin v. Spann*, 85 Ark. 556, 109 S. W. 534 (1908); *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409 (1860).

⁴ *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372 (1891); *Mustard v. Wohlford's Heirs*, 15 Gra. (Va.) 329, 76 Am. Dec. 209 (1859).

⁵ 53 Me. 451, 89 Am. Dec. 705 (1866).

⁶ *Brewster v. Weston*, 235 Mass. 14, 126 N. E. 271 (1920).

the principle to cases involving other than realty transactions may be typified by the holding in *Downing v. Stone*.⁷ It was held therein that a contract for the sale of goods made by an infant was voidable during the infant's minority, so that, upon his election to avoid the contract and upon giving notice to his vendee of such rescission, tendering the return of the consideration received if he still had it, the matter would stand as if no sale had ever been made. The infant might then follow the property he had delivered to the vendee, into whomsoever's hands it may have passed, with full right to recover it in kind or to maintain trover for its conversion if possession was denied to him.⁸

The foregoing discussion serves to exemplify the attitude of the common law toward the problem of disaffirmance of contracts made by infants. The court in the instant case found a basis for a contrary holding in Section 24 of the Uniform Sales Act. That section states, in substance, that where one who has acquired a title to goods, but which title is voidable in nature, transfers such title prior to the time when his title has been avoided, the one who takes from him gets a good title provided the taker acts in good faith, pays value, and has no notice of the defect in his transferor's title.⁹ The word "infant" does not expressly appear in the section, so the question becomes one of whether or not an infant's contract comes within its terms by inference. In that connection, it may first be noted that the term "voidable," as employed in the section, is used without any qualifying clause. It may be reasonably inferred, from this fact, that the framers of the statute used that term in its ordinary legal connotation, intending thereby to include all contracts considered voidable, for whatever reason, at the time of the enactment of the section. Certainly, this line of reasoning would bring the contracts of infants within the purview of Section 24, for they have generally been regarded to be voidable, rather than void.

A second argument offered to support the holding in the instant case was adduced from a reading of the whole of the Uniform Sales Act. The Arkansas court noted that the legislature had expressly excluded infants

⁷ 47 Mo. App. 144 (1891).

⁸ The language of the *Downing* case is not only clear but also comprehensive. Language more colloquial in character, but to the same effect, was employed in *Mellott v. Love*, 152 Miss. 860, 119 So. 913 (1929). It was there said, in a case concerning an infant who disaffirmed his purchase of shares of stock in a bank, that the infant's right to avoid a contract because of infancy was not affected by the fact that the rights of third parties had intervened.

⁹ Unif. Laws Anno., Vol. 1, § 24. The section has most often been applied to transfers of title in cases wherein fraud has been involved. In that regard, the New York court concerned in the case of *Neal, Clark & Neal Co. v. Tarby*, 99 Misc. 380, 163 N. Y. S. 675 (1917), stated that the section merely restated the common law which accorded protection to the innocent party against one whose actions had placed the offender in a position to do wrong.

from the workings of the act wherever it had clearly desired to do so.¹⁰ The absence of express exclusionary language in Section 24 was held to be indicative of an intention that it should be applied to infants' contracts as well as to those of admittedly competent persons. The argument might be weakened to some extent by a firm policy of according to infants a favored position in law which might be taken to require an express legislative mandate for inclusion, rather than an implied exclusion, of infants under the section in question. Further guidance in this connection, however, is offered by Professor Williston, whose role in both the drafting and the adoption of the Uniform Sales Act is well known. Specifically commenting upon Section 24, he once wrote: "In a few classes of cases, however, the law as distinguished from equity gives a special right of avoiding a transfer of title, a right which has been held to exist not simply against the first taker of title, but against any subsequent transferee irrespective of bona fides or value. This has been the privilege of infants and in jurisdictions where the contract of a lunatic is regarded as analogous to that of infants the same principle has been applied. In regard to such cases this section of the Sales Act works a change in the law. It is desirable that at some time the title to goods bought from an infant or lunatic should be protected and the advantage to trade and stability of titles justifies the diminution in the privilege of infants and lunatics."¹¹

Similar reasoning underlies the instant case and supports, at least in part, a few of the decisions relied upon by the Arkansas court as authority for the position it adopted. The first, and perhaps the principal, of these authorities is the case of *Casey v. Kastel*.¹² In that case, an infant sought to disaffirm his contract for the sale of stock certificates, made through an agent, and thereby affect the rights of third parties. The New York court, applying Section 24 of the Uniform Sales Act, treated the sales contract as being only voidable in nature and, as it had not been avoided by the infant before a bona fide purchaser for value had taken title without notice, it held the latter had obtained a good title. The second of these cases, that of *Carpenter v. Grow*,¹³ concerned a situation somewhat more akin to the instant case than the one involved in the Casey decision. The minor there concerned had purchased an automobile and had paid for the same by way

¹⁰ The court called particular attention to Section 2, one which deals with capacity to contract and with liability for necessities: Unif. Laws Anno., Vol. 1, § 2. That section expressly includes infants among those who are required to pay only a reasonable price for necessities furnished, as distinguished from other parties who would, generally, have to pay the contract price.

¹¹ See Williston, Sales, Vol. 2, § 348, p. 349.

¹² 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924). New York adopted the Uniform Sales Act in 1911.

¹³ 247 Mass. 133, 141 N. E. 859 (1923). The Uniform Sales Act was adopted by that state in 1909.

of a trade-in plus cash and notes. The vendor having resold the automobile received in trade from the infant, the court limited the infant's recovery against the vendor to the money advanced. It stated that while the avoidance of the infant's contract had caused the contract to be void *ab initio*, the Uniform Sales Act had deprived the infant "of any rights against the defendant's transferee."¹⁴

Where the question of the applicability of Section 24 of the Uniform Sales Act to infants' contracts has been directly raised, courts of accepted authority have recognized the protection afforded by it to third persons who have acted in a bona fide fashion. The same result was achieved in the Iowa case of *Kuehl v. Means*,¹⁵ but no mention was made therein of a possible application of Section 24 to the situation there at hand. The problem involved concerned three infants who had entered into a partnership agreement. Two of the infants attempted to avoid a contract which had been made, on behalf of the partnership, by the third. The court, speaking of the right to so avoid as applied to the adult party who had contracted with the infants, said: "The right of a minor to pursue his property upon disaffirmance into the hands of a third party may not be predicated upon the mere fact of his minority. Such right of pursuit must be predicated not only upon minority and disaffirmance, but upon some form of fraud chargeable to the third party. Where a minor parts with his property on a contract valid until disaffirmed, the third parties, becoming innocent purchasers thereof for value are entitled to protection as such. If a minor seeks recourse beyond the party with whom he contracts, he must connect such third party in some manner by notice or otherwise with the contract which he disaffirms."¹⁶

The precise question here involved does not appear to have arisen in Illinois to date, but the state has adhered to common-law doctrines, particularly as they bear on the general problem of avoidance of infants' contracts.¹⁷ It has been held that contracts concerning the sale of personalty may be avoided by the infant either during or after minority and that

¹⁴ 247 Mass. 133 at 137, 141 N. E. 859 at 861.

¹⁵ 206 Iowa 539, 218 N. W. 907 (1928). Section 24 of the Uniform Sales Act could have been cited, as it had been adopted in Iowa as early as 1919.

¹⁶ 206 Iowa 539 at 547, 218 N. W. 907 at 911.

¹⁷ The following cases illustrate the general state of the law in Illinois as to avoidance of contracts made by infants: *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796 (1909); *Fuller v. Pool*, 258 Ill. App. 513 (1930); *Crandell v. Coyne Electrical School*, 256 Ill. App. 322 (1930); *Collins v. Peter's Real Estate Corp.*, 252 Ill. App. 348 (1929); *Kuipers v. Thome*, 182 Ill. App. 28 (1913); *Pennsylvania Corp. v. Purvis*, 128 Ill. App. 367 (1906); *Ashlock v. Vivell*, 38 Ill. App. 57 (1890). In *Fuller v. Pool*, 258 Ill. App. 513 (1930), the court cited with approval a statement made in 14 R. C. L. p. 242 to the effect that upon disaffirmance of a contract by an infant, the rights of the parties are as if the contract had never existed.

there is, for this purpose, no distinction in law between executory and executed contracts. For that matter, it was said in *Hunter v. Egolf Motor Company*,¹⁸ that a minor was not precluded from asserting his right to disaffirm a contract by the fact that the disaffirmance might operate injuriously and unjustly against the other party. These holdings, of course, grew out of situations which concerned only the infant and his other contracting party, but they may be indicative of a desire to provide a far-reaching protection for the infant. If the infant is to be protected to the fullest extent, it could be argued that similar results should be obtained in cases of resale of the chattels by the infant's transferee, particularly where only the return of the specific chattel would serve to mitigate the situation. But the dangers involved in such a possibility should be weighed against the benefits to be derived from a contrary rule, one which could be built around a comparable interpretation of the Illinois statute. The problem is, then, one of setting a fair limit upon the extent of the protection to be afforded to infants while at the same time not acting to deprive innocent third persons of their rights. As stability of titles is a prerequisite, in a commercial world, to sound business dealings, there would seem to be much justification for fixing that limit at the precise point established by the instant case.

R. L. ENGBER

JOINT TENANCY—CREATION AND EXISTENCE—WHETHER OR NOT THE LEASING OF A SAFETY DEPOSIT BOX UNDER A JOINT TENANCY LEASE ESTABLISHES A JOINT TENANCY IN THE CONTENTS OF SUCH BOX—By its decision in the case of *In re Wilson's Estate*,¹ the Illinois Supreme Court has placed a novel interpretation on an Illinois statute regulating joint tenancies² at least insofar as such statute applies to the contents of safety deposit boxes. The proceeding there involved was instituted by two of the beneficiaries under a will to compel the wife of the testator, who acted as executrix of the estate, to include, in her inventory of the estate, the contents of two safety deposit boxes as well as the balance on deposit of a joint bank account. Both the safety deposit boxes and the bank account were held in joint tenancy by the testator and the executrix. Despite this, the beneficiaries, who were children of the testator by a former marriage, contended that the personal property contained in the boxes and the balance of the bank account were the sole property of the testator. The widow-executrix,

¹⁸ 268 Ill. App. 1 (1932).

¹ 404 Ill. 207, 88 N. E. (2d) 662 (1949), noted in 38 Ill. B. J. 228, affirming 336 Ill. App. 18, 82 N. E. (2d) 684 (1948).

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 76, § 2.

on the other hand, contended that, as the property in question was held under joint tenancy agreement made between the testator, the widow, and the bank, the entire property in question passed to her by right of survivorship. In further support of her claims, the widow offered a note or memorandum found in one of the boxes which bore the signature of the testator and purported to create a joint tenancy in the contents thereof. The trial court found in favor of the executrix, but its judgment was reversed and the cause was remanded by the Appellate Court for the Second District.³ Upon further appeal by the executrix, the Illinois Supreme Court affirmed the judgment of the Appellate Court insofar as it had held that no joint tenancy had been created over the contents of the safety deposit boxes but it reached the conclusion that the balance on deposit in the bank account had passed to the widow-executrix as survivor. The significance of the case lies in the fact that the court held that neither the leasing agreement with the bank for the rental of the safety deposit box nor the note found therein were sufficient to constitute that "instrument in writing" made necessary by the statute prescribing the method for the creation of a joint tenancy in personal property.

The present Illinois statute abolishes the right of survivorship by way of joint tenancy in personal property except in the special instances therein enumerated, to-wit: property held by executors and trustees, and in cases where, by will or other instrument in writing, there is an expressed intention to create a joint tenancy in the personalty with the right of survivorship. A separate provision of the statute permits a bank to accept deposits payable on demand to one or more, and to accept a receipt or acquittance of any one or more as a full discharge from all, so long as an agreement providing for such payment is signed by all of the parties, either at the time the account is opened or thereafter. A similar provision exists covering the payment of dividends or earnings of stock jointly held where there is an agreement in writing signed by such joint owners. The court had little difficulty, therefore, in reaching the conclusion that the money remaining on deposit in the joint bank account belonged to the widow-executrix in her own right. As the account had been carried in the names of both the executrix and the testator, under an agreement in writing which the parties had entered into with the bank, the balance of the account obviously fell within the statutory exception outlined above.⁴

The question of ownership of a quantity of currency and of certain bearer bonds found in the safety deposit boxes presented a more difficult

³ 336 Ill. App. 18, 82 N. E. (2d) 684 (1948), noted in 37 Ill. B. J. 212.

⁴ See also *Reder v. Reder*, 312 Ill. 209, 143 N. E. 418 (1924); *Illinois Trust & Savings Bank v. Van Vlack*, 310 Ill. 185, 141 N. E. 546 (1923); *Erwin v. Felter*, 283 Ill. 36, 119 N. E. 926, L. R. A. 1918E 776 (1918).

problem. The precise issue faced by the court was whether either the rental contract with the bank, under which these boxes had been rented, or a note found in one of the boxes, constituted a written instrument within the statutory provision, that is one which not only created the estate but also served to express an intention of giving to it the incident of survivorship.

The existence of a leasing agreement purporting to create a joint tenancy in the contents of the safety deposit box has generated a problem which has been litigated in a number of American jurisdictions with considerable lack of unanimity in the holdings pronounced by the various courts. In one of the earliest cases, that of *Mercantile Safety Deposit Company v. Huntington*,⁵ it was held that the presence of a joint ownership of a safety deposit box, under a leasing agreement with a bank, indicated nothing as to the ownership of the contents, for the only inference to be drawn from such joint ownership of the box was that the parties had an intention to qualify each of the depositors for access to the box and no more.⁶ The independent ownership of property by one of the parties was said not to be altered by the act of placing such property in a safety deposit box rented under a joint tenancy lease. That action has been held insufficient to establish joint ownership even where the parties are husband and wife.⁷ Not even the presence of an express recital to the effect that the contents of a box leased by husband and wife were the joint property of both lessees and should, upon the death of either party, pass to the survivor was regarded as being sufficient, in the Arkansas case of *Black v. Black*,⁸ to establish common ownership of the contents. The clause was there said to be for the protection of the lessor and merely determined, as between the lessor and lessees, that the lessees were joint tenants. It has also been held that, where either party has a right to surrender the box to the lessor, the rental agreement would not even serve to create a joint tenancy as to the box, much less of its contents.⁹

The contrary view, one holding that the leasing of a safety deposit box under a joint tenancy rental agreement does establish joint ownership in the contents of such box, rests on the theory that the lease does disclose an intention on the part of the lessees to establish such a relationship. A

⁵ 89 Hun. 465, 35 N. Y. S. 390 (1895).

⁶ Much the same view is expressed in the later cases of *Security First National Bank of Los Angeles v. Stack*, 32 Cal. App. (2d) 586, 90 P. (2d) 337 (1939), and *Richards v. Richards*, 141 N. J. Eq. 579, 58 A. (2d) 544 (1948).

⁷ *Clevidence v. Mercantile Home Bank & Trust Co.*, 355 Mo. 904, 199 S. W. (2d) 1 (1947); *Matter of Brown*, 86 Misc. 187, 149 N. Y. S. 138 (1914); *In re Wohleber's Estate*, 320 Pa. 83, 181 A. 479 (1935).

⁸ 199 Ark. 609, 135 S. W. (2d) 837 (1940).

⁹ *Millman v. Streeter*, 66 R. I. 341, 19 A. (2d) 254 (1941).

perfect illustration of this view may be observed in the case of *Graham v. Barnes*¹⁰ where it was held that negotiable bonds owned by an intestate and placed in a safety deposit box leased in the joint names of the intestate and his mistress, became the sole property of the mistress by right of survivorship upon the decease of the intestate. Other cases reach the same result in the absence of any statute regulating joint tenancies¹¹ but they may turn on the precise language of the agreement.¹²

In electing to adopt the first of these views, to-wit: the mere fact that persons lease a safety deposit box as joint tenants does not, in and by itself, create a joint tenancy in the contents thereof, the Illinois court reasoned that, to fulfill the requirements of the statute, it was essential that the written instrument purporting to create the joint tenancy relationship had to be one in the form of a conveyance of an interest in the property. A rental agreement could hardly accomplish this result as it would be a writing entered into between the bank on the one hand, as lessor, and the husband and wife on the other, as lessees, rather than between a vendor and vendees. Furthermore, no specific property would be described in a leasing contract covering a safety deposit vault whereas it would be essential, in order to create a joint tenancy in personal property, for that property to be definitely described in the instrument evidencing the ownership. While the decision in the instant case merely purported to invalidate the attempted creation of a joint tenancy by reason of the particular leasing agreement therein involved, it would be reasonable to conclude that it is not possible, in Illinois, to utilize a safety deposit box lease as an instrument by which to establish a joint tenancy relationship as to the personalty contained therein,¹³ for the reasoning of the court, in reaching that result, would be

¹⁰ 259 Mass. 534, 156 N. E. 865 (1927).

¹¹ See *Brown v. Navarre*, 64 Ariz. 262, 169 P. (2d) 85 (1946); *Lilly v. Schmock*, 297 Mich. 513, 298 N. W. 116 (1941), where the court stated that there was no statute or court decisions in the jurisdiction forbidding the creation of a right of survivorship in personalty when done by the express act of the parties; In re *Petersen's Estate*, 239 Mich. 452, 214 N. W. 418 (1927).

¹² The California cases have come to divergent results by interpretation of individual leasing agreements: Gelber, "The Unintentional Creation of a Joint Tenancy in the Contents of a Safety Deposit Box," 32 Cal. L. Rev. 301 (1944). Cases holding that a joint tenancy was created appear in *Hausfelder v. Security First Nat. Bank of Los Angeles*, 77 Cal. App. (2d) 478, 176 P. (2d) 84 (1946); In re *Gaines' Estate*, 15 Cal. (2d) 255, 100 P. (2d) 1055 (1940); *Young v. Young*, 126 Cal. App. 306, 14 P. (2d) 580 (1932). But see contra: *California Trust Co. v. Bennett*, 33 Cal. (2d) 694, 204 P. (2d) 324 (1949); In re *Dean's Estate*, 68 Cal. App. (2d) 86, 155 P. (2d) 901 (1945); *Security First Nat. Bank of Los Angeles v. Stack*, 32 Cal. App. (2d) 586, 90 P. (2d) 337 (1939).

¹³ See In re *Jirovec's Estate*, 285 Ill. App. 113, 3 N. E. (2d) 102 (1936), where the Illinois Appellate Court held that the application card for the lease of a safety deposit box signed by the co-renters and bearing the stamp "either or survivor" was not sufficient to create a joint tenancy in the contents of the box, but was merely an expression of an intention to authorize the bank to allow access to the

applicable to all such leasing agreements, no matter how detailed or comprehensive they may be.

The court was, however, confronted with a much more difficult problem when it had to determine the effect of the note which had been signed by the deceased and left in the safety deposit box.¹⁴ That note merely stated that there was a certain sum in the box and that such money was held in joint tenancy by the maker and his wife, but the query was whether this note represented such an "instrument in writing" as would satisfy statutory requirements. For this purpose, the court considered the meaning of the words "instrument in writing" to be the equivalent of such a written instrument as would comply with the requirements of the statute of frauds insofar as it relates to conveyances of personalty upon a consideration not deemed valuable in law.¹⁵ The last mentioned statute requires that transfers of goods and chattels, without a consideration deemed valuable in law, must be by will or deed, as in the case of real property, or by possession remaining bona fide in the donee. By application of this interpretation to the note concerned in the present case, the court readily found that there was no conveyance of property present, words of transfer being lacking, in addition to which the note did not even express an intention to create a joint tenancy relationship.¹⁶

It may be inferred, from this reasoning, that if the language of such a note were comprehensive enough it might be sufficient to establish a joint tenancy over the contents of a safety deposit box. Perhaps the court had in mind the written agreement which had been presented to the Illinois Appellate Court in the case of *In re Koester's Estate*.¹⁷ The written agreement there concerned had provided that all property placed or contained in the safety deposit box, whether put there before or subsequent to the making of the agreement, should belong to the lessees jointly with right of survivorship. That writing was held to be such an instrument as would comply with statutory requirements. The facts of that case, however, dis-

box by either or both the co-renters and to protect the bank in case of withdrawal of securities by either. Subsequent to the decision in the case here under consideration, the Appellate Court reiterated the holding thereof in the case of *In re Brokaw's Estate*, 399 Ill. App. 353, 90 N. E. (2d) 300 (1950).

¹⁴ The note read: "There is \$37,000 in this box and it is a joint tenancy between my wife Mary Aldah Wilson, and myself. E. G. Wilson, M.D. 6-11-46." See 404 Ill. 207 at 209, 88 N. E. (2d) 662 at 663.

¹⁵ Ill. Rev. Stat. 1949, Vol. 1, Ch. 59, § 6.

¹⁶ In *Napier v. Eigel*, 350 Mo. 111, 164 S. W. (2d) 608 (1942), the court found that a note left in a safety deposit box designating that certain funds in the box were for the emergency use of the deceased and her surviving sister did not serve to establish a joint tenancy in the funds upon the happening of the contingency.

¹⁷ 286 Ill. App. 113, 3 N. E. (2d) 102 (1936). The note there concerned was a separate agreement signed by the husband and wife, but executed at the time the leasing agreement was made with the bank.

close that securities had been purchased by each of the parties from their individual funds and had been placed in the box subsequent to the date of the written agreement. The Appellate Court indicated that the written agreement was operative on such after-acquired property, even though such property was originally purchased from the sole funds of one of the parties. In view of the fact that in that case, as in the present one, there was no specific description of the property nor any separate conveyance, it would seem that the contract there involved would be inadequate in the light of the present decision by the Supreme Court.

Even supposing words of conveyance were present, there is some question as to whether such a writing would have created a joint tenancy in the contents of a box. It is fundamental to the proper creation of a joint tenancy at common law that there be unity in the four elements of title, interest, time and possession, so that the joint tenants must have the same interest, accruing under the same conveyance, commencing at the same time, and hold under the same undivided possession.¹⁸ An intention alone, no matter how emphatically expressed,¹⁹ is not sufficient to create rights; for to create such intended rights the intent must be carried into effect by acts which are legally capable of accomplishing the intended purpose. How, then, can one already holding title expect to create a joint tenancy in personalty by his own unilateral act? Should he not be required to follow the time-honored method utilized in real estate transactions, under which he divests himself of his individual title to a disinterested third person and receives a reconveyance to himself and his joint tenant? Only in that fashion may the four unities be preserved.

It is true that it was not necessary for the court, in the instant case, to decide whether it was essential that the four unities be preserved as the instrument itself was found to be insufficient, making recourse to the subsidiary problem unnecessary. It may be noted, however, that the court may have intimated that the four unities might be necessary for it cited a case to this effect.²⁰ In this regard the court would appear to be contradicting itself, as well as disagreeing with the reasoning of the Appellate Court in the Koester case, for the four unities were not discussed as being an essential attribute to the creation of a joint tenancy relationship either in the instant case or in that case. On the contrary, it might be argued that as the statute enacted to govern the creation of joint tenancy in per-

¹⁸ *Hood v. Commonwealth Trust & Savings Bank*, 376 Ill. 413, 34 N. E. (2d) 414 (1941); *Deslauriers v. Senesac*, 331 Ill. 437, 163 N. E. 327 (1928). See also *Millman v. Streeter*, 66 R. I. 341, 19 A. (2d) 254 (1941).

¹⁹ *Strout v. Burgess*, — Me. —, 68 A. (2d) 240 (1949).

²⁰ Reference was made in the opinion to the holding in *Hood v. Commonwealth Trust & Savings Bank*, 376 Ill. 413, 34 N. E. (2d) 414 (1941).

sonal property does not mention the need for the four unities, it may, by superseding the common law, have, by its very silence, obviated the necessity for these formalities. That argument may not prove to be successful, if the court should extend its process of interpretation. It has imposed the requirement that the writing be in the form of a conveyance, although a perusal of the statute will reveal that the word "conveyance" is lacking in its context. If the court continues to think in terms of the four unities, a unilateral agreement by one already holding title may also, by interpretation, prove insufficient unless it can operate as a will.

There is enough in the decision to disquiet the peace of mind of persons who have attempted to establish joint tenancy relationships in personal property. As the statute now stands, the result attained is logical and sound, but may not be the one expected. The legislature, which saw fit to abolish the right of survivorship in personal property, except in the instances enumerated, should consider a revision of the statute. Despite the reticence with which the law recognizes the ownership of property in joint tenancy, a vast amount of wealth is now represented by personal property of a kind particularly adaptable to storage in safety deposit box facilities. If joint tenancy ownership thereof requires full compliance with the details made necessary for joint tenancy ownership of real property, it is time the legislature said so.

W. P. McCray

MUNICIPAL CORPORATIONS—USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS—WHETHER OR NOT A MUNICIPALITY IS LIABLE FOR NEGLIGENTLY FAILING TO CORRECT A DEFECTIVE AUTOMATIC TRAFFIC CONTROL DEVICE—The Illinois Supreme Court, in an unprecedented decision in the case of *Johnston v. City of East Moline*,¹ affirmed a decision of the Appellate Court for the Second District which had upheld a trial court decision to the effect that a city is liable for damages arising from an automobile accident proximately caused by the malfunctioning of a traffic signal. The plaintiff's complaint charged that she, as a passenger in the automobile of another, had entered a partially controlled street intersection at the invitation of a green light when the car in which she was riding was violently struck by another automobile which had entered the intersection from a transverse direction then uncontrolled because of a failure in the operation of the traffic light. The plaintiff predicated her suit upon the alleged negligence of the city in failing to repair the malfunctioning traffic light for a period of six days after notice of the defect. The city dis-

¹ 405 Ill. 460, 91 N. E. (2d) 401 (1950), affirming 338 Ill. App. 220, 87 N. E. (2d) 22 (1949).

claimed liability on the ground that the maintenance and operation of traffic signals constituted a governmental function for which there could be no liability in damages. All courts concerned with the particular case, in holding for the plaintiff, ruled that the conduct of operating and maintaining highway traffic signal lights was non-governmental rather than governmental in character, as a consequence of which the defendant could be held liable for its negligence in failing to readjust or repair the light within a reasonable time.

Courts have always taken the position that municipal corporations, at least as to defects in the surfacing of streets, would be exposed to liability for neglect.² Such liability has generally been viewed as arising by necessary implication from the fact that municipal corporations are usually invested with exclusive authority and control over the streets within the corporate limits. Possessing the means for the construction and repair of such streets, it is only fitting that municipal duty should arise, in favor of the public, to keep the streets in a reasonably safe condition. As a necessary corollary thereof, a corresponding liability exists to respond in damages to those who might be injured by a neglect to perform that duty.³ But the duty has been extended beyond mere responsibility for care over the surface of the travelled way, for Illinois courts have generally been quite liberal in their interpretation of what constitutes a street and its appurtenances. It has been held, for example, that municipalities may be liable for damage caused by negligence in repairing water mains,⁴ in permitting uninsulated electric wires to so obstruct the public streets as to render them dangerous,⁵ in not preventing the falling of defective awnings,⁶ in allowing a trash fire set by a street sweeper to ignite the clothing of a child,⁷ in not repairing or removing a traffic signal platform which contained acid so that the same might not splash on and burn a pedestrian,⁸ and for allowing a metal "stop" sign to become loose so that it might fall and strike a child playing on the street.⁹

In contrast, however, the regulation of traffic upon the street has generally been considered to be a governmental function, with the attendant effect that the municipality is not liable for injuries or damages which may arise out of negligence in the control of such traffic. A municipal cor-

² In general, see 63 C. J. S., *Municipal Corporations*, § 782.

³ *Browning v. City of Springfield*, 17 Ill. 143 (1850).

⁴ *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 306 (1903).

⁵ *Village of Palatine v. Siter*, 225 Ill. 630, 80 N. E. 345 (1907).

⁶ *Hanrahan v. City of Chicago*, 278 Ill. 400, 124 N. E. 547 (1919).

⁷ *Rombos v. City of Chicago*, 332 Ill. 70, 163 N. E. 361 (1928).

⁸ *Koch v. City of Chicago*, 297 Ill. App. 103, 17 N. E. (2d) 411 (1938).

⁹ *Scarpici v. City of Chicago*, 329 Ill. App. 434, 69 N. E. (2d) 100 (1946).

poration, for example, is said not to be liable for the acts of its officers when attempting to enforce police regulations nor is it liable for the wrongful or negligent acts of its police officers while they are acting in the performance of their public duties.¹⁰ In that regard, courts have held that devices installed by the municipality to aid or assist the police in regulating traffic are installed and operated under an exercise of the governmental function so that the municipality is relieved from liability arising from a negligent installation or operation of such a device, provided the same does not actually constitute a physical defect in the street itself. In *Kirk v. City of Muskogee*,¹¹ for example, an Oklahoma court once stated that "a municipality is liable for damages sustained from defects in its streets, but there is a clear distinction between the failure of a city to keep its streets in a safe condition as regards physical defects therein, and failure or neglect in regulating traffic thereon."¹² Cases from other jurisdictions, with similar fact situations to the instant case, hold that, as regulation of traffic is a governmental function, any traffic signals installed to assist in such regulation are no more than mechanical substitutes for police officers so as to be within the general immunity provided for acts done pursuant to such governmental function.¹³

It would appear, from its decision in the instant case, that the Illinois court refuses to follow a well-ordered path of legal logic established in other jurisdictions where governmental immunity has been permitted to attach to inanimate or mechanical signals designed to regulate traffic. It is difficult to determine why a municipality should be immune from liability for injuries produced by the negligence of its human officers engaged in the regulation of traffic but be exposed to liability where the same function is being exercised by mechanical traffic signals. As the job being done is the same in both cases, any difference in the result must be attributed to some other factor. The court in the instant case hints at a distinction but does not, as is so often the case, make that distinction clear in precise words. It mentions that traffic signals perform their functions in a ministerial or non-discretionary manner. It is self-evident that an inanimate regulator does not have the ability to exercise any discretion.

¹⁰ See, in general, Dillon, *Municipal Corporations*, 5th ed., Vol. 2, § 773; McQuillin, *Municipal Corporations*, 2d ed., Vol. 6, § 2301.

¹¹ 183 Okla. 536, 83 P. (2d) 594 (1938).

¹² 183 Okla. 536 at 537, 83 P. (2d) 594 at 595.

¹³ *Dorminey v. City of Montgomery*, 232 Ala. 47, 166 So. 689 (1936); *Avey v. City of West Palm Beach*, 152 Fla. 717, 12 So. (2d) 881 (1943); *Sandman v. Sheehan*, 279 Ky. 614, 131 S. W. (2d) 484 (1939); *Auslander v. City of St. Louis*, 332 Mo. 145, 56 S. W. (2d) 778 (1932); *Hodges v. City of Charlotte*, 214 N. C. 737, 200 S. E. 891 (1939); *Vickers v. City of Camden*, 122 N. J. L. 14, 3 A. (2d) 613 (1939); *Martin v. City of Canton*, 41 Ohio App. 420, 180 N. E. 78 (1931).

It merely blinks or buzzes at regularly fixed intervals and is totally lacking in the ability to change its procedures as the needs of the traffic might demand. By contrast, an officer set to directing traffic, while performing the same function, may exercise discretion for his procedures may be changed to fit the occasion. Therein may lie the clue.

It has been the custom in the past for some jurisdictions, including Illinois, to utilize a distinction between discretionary and ministerial powers in determining whether a particular municipal function is governmental or proprietary in character. If the former, immunity from tort liability exists; if the latter, it does not.¹⁴ Such reasoning proceeds on the basis that an exercise of discretion is the main element called for in the discharge of legislative or judicial powers, by reason of which they are purely governmental in nature. Ministerial powers, on the other hand, have no such connotation. If this test be applied to the regulation of traffic on streets and highways, one is forced to conclude that the promulgation of all regulatory measures calls for the exercise of discretion so, if the pattern of logic is followed, should be classified as being governmental in character. The Illinois court, however, carries the reasoning process one step farther. It now requires that the element of discretion must be present in all phases of the function, that is not only in the promulgation of the regulation but also in the mode of putting such regulation into operation. As the complete element of discretion is lacking in the case of a mechanical traffic regulator, immunity from tort liability must also be absent. One hesitates to say how far that thought may be carried but the instant case clearly indicates that when, in Illinois, a traffic signal has been installed it immediately becomes an appurtenance to the street or highway for which the municipality must become responsible. When it ceases to function properly and becomes a physical hazard to traffic, the municipality which negligently allows the signal to continue in that status must expect to be liable for any injury caused thereby.

J. E. STRUNCK

¹⁴ The extent to which that distinction may be pushed, entirely out of all proportion to its proper functioning, may be observed in the holding in *Mower v. Williams*, 402 Ill. 486, 84 N. E. (2d) 435 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 103, where a highway maintenance employee, charged with driving a snow plow, was absolved from liability for colliding with a passenger vehicle because engaged in a "governmental" function. Crampton, J., dissented. The amount of "discretion" involved in the act of driving a truck, with snow plow attached, on a public highway may be classed as negligible.

RECENT ILLINOIS DECISIONS

CHARITIES—CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT—WHETHER OR NOT CHARITABLE CORPORATION WHICH HAS INSURED AGAINST TORT LIABILITY FOR NEGLIGENCE OF ITS AGENTS MAY INVOKE DEFENSE OF IMMUNITY—In the case of *Moore v. Moyle*,¹ the Illinois Supreme Court has taken a most significant tack from the current of Illinois decisions regarding the liability of charitable corporations for the tortious acts of their servants and agents.² The principal defendant therein, Bradley Polytechnic Institute, had purchased certain gymnastic equipment for use in a proposed student circus and had placed the supervision of the erection and use thereof in the hands of the individual defendants, two physical education instructors. While the equipment was under their supervision, the plaintiff fell and was injured by the collapse of the apparatus. When suing to recover for such injuries, plaintiff charged that the educational institution was fully insured, and also had other non-trust property, so that a judgment could be satisfied without impairing any charitable trust fund. The trial court dismissed the action as to the principal defendant and entered a judgment in its favor on the ground that the doctrine of *respondeat superior* did not apply to a charitable corporation. That judgment was affirmed by the Appellate Court for the Second District,³ but was reviewed by the Supreme Court on a certificate of importance. The judgment below was reversed and remanded when a majority of that court held that the prior Illinois cases in the field merely made the defense of immunity available as a defense but did not make it operate to destroy the cause of action. The thought was expressed that the law in Illinois went only far enough to hold that trust funds of charitable corporations were entitled to be deemed exempt from liability, hence it followed that non-trust fund property, such as the proceeds of insurance, could be subjected to judgments based on ordinary rules regarding *respondeat superior*.

Needless to state, the case will prove to be one of decisive importance to much pending and possible future litigation,⁴ for the court has gone a

¹ 405 Ill. 555, 92 N. E. (2d) 81 (1950), noted in 38 Ill. B. J. 581. Crampton, J., wrote a dissenting opinion. Wilson, J., also dissented.

² For an exhaustive review of the general problem, see annotations in 14 A. L. R. 572; 23 A. L. R. 923; 30 A. L. R. 455; 33 A. L. R. 1369; 42 A. L. R. 971; 62 A. L. R. 724; 86 A. L. R. 491; 109 A. L. R. 1199; 133 A. L. R. 821. See also Feezer, "The Tort Liability of Charities," 77 U. of Pa. L. Rev. 191 (1928); Zollman, "Damage Liability of Charitable Institutions," 19 Mich. L. Rev. 395 (1921). A review of the pertinent Illinois decisions appears in a note to *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N. E. (2d) 342 (1947), in 26 CHICAGO-KENT LAW REVIEW 279.

³ See *Moore v. Moyle*, 335 Ill. App. 342, 82 N. E. (2d) 61 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 3, 28 CHICAGO-KENT LAW REVIEW 1 and 103, and 38 Ill. B. J. 187.

⁴ Counsel for persons injured or killed in the recent Effingham Hospital fire will certainly take note of the decision.

long way toward circumscribing the unjustifiable immunity which has previously been granted to charitable corporations. However desirable the immediate result may be, it is extremely regrettable that the court did not completely abolish rather than just limit the immunity. One cannot but be persuaded by the cogent logic of the dissent that ". . . the crucial policy of exempting charitable institutions from tort liability is of sufficient gravity to require a further appraisal by this court of the reasons which sustain it. The issue here presented should be resolved upon the merit of those reasons rather than by the adoption of criteria which merely purport to extend or modify the doctrine and which . . . can result in little but confusion in the law."⁵ It is hoped that the Illinois court will soon reconsider the problem and accept the persuasive logic expressed by the Vermont Supreme Court, in another recent case,⁶ where every argument for charitable tort immunity was carefully examined and effectively refuted by a court which, for the first time in that jurisdiction, refused to embark on the muddled sea of charitable immunity.

DIVORCE—DEFENSES—WHETHER CONDONATION OF EXTREME AND REPEATED CRUELTY WILL BE REVOKED BY A SUBSEQUENT DESERTION ON PART OF FORGIVEN SPOUSE—A new problem involving aspects of divorce law was presented to, and resolved by, the Illinois Appellate Court for the Fourth District in the recent case of *Middleton v. Middleton*.¹ The complaint there charged extreme and repeated cruelty as ground for divorce but acknowledged that the plaintiff's acts of cohabitation with defendant subsequent thereto amounted to a condonation. Plaintiff, therefore, specially charged that an alleged wilful desertion of plaintiff by defendant for a period of one day prior to suit² operated to revoke the previous condonation and thereby reactivated plaintiff's right to a divorce on the ground of the prior cruelty. A temporary injunction was granted immediately upon suit, designed to restrain the defendant from molesting the plaintiff or from re-entering the premises of their domicile. After receiving plaintiff's evidence in support of her complaint, the trial court granted the defendant's

⁵ See dissenting opinion of Crampton, J., in 405 Ill. 555 at 568, 92 N. E. (2d) 81 at 88.

⁶ *Foster v. Roman Catholic Diocese of Vermont*, — Vt. —, 70 A. (2d) 230 (1950). Among other things, this court makes the most poignant observation that a "charity should not be permitted to inflict injury upon one without redress in order that it may do charity to others." See — Vt. — at —, 70 A. (2d) 230 at 235.

1 339 Ill. App. 448, 90 N. E. (2d) 248 (1950).

² The desertion was alleged to have occurred on April 18th and suit was begun on April 19th of the same year. To constitute a separate cause for divorce, the desertion must be wilful and for the space of one year: Ill. Rev. Stat. 1949, Vol. 1, Ch. 40, § 1.

motion to dismiss the suit for lack of proof. On appeal, that order was affirmed when the Appellate Court concluded that the proof failed to show any additional misconduct on the defendant's part beyond a brief quarrel leading to defendant's removal of himself and his clothing from the family domicile and that the presence of the temporary injunction literally operated to prevent defendant from returning to the family domicile or making any move toward reconciliation. It was, therefore, decided that the condonation had not been effectively revoked.

While a majority of cases from other states do recognize that a desertion for a period less than the statutory one will operate to revoke a prior condonation,³ the case at hand is the first one in which the question has been presented to a reviewing court of this state. Prior decisions have expressed the view that condonation for previous acts of cruelty is granted on the implied condition that the offending party will thereafter treat the other with conjugal kindness,⁴ but whether or not a revocation of the condonation has occurred has been said to depend upon the particular facts and circumstances of each case. Emphasis was here laid on the fact that the defendant had, on several occasions in the past, left his home for varying periods of time but had always returned of his own accord, and there was no evidence of any extra-marital misconduct by him during his absence. When it appeared that plaintiff's attitude at the time of defendant's leaving might be said, to some extent, to have disclosed a degree of willingness to participate in the quarrel and the subsequent departure of the defendant, the court felt constrained to say that the circumstances were not of such nature as to justify a right to revoke the prior condonation.⁵ It might be pointed out that a person in the position of the plaintiff should, in all equity, have respectful precaution toward coming into court with clean hands, so that plaintiff's own acts could well be considered as a contributing factor to the desertion. There is enough in the case, however, to indicate the possible adoption of the majority view by this state should the aggrieved spouse be able to show absence of fault and a period of desertion sufficiently long to indicate a lack of intention to return, even though the period be not long enough to constitute a separate and distinct cause for divorce. A highly unfortunate result would follow if it should be necessary to show a complete period of desertion to nullify a prior condonation. If that were so, the injured spouse would be faced with the proposition that a condonation once given could be abrogated only on the basis of a repetition of a type of marital misconduct similar to the one which had been forgiven.

³ See 17 Am. Jur., Divorce and Separation, § 213; 27 C. J. S., Divorce, § 62.

⁴ Ollman v. Ollman, 396 Ill. 176, 71 N. E. (2d) 50 (1947); Young v. Young, 323 Ill. 608, 154 N. E. 405 (1926); Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (1901).

⁵ Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (1901).

EMBEZZLEMENT—ELEMENTS OF OFFENSE—WHETHER FAILURE TO PUT SUFFICIENT FUNDS INTO A DIVIDEND ACCOUNT, AND COMMINGLING OF FUNDS IN SEPARATE DIVIDEND ACCOUNTS, AMOUNTS TO AN EMBEZZLEMENT BY A LIQUIDATION TRUSTEE—In the recent case of *People v. Barrett*,¹ a successor trustee under a plan of reorganization of a bank declared a 10% dividend for certain liquidating certificate holders. He deposited a sufficient sum of money in an account for the payment of this dividend. Approximately two and one-half years later he declared a similar dividend for the same persons, but this time he deposited an amount short of that required to pay such dividend and commingled the second fund with the funds still remaining on hand from the unpaid portions of the first dividend, the total being insufficient to pay both in full. This same process was repeated still another year and one-half later when a third dividend was declared. The result of these transactions was that, instead of depositing a total of approximately \$280,000 which would have been necessary to pay all three dividends, the trustee deposited approximately \$212,000. For these acts and omissions, the trustee was indicted for embezzlement under an indictment which charged the taking of funds belonging to the unpaid certificate holders of the first dividend. The theory of the prosecution was that the defendant had wilfully converted the unpaid sum of the first dividend to his own use by applying it to the discharge of his obligations under the second and third dividends. The trial court found him guilty and entered sentence but, on error to the Supreme Court, the judgment was reversed and the cause remanded when the upper court held that the acts were not sufficient to manifest the necessary criminal intent required to make the defendant guilty of the crime charged.² It laid particular stress on the requirement of secrecy and cited *People v. Parker*³ for the view that while the acts of the trustee might be acts of maladministration, amounting to a breach of trust, they would be insufficient to support conviction unless it could be shown that he had converted the money to his own use or had secreted it with intent so to use.⁴ Agreeing with the holding in *People v. Ervin*,⁵ the court said the criminal intent had to be proven as a necessary

¹ 405 Ill. 188, 90 N. E. (2d) 94 (1950).

² It is understood that at a subsequent trial without a jury, after remandment, the defendant was acquitted.

³ 355 Ill. 421, 174 N. E. 529 (1930).

⁴ As collateral evidence of the trustee's lack of intent, the court pointed to his offer in open court to make good the loss sustained by the certificate holders of the first dividend. Other factors were said to be (1) that he made no personal use of the money, (2) that the transactions did not benefit him in the slightest degree; (3) that his acts were only for the benefit of the certificate holders; (4) that there was no secrecy in his dealings; and (5) that notices of the dividend were sent to all certificate holders.

⁵ 342 Ill. 421, 174 N. E. 529 (1930).

element of the crime of embezzlement; that great latitude should be allowed in proving such intent; but that the defendant should also be allowed to show facts and circumstances designed to rebut the presumption that he had committed the crime.

The case was marked by a strong dissent from Justice Daily who indicated that, in his opinion, the defendant's conduct in supplying the deficits in the second and third dividend funds from the funds belonging to the first dividend owners disclosed an intent to convert the funds to his own use.⁶ He implied that the acts were secretly done from the fact that the beneficiaries had no knowledge thereof. One would assume, as the dissenting judge indicates, that in rendering its decision the majority of the court looked more nearly to what the trustee did not do instead of to what he did do.⁷

EVIDENCE—JUDICIAL NOTICE—WHETHER OR NOT A COURT SHOULD TAKE JUDICIAL NOTICE OF THE SCIENTIFIC FACT THAT A HUMAN BEING CANNOT CONTRACT TRICHINOSIS BY CONSUMING PORK WHICH HAS BEEN PROPERLY COOKED—The Appellate Court for the First District, by the decision in the case of *Nicketta v. National Tea Company*,¹ has virtually put an end to litigation heretofore begun by domestic consumers of pork against the sellers of that product to recover damages for having contracted the dreaded food disease of trichinosis. The plaintiffs there claimed they had purchased fresh pork from the defendant for home consumption and, after eating it, had become infected with the disease. The complaint charged the existence of an implied warranty between the parties that the fresh pork would be fit for human consumption after it had been properly cooked and that the product purchased had been so processed, despite which plaintiffs had contracted trichinosis. The defendant filed a motion to dismiss the complaint, claiming it to be an irrefutable scientific fact that properly cooked pork could never be the source of the disease, so that, if the plaintiffs had suffered as claimed,

⁶ See *Spalding v. People*, 172 Ill. 40, 49 N. E. 993 (1898).

⁷ A question as to whether or not the period of limitation on prosecution had run was also involved. The court decided that the three-year period fixed by Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 630, had not expired even though the second deposit occurred more than three years prior to the indictment. Following the view expressed in *People ex rel. Nelson v. People's Bank & Trust Co.*, 353 Ill. 479, 187 N. E. 522 (1933), the court said that a trustee is presumed to use his own money before that of the trust fund, so that the embezzlement would not be completed until the entire deposits for all three of the dividends had been used up. The court ruled out a possible application of the "first in first out" doctrine relating to bank deposits on the basis that such doctrine rests on a debtor-creditor relationship.

¹ 338 Ill. App. 159, 87 N. E. (2d) 30 (1949).

it must have been because the pork was not adequately processed. Upon that basis, it was urged that plaintiffs were in no position to take advantage of the implied warranty as they could not, then, show any breach thereof. The trial court, upon the hearing of the motion, took judicial notice of the scientific fact so alleged to exist and, on the basis thereof, dismissed the action. On appeal, that judgment was affirmed.

Trichinosis, a disease caused by the parasitic worm *trichinella spiralis*, can only be acquired by human beings through the consumption of pork or pork products which contain trichinae. Once an individual becomes infested, the result is a period of prolonged suffering which may, in severe cases, cause death.² It has, however, long been well established by authoritative scientists, as well as by governmental tests, that the trichinae cannot survive a heat in excess of 137° Fahrenheit, so that the consumer of pork or pork products may adequately safeguard himself by properly cooking the meat before eating it.³ Accordingly, as far as the world of science has been concerned, the presence of trichinosis in a human being is regarded as conclusive evidence that the individual has consumed infested raw or improperly processed pork.

Acceptance of this scientific fact by way of judicial notice, at least in the pleading stage of a case, is novel in the law of Illinois. Obviously, a litigant claiming to be the victim of trichinosis should not be allowed to recover as he cannot have brought himself within the scope of the existing implied warranty, to-wit: that pork when properly cooked will be fit for human consumption.⁴ Until now, however, trial courts have permitted the taking of evidence in such suits and have then submitted the issue to the jury for determination. In those cases where a finding for the plain-

² Schwartz, "A Disease Caused by Eating Raw Pork," U. S. Dept. of Agriculture, Leaflet No. 34 (1941).

³ See "Trichinosis and Nonclinical Infections with *Trichinella Spiralis*," a report by a special committee of the Advisory Council of Meat Research, in *Am. Med. Jour.*, Vol. 114, p. 35, particularly note 1. No feasible tests to determine the presence of trichinae, without rendering the meat unusable, appear to exist: McCoy, Miller and Friedlander, "The Use of An Intradermal Test in the Diagnosis of Trichiniases," *Journ. of Immunology*, Vol. 24, No. 1 (Jan., 1933).

⁴ The writer of the note in 16 Temple L. Q. 80 has suggested that the meat packing industry should shoulder the financial burden caused by the disease. A complete analysis of the economic and social implications of such a proposition would be necessary before it could be accepted as a solution. If that procedure were to be adopted in trichinosis cases, it would be equally sound to urge acceptance thereof in all negligence problems, thereby putting all cost of carelessness on society at large rather than on the careless individual. Courts have generally refused to extend the implied warranty beyond the point that it covers wholesomeness of meat which has been properly processed: *Ketterer v. Armour & Co.*, 247 F. 921 (1917); *Feinstein v. Daniel Reeves, Inc.*, 14 F. Supp. 167 (1936); *Zorger v. Hillman's, Inc.*, 287 Ill. App. 357, 4 N. E. (2d) 900 (1936); *Cheli v. Cudahy Bros. Packing Co.*, 267 Mich. 690, 255 N. W. 414 (1934); *Tavani v. Swift & Co.*, 262 Pa. St. 184, 105 A. 55 (1918); *Yachetti v. John Duff & Sons, Ltd.* (1942), Ont. Rep. 682.

tiff has been made, a reversal of the decision has occurred on appeal on the ground that the verdict was contrary to the evidence.⁵ Reviewing courts have there given judicial recognition to the fact that one cannot contract the disease except through his own carelessness, but judicial recognition of the doctrine was belated.⁶ In the instant case, recognition occurred at the proper moment with a consequent saving of time, money and effort in the conduct of needless and expensive litigation.

LIMITATION OF ACTIONS—PLEADING, EVIDENCE, TRIAL, AND REVIEW—WHETHER EXPIRATION OF TIME LIMIT FOR COMMENCEMENT OF ACTION SERVES TO BAR THE FILING OF A COUNTERCLAIM FOR WRONGFUL DEATH—The case of *Wilson v. Tromly*¹ serves notice on those who would wait until they are sued, before asserting any claim based on the Injuries Act² which they might have against the plaintiff, that such delay may well prove fatal to such claim. The action therein arose out of a collision which occurred in Illinois on September 7, 1946, with fatal result to both drivers. On September 4, 1947, within the year permitted by law, suit was filed by the plaintiff as administrator for the estate of the Indiana decedent. The defendant, administrator of the estate of the Illinois decedent, brought no original suit but did, on October 4, 1947, within what would ordinarily be an appropriate time, file an answer containing a counterclaim for wrongful death. A motion to strike the counterclaim was granted on the ground that the latter was barred by law inasmuch as it purported to assert a claim not filed until after the expiration of one year from the date of death.³ A judgment that the defendant take nothing under the counterclaim was affirmed by the Appellate Court for the Fourth District and, on leave to appeal, the judgment was again affirmed by the Supreme Court. The latter held that a counterclaim for wrongful death, being in effect an independent cause of action, had to be filed within the time limit prescribed by statute, which time limit was a condition of liability and not merely a limitation on the remedy. For that reason, the saving provisions of the Limitation Act⁴ were said not to apply.

While the decision is one in which, for the first time in Illinois, it has

⁵ *Ketterer v. Armour & Co.*, 247 F. 921 (1917); *Weihardt v. Krey Packing Co.*, 264 Ill. App. 504 (1932). See also *Lucey v. Harstedt*, 270 App. Div. 900, 61 N. Y. S. (2d) 157 (1946), affirmed in 296 N. Y. 810, 71 N. E. (2d) 775 (1947).

⁶ On the general subject of judicial notice, see 20 Am. Jur., Evidence, § 97.

¹ 404 Ill. 307, 89 N. E. (2d) 23 (1949), affirming 336 Ill. App. 403, 84 N. E. (2d) 177 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 28-9.

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 70, § 1.

³ *Ibid.*, Ch. 70, § 2.

⁴ *Ibid.*, Vol. 2, Ch. 83, § 20.

been held that a counterclaim for wrongful death filed after the year has expired, albeit filed in an action begun in apt time, must be deemed barred, the decision is merely a logical combination of two well recognized principles. The first of such principles is that a counterclaim is to be regarded as a vehicle for the assertion of an independent cause of action.⁵ The second declares that a suit brought under the Injuries Act does not come within the class of actions enumerated in the Limitations Act, being *sui generis*, hence must rest on the legislative enactment first mentioned and be governed by the statutory conditions regulating the conduct of such suits.⁶ The first statement needs no comment, but, as to the second, some explanation is necessary. The saving provisions of Sections 17 and 19 of the Limitation Act⁷ must be read in connection with Section 12 thereof, for that section impliedly limits the scope of the statute to those actions specifically enumerated by expressly excluding the several periods of limitation from applying when "a different limitation is prescribed by statute." It should also be remembered that statutes of limitation are generally considered procedural in character,⁸ and may be waived under certain conditions, while statutes of survival are substantive in nature.⁹ For that reason, strict compliance with the latter is necessary for they create rights to sue which did not exist at common law. Under no circumstances, therefore, can the provisions of the Limitation Act be said to affect the essential condition imposed by the Injuries Act that suit must be brought within one year. The fact that such action is filed in the form of a counterclaim, even when filed in a suit brought in apt time, will not extend that condition. Such a counterclaim can be sustained only if it is filed within one year from the date of death.

⁵ *Roberts Mine & Mill Co. v. Schrader*, 95 F. (2d) 522 (1938); *Groton Bridge Co. v. American Bridge Co.*, 151 F. 871 (1907); *Albrecht v. Dillon*, 224 Ill. App. 421 (1922); *Hoyle v. Carter*, 215 N. C. 90, 1 S. E. (2d) 93 (1939); *Pennsylvania Co. v. Lynch*, 308 Pa. 23, 162 A. 157 (1932).

⁶ *Hartray v. Chicago Railways Co.*, 290 Ill. 85, 124 N. E. 849 (1919); *Carlin v. Peerless Gaslight Co.*, 283 Ill. 142, 119 N. E. 66 (1918); *McFadden v. St. Paul Coal Co.*, 263 Ill. 441, 105 N. E. 314 (1914); *Rhoads v. Chicago & Alton R. R. Co.*, 227 Ill. 328, 81 N. E. 371 (1907).

⁷ Ill. Rev. Stat. 1949, Vol. 2, Ch. 83, § 18, permits a defendant to plead a counterclaim barred by the statutes of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such counterclaim was so barred. Section 20 thereof permits a cause of action which survives to be brought against the administrator of the person against whom such action lay within nine months after the issuing of letters of administration.

⁸ *Crampton v. D. V. Frione Co.*, 1 F. Supp. 989 (1932); *Hillberg v. Industrial Commission*, 380 Ill. 102, 43 N. E. (2d) 671 (1942).

⁹ *Ehlich v. Merritt*, 96 F. (2d) 251 (1938); *Sanders v. Louisville & N. R. R. Co.*, 111 F. 708 (1901).

PLEADING—ISSUES, PROOF, AND VARIANCE—WHETHER OR NOT A PLAINTIFF IS ENTITLED TO A JUDGMENT ON A PLEADING SETTING FORTH AN AFFIRMATIVE DEFENSE WHICH, IN EFFECT, OPERATES TO DENY THE ALLEGATIONS OF THE COMPLAINT—The complaint in the recent case of *Central States Cooperatives, Inc. v. Watson Brothers Transportation Company, Inc.*,¹ alleged that the plaintiff had leased certain premises to the defendant under a written agreement for a fixed term, which term had expired, and that defendant continued in possession after the expiration date without payment of any rent. Plaintiff sought a judgment for the reasonable rental value of the premises and also for statutory double rent, available in the case of a wilful holdover.² The defendant's answer set up, as an affirmative defense,³ the existence of an oral rental agreement covering the period of the holdover occupation of the premises and admitted liability for the amount of rent specified in such contract, but denied all other allegations of the complaint. The plaintiff moved for and, over objection, received a partial judgment on the pleadings on the basis of such admission of liability.⁴ That decision was affirmed by the Appellate Court for the First District on the ground that there could be no escape from the liability to pay the admitted amount. The Supreme Court, having granted defendant leave to appeal, reversed the decision and remanded the cause for further proceedings.

The court, in substance, pointed out that the office of a motion for judgment on the pleadings is to permit the entry of a decision against one who has failed to allege an adequate defense against a declared cause of action. The complaint in the instant case alleged a wrongful holdover and requested appropriate damages, to-wit: reasonable rent. The defendant adequately denied the existence of that particular cause of action by alleging the presence of an oral leasing agreement covering the period of the alleged wrongful possession. It cannot be denied that possession under an agreement negates a wrongful holding over. As nowhere, in the answer, did the defendant admit the particular liability charged to it, the final decision in the case would appear to be the proper one. The case has deeper significance, however, in that it aptly serves to illustrate the principle that one may not have relief under proof without allegation,

¹ 404 Ill. 566, 90 N. E. (2d) 209 (1950), reversing 336 Ill. App. 314, 83 N. E. (2d) 752 (1949), noted in 28 CHICAGO-KENT LAW REVIEW 35-6.

² Ill. Rev. Stat. 1949, Vol. 2, Ch. 80, § 2.

³ *Ibid.*, Vol. 2, Ch. 110, § 167(4), requires the defendant to plead, as an affirmative defense, any matter which would, if not so pleaded, be "likely to take the opposite party by surprise."

⁴ *Ibid.*, Ch. 110, § 181, permits the entry of a partial judgment where the defense is "to a part only of the demand." Italics added.

nor under allegation without proof.⁵ The necessity for adopting and pursuing a particular theory throughout a course of pleadings has not been nullified despite an apparent abolition of distinctions which heretofore existed between the prior forms of action.⁶

RECORDS—REGISTRATION OF TITLES TO LAND—WHETHER COMPLIANCE WITH THE REVENUE ACT BY A PURCHASER OF REGISTERED REALTY AT A TAX FORECLOSURE SALE OBVIATES THE NECESSITY OF ADDITIONAL COMPLIANCE WITH THE TORRENS ACT—Tax foreclosure proceedings were instituted, in the case of *People v. Mortenson*,¹ against realty in Cook County which had been registered under the Torrens Act.² Sale of the property was ordered for non-payment of taxes and it was decreed that, upon the expiration of a two-year period of redemption, whoever became the holder of the certificate of purchase would, upon compliance with the provisions of the Revenue Act,³ be entitled to a deed. One Klopfer, not previously an owner of the property, purchased at the sale and, upon confirmation thereof, received a certificate of purchase. He subsequently proceeded in accordance with the Revenue Act, serving all necessary notices and paying all subsequent taxes levied on the property, but failed to comply with the Torrens Act in that he did not register the certificate of sale within one year from the date of the tax sale.⁴ Upon expiration of the redemption period, Kolofer sought the issuance of a deed to the premises but his application was denied by the county clerk on the ground that he had released his rights by failing to register the certificate of purchase. The Circuit Court of Cook County, still having jurisdiction over the tax foreclosure proceedings, upheld the action of the clerk. Upon direct appeal to the Supreme Court, for questions of freehold and of revenue were involved, the decree was affirmed.

The main contention of the certificate holder was that as he had fully complied with the original order, having proceeded in accordance with the Revenue Act, and because no rights of innocent third parties were involved, his failure to register the certificate of purchase in the Torrens

⁵ *Leitch v. Sanitary District*, 386 Ill. 433, 54 N. E. (2d) 458 (1944).

⁶ Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 155.

¹ 404 Ill. 107, 88 N. E. (2d) 35 (1949).

² Ill. Rev. Stat. 1949, Vol. 1, Ch. 30, § 45 et seq.

³ *Ibid.*, Vol. 2, Ch. 120, § 744.

⁴ *Ibid.*, Vol. 1, Ch. 30, § 119, directs: "The holder of any certificate of sale of registered land . . . shall . . . within one year from the date of any such sale . . . present the same . . . to the registrar . . . Unless such certificate is presented and registered . . . within the time above mentioned, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance of such certificate."

office should not act as a forfeiture of his right to a deed. The Supreme Court pointed out, however, that the fundamental legislative intent, at the time of enacting the Torrens Act, was to develop an ideal recording system wherein the interest of any person in a particular piece of realty could be registered in one location. In order to effectuate this purpose it was necessary to force all individuals who might claim title, by reason of tax sale or otherwise, to register their claims within a reasonable period of time. The necessary element of coercion was, of course, to be found in the fact that non-compliance would result in the forfeiture of all right to the realty. While the decision might seem extremely harsh, inasmuch as it inflicts a severe penalty upon one who is called upon to abide by, but fails to observe, more than one legislative requirement, it is clearly consistent with the fundamental objectives of a Torrens system of land registration.

REFORMATION OF INSTRUMENTS—RIGHTS OF ACTION AND DEFENSES—WHETHER ONE BENEFICIARY MAY HAVE A VOLUNTARY DEED IN TRUST REFORMED, AS AGAINST A CO-BENEFICIARY, SO AS TO CORRECT A SCRIVENER'S MISTAKE—In the recent case of *Reinberg v. Heiby*¹ it appeared that the donor had, at separate times, acquired two adjacent tracts of land having areas of four acres and twenty acres respectively. He wished the land to go, after his death, to his two daughters, plaintiff and defendant therein, in the form of two individually owned tracts of twelve acres each. To effectuate this purpose, he hired a surveyor to so divide the land and then retained a lawyer to set up a land trust with direction to the trustee, after the donor's death, to make conveyance to the daughters in accordance with his plan of distribution. The daughters were fully informed as to the plan, but the donor's lawyer, when drawing up the trust papers, inadvertently described the lands as they had originally been described when purchased rather than as the two twelve-acre plots referred to in the plat of survey. Upon donor's death, the trustee tendered to plaintiff a deed for only four acres and gave defendant a deed for twenty acres in accordance with the direction of the trust instrument as drawn, at which time the scrivener's mistake was discovered. Plaintiff sued to reform the trust agreement and the deeds to defendant and herself so as to make the same conform to the intention of the donor. The trial court ordered reformation and, on direct appeal to the Supreme Court, the decree was affirmed. The defendant had argued that as the plaintiff had paid nothing, plaintiff had lost nothing by the mistake and hence should fail. The doctrine is well established that a

¹ 404 Ill. 247, 88 N. E. (2d) 848 (1949).

court of equity will not entertain an action by a voluntary grantee to reform a deed for mistake, as against the grantor or anyone claiming under him,² for to permit such an action would result in enlarging the bounty of a recipient at the expense of and against the interest of the donor-grantor and would, in a sense, result in compelling specific performance of a promise to make a gift.³ That doctrine was held inapplicable to the instant case, however, on the ground that the suit was not directed against the donor, who had parted with the entire title to the property, but was more nearly a suit to prevent one voluntary grantee from becoming unjustly enriched at the expense of another voluntary grantee, contrary to the donor's intention. The Illinois court, facing the particular situation for the first time, appropriately corrected the manifest error by limiting the use of the doctrine aforementioned to suits directed against the grantor or those claiming through or under the grantor.

² *Marvin v. Kelsey*, 373 Ill. 539, 27 N. E. (2d) 469, 128 A. L. R. 1295 (1940); *Stanforth v. Bailey*, 344 Ill. 38, 175 N. E. 784 (1931); *Henry v. Henry*, 215 Ill. 205, 74 N. E. 126 (1905); *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767 (1903).

³ In general, see 45 Am. Jur., *Reformation of Instruments*, § 28.

BOOK REVIEWS

MELVILLE WESTON FULLER: Chief Justice of the United States, 1888-1910.
Willard L. King. New York: The Macmillan Company, 1950. Pp. x,
394.

Few men, of the thirteen who have occupied the exalted office of Chief Justice of the Supreme Court of the United States to date, have served for longer terms than did Melville Weston Fuller but, until the publication of this biography, far more was known about other Chief Justices, from Marshall on down, than had come to light about the one whose period of service extended from Waite and *Munn v. Illinois*,¹ on the one hand, to White and *Standard Oil Company v. United States*,² on the other. Now that this biography has been written, a gap of no small magnitude in the history of the Supreme Court has been closed. In the process, not only has a life story been sympathetically told in a fashion that should appeal to all, whether connected with the law or not, but, in addition, a most revealing sidelight has been thrown on the traditions of the court and on its inner workings.

Fuller's life story may be sketched briefly into three main divisions. His birth, growth and education in Maine³ may be said to be typical of that of any other well-born American who turned toward law as a profession during the first half of the nineteenth century. That part of the story is not lacking in interest, but is briefly told except insofar as it discloses signs of an ability beyond average. The second, dealing with his life as a lawyer at the Chicago bar, tells of many a colorful incident, many a case that, marking the growth of a great metropolitan center, showed him to be a dexterous as well as a persistent advocate, albeit one who suffered a cruel starvation period, a staggering financial loss in the Chicago fire, and much calumny for his participation in Democratic politics during the Civil War period. None interested in the history of Chicago or in the growth of the legal profession in Illinois should fail to read these chapters. Names appear,⁴ details are supplied, to round out the bare records of cases

¹ 94 U. S. 113, 24 L. Ed. 77 (1877).

² 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

³ Notice is taken, by the author, of Fuller's initiation into the social fraternity of Chi Psi while at Bowdoin College, and of his election to Phi Beta Kappa. No mention is made of his initiation into Phi Delta Phi International Legal Fraternity, at a later period in his life. It should not pass without notice that, following the installation of a branch of that fraternity at Chicago-Kent College of Law in 1896, he was initiated as a member thereof and gave to that branch the name it is still honored to bear, to-wit: Fuller Inn of Phi Delta Phi.

⁴ One such name is that of Henry C. Morris, son of one of Fuller's closest friends and office associates, John Morris of the Chicago bar. The younger Morris was

reported in official reports. But, for all of his thirty-two years of practice, Fuller was virtually an unknown, at least outside of Illinois, when, at President Cleveland's unexpected and unsolicited request, he moved into the national arena and the third phase of his life.

The greater part of the biography, most fittingly, deals with his masterful administration of a great court during a twenty-two year period packed with tremendous labor on the part of Fuller and, at varying intervals, on the part of such associates as Stephen J. Field, Joseph P. Bradley, John M. Harlan, Horace Gray, Lucius Q. C. Lamar, David J. Brewer, Oliver Wendell Holmes, Jr., and Edward Douglass White, who was to become his successor. The book was not designed to be a catalog of the 840 opinions which he wrote for the court, nor the thirty dissenting opinions he felt constrained to issue, but it does explain and illustrate his great ability to win the friendship and admiration of his fellow judges and to preserve equanimity on the court. Leading decisions attributable to Fuller, such as the holding in *Pollock v. Farmers' Loan & Trust Company*⁵ which declared the Income Tax Act of 1894 unconstitutional, are, however, subjected to an extended treatment that is most revealing. Just as one should not attempt to understand the holdings in *Marbury v. Madison*⁶ or in the Dartmouth College case⁷ without first reading Senator Beveridge's explanatory comments in his "Life of John Marshall," so the study of Fuller's constitutional decisions should, hereafter, be made against the background so ably sketched by Mr. King. But there is more to this part than a profile of a judge in action; there is a revealing account of events and happenings behind the scenes which discloses Fuller to have been, to the moment of his death, a warm-hearted man of far greater stature than one might be led to think from a view of his slender physical frame.

A word about the author of so excellent a book may serve as a fitting tribute to a hobby that has paid off handsomely, if not in money then in terms of untold pleasant hours for both author and reader. Willard L. King, well known in Chicago circles as a member of the Illinois bar, as an author of more technical legal works, and as an untiring officer of legal and historical societies, has spent years collecting the information for this

himself a lawyer and had Fuller's help in obtaining a post as consul at Ghent, later to become Minister to the Hague. He will long be remembered as a member of the first class to graduate from Chicago-Kent College of Law. Another such name is that of the Honorable Thomas A. Moran, Judge of the Appellate Court of Illinois and second Dean of the College. A lawyer practicing in Illinois will recognize many others.

⁵ 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895), heard on rehearing in 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895).

⁶ 5 U. S. (1 Cranch.) 137, 2 L. Ed. 60 (1803).

⁷ Trustees of Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629 (1819).

book. He amassed literally thousands of documents in connection with its preparation. There is evidence that the finished biography, drawn from these materials, is a labor of that love which can grow out of long association with a project, yet one which can be tempered in the recesses of the analytical mind of an eminent lawyer. It is, then, the product of a love that is not blind to fault while it faithfully records much that is worthy of praise. A happier combination of biographer and subject would be harder to discover than Willard L. King and Melville Weston Fuller.

THE FORMATIVE ERA OF AMERICAN LAW. Roscoe Pound. New York: Peter Smith, reprinted by permission of Little, Brown and Company, 1950. Pp. x, 188.

It could well be thought strange that it should be necessary to review a book already once subjected to extensive reviewing,¹ but as a round dozen of years have passed since this little work first appeared there is point to giving it further notice, if for no other reason than to call attention to the fact that it has been reprinted. Its author needs no introduction, and none will be given. Its content may be briefly summarized by saying that it presents, in printed form, four lectures delivered by the author at the Law School of Tulane University on the occasion of the centennial of the death of Edward Livingston but is not, except in passing reference, about that first proponent for codification of American law. Instead, these lectures, as indicated by their separate titles, elaborate upon the thought that natural law did much to set the stage on which American law evolved and to which it now appears to be returning; that legislative power had, but badly fumbled, the opportunity to shape its growth; that the course of judge-made law has been the prime means by which a degree of historical continuity has been given to the reception of a much modified form of English law into this country; and lastly, that no small part of the task of fashioning law has been performed by the great text-writers of the nineteenth century, *i. e.*, by those who lived and wrote in the very formative era from which the book derives its title. To comment on the highly readable style of an author already so well-known to American lawyers would be superfluous. Little else, then, need be said except to utter a reminder that if the reader has not perused this book as yet, he now has the opportunity to profit from a sampling of the wisdom of an outstanding jurist. One thing is certain, the book has not suffered from the passage of time.

¹ The original edition was reviewed in 25 Am. Bar Jour. 339-40; 19 Bost. U. L. Rev. 344-7; 25 Corn. L. Q. 156-9; 52 Harv. L. Rev. 1191-4; 34 Ill. L. Rev. 372-4; 24 Iowa L. Rev. 812-4; 29 Ky. L. Rev. 137-9; 2 La. L. Rev. 206-7; 18 N. Y. U. L. Q. 513-4; 16 Tenn. L. Rev. 253-4; 18 Tex. L. Rev. 245; 13 Tulane L. Rev. 482-5; 25 Va. L. Rev. 1002; 24 Wash. L. Rev. 297-9.

CONSTITUTIONS OF NATIONS. Amos J. Peaslee. Concord, N. H.: The Rumford Press, 1950, Vol. I, pp. xxiv, 807; Vol. II, pp. ix, 823; Vol. III, pp. vii, 839.

When the British Foreign Office, in 1938, announced its intention to publish the national constitutions of the world in the English language, scholars applauded the proposal as a forward-looking step to world understanding. The intervention of World War II prevented completion of more than a single volume containing the constitutional documents of the countries comprising the British Empire. What seemed like an unfortunate disaster has now, in fact, turned out to be a blessing in disguise for, thanks to American skill and energy, there has now been made available not only a complete compilation but one much more accurate in that it reflects the many constitutional changes which have intervened with the passing years.

The three volumes which make up the set contain a vast mine of constitutional materials which will interest, as well as serve, an ever-increasing body of officials, lawyers, educators and students concerned with international affairs. Preceding the official texts of the constitutional documents of some eighty-three states and nations, is a masterful general summary, prepared by the author, which serves as an excellent introduction to fundamental constitutional concepts. A fitting contrast is there provided for the diverse views which exist as to such matters as constitutional forms, sources of sovereign power, popular rights, and distributions of authority between departments of government. Comparisons are also provided concerning the size of the several countries considered and their relative populations, from which it is worthy of note that the analysis ranges from Vatican City, with an area of 0.16 square miles and a population of 1,625 persons, to the staggering 8,473,000 square miles of the Union of Soviet Socialist Republics, but that many countries possess an area smaller than that of Texas and a population fewer than that to be found in the state of New York. The set closes with other significant comparative tables and tentative texts of draft constitutions not yet completely in force.

Between these points, in alphabetical arrangement, appears a section devoted to each of the nations or states considered. Each section includes (1) a statement of its relationship, if any, to the United Nations; (2) pertinent historical and political data of importance; (3) a brief description of its form of government; (4) a reproduction of its distinctive emblem, seal, or coat of arms; (5) the text of its constitution or constitutional documents, with reference to official sources; and (6) a selected

bibliography. Not only are all the great powers listed but the list extends to such relatively unimportant jurisdictions as the Republic of Andorra, the Principality of Liechtenstein, and the elective monarchy of Yemen. A more complete or comprehensive work does not exist.

It is not possible, in any brief review, to give a more adequate description of the veritable treasure-house of information that has been gathered, compiled, digested and synthesized in these three volumes. They contain much that may be regarded as quaint or bizarre to modern minds. It is said, for example, that the rack and other forms of torture are absolutely prohibited in Afghanistan; that a civil servant of Saudi Arabia, who shows efficiency and application in his work, may not be transferred without his consent; or that a deaf and dumb citizen of Thailand, who is incapable of reading or writing, is to be denied the privilege of voting at national elections. These references have not been accentuated with any thought of ridiculing the contents of these three volumes but, more nearly, to display their comprehensive character. The reading public should long applaud the untiring effort that has been put forth by the author and his cohorts. Mr. Peaslee's service as Secretary-General of the International Bar Association is well known. His authorship of such books as "A Permanent United Nations," and of "United Nations Government," received favorable notice. He may well be said to have earned a crown for this, his most recent, work.

CHARACTER ASSASSINATION. Jerome Davis. New York: Philosophical Library, 1950. Pp. xix, 259.

In a ringing introduction to this rather sketchy book, Chancellor Hutchins of the University of Chicago poses the thought that, while many agree that the American way of life is in danger, few have any idea what that way of life really is. Many appear to consider it to be no more than a system for unanimous tribal self-adoration, one which would forbid criticism and put down protests, unpopular opinions, and independent thoughts. To him, the essence of the American way of life is its hospitable attitude toward the very things thereby condemned, things guaranteed by such constitutional rights as the right to free speech, free thought and free association. He believes the present danger comes from all movements and all things which would be apt to restrict the free exchange of ideas, the unpopular as well as those pleasing to the mass mind.

Dr. Davis, a former president of the American Federation of Teachers, and himself a sufferer from the practices against which he inveighs in his book, proceeds to develop the thought thus expressed by Chancellor

Hutchins by showing how it is possible, through manipulation of the mass mind, to suppress the unpopular thought and those who agitate for its acceptance by means of character assassination. He, too, in that process, would see grave danger to American freedom generally, but he is more concerned with the freedom of minority and under-privileged groups who clamor most loudly about discrimination. The book has been referred to as "sketchy." As it ranges over so wide a period of time as that which extends from the Salem witch trials to last week's loyalty hearing, it is not surprising that the fragmentary parts do not adhere to one another with any degree of cohesiveness. Much of the book is written in a white heat of indignation that hardly reflects the sober thought of the scholar. But it does convey a devastating picture of what may be, and has been, done to destroy the influence of unpopular protagonists of unpopular ideas; even to the point of blue-printing the several methods used or available for that purpose. It is not until the author reaches the close of the book that he recovers balance enough to chart what may be done to offset the insidious influences he has described. That part, however, is worthy of constant study for it points the way by which it would be possible to head off even greater waves of mass hysteria.

SUPREME COURT PRACTICE. Robert L. Stern and Eugene Gressman. Washington, D. C.: The Bureau of National Affairs, Inc., 1950. Pp. xiii, 553.

There can be little doubt that, when an attorney has occasion to practice before a tribunal the workings of which are new to him, he would do well to equip himself with at least a knowledge of the mechanics involved in that unfamiliar situation. Only too often the inexperienced attorney finds that the theoretical knowledge which he believes he has mastered leaves him somewhat short of the complete store of tools he needs for actual practice. Learning one's way around a court is as necessary an adjunct to one's knowledge as learning one's way through the reported cases. Certainly, then, these propositions apply with no less force when the problem is one of practice before the Supreme Court of the United States. Few lawyers have opportunity to practice before that august body, although they may possess the right to do so, and even fewer have had the chance afforded by extensive practice to become familiar with its procedural workings. It is for those who do find themselves so opportuned that the volume here reviewed was prepared as a basic minimum aid so that they might learn what they will need to know in order to handle a case before that tribunal. The effort here put forth in large degree succeeds in that purpose.

The authors, according to advance information supplied by the pub-

lisher, are both attorneys with much practical court experience at the national capitol. They have consulted officials of the court on all phases of the material presented so that advice from the clerk and from the marshal is to be found herein. This is of importance for it is well to learn quickly that proper dealings with these persons may have much to do with the success an attorney may attain while attending to his daily court tasks. The method of presentation employed is not strictly that of a treatise, being more akin to the style of a handbook. But there lies an advantage, for the authors anticipate that the attorney will often need quick reference to a certain point and would prefer not to wade through pages of descriptive material to find it. The information given is, however, sufficiently detailed, when taken together with the free citation to cases and other references, so as to give to the reader a broad view of the workings of all phases of Supreme Court practice.

Most of the detail offered relates to the two principal methods for bringing cases before the Supreme Court, that is to say by certiorari and by appeal. This, of course, is as it should be for it is upon these phases of the case that counsel will be inclined to put forth most of his intellectual effort. Unless success is achieved in gaining the ear of the court, other labor would be futile. The reader, therefore, is provided with a discussion of the fundamental jurisdictional questions so that he may learn the nature of the controversies which can be brought before the court. No small part of the volume, however, is devoted to a section of forms and to a compilation of rules and statutes. These parts alone give the book value for they bear on the recent modifications made in the Judicial Code and in court rules. On rare occasions, the authors have inserted value judgments as to certain portions of the procedure which they set out to describe. It is doubted that these expressions contribute much to a work which is avowedly descriptive in purpose but the net effect thereof does not distract from the utility of the publication. The authors would be less than human if they failed to voice some dissatisfaction with at least a part of what they have observed. Despite this, the volume represents an advantageous contribution to join other works on federal practice.