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Comparative Negligence in Contradistinction to Contributory Negligence

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COMPARATIVE NEGLIGENCE
IN CONTRADISTINCTION TO CONTRIBUTORY NEGLIGENCE.

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I N T R O D U C T I O N

I do not propose in this thesis to compare the law of contributory negligence with the doctrines of comparative negligence. This would necessitate my going into the subject of contributory negligence too deeply. I simply intend to discuss the rules of comparative negligence as laid down by the courts in which those rules were and are law. In order to do this I am forced to touch upon the subject of contributory negligence, but shall only go so far as will enable me to point out their chief dintinctions.

The work will be divided into four parts. The first part will treat generally of the subject of contributory negligence. In part two I shall discuss comparative negligence. In part three will be considered the law as it obtained in Illinois, and in part four, as it obtains in Georgia.

COMPARATIVE NEGLIGENCE
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"To frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it and rarely indeed is it in their power to frame any definition to which exception may not justly be taken." With such an assertion staring me in the face and coming from no less a writer than Baron Lindley, there is no wonder that I abandon all attempt to formulate a definition of a term so difficult as "Negligence". I shall content myself with an enumeration of several definitions of a few of our most respected authorities.

Baron Alderson says, "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." (11 Exch. 784)

Wharton suggests: "Negligence in its civil relations is such an inadvertant imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency or want of due consideration of duty is the injuria, on which, when naturally followed by the

damnum, the suit is based." (Wharton on Negligence, Sec. 3)

"A negligence", says Mr. Bruce, (I Ky. L. J. 469), "is the proximate cause of an injury, when it consists of such an act or omission, on the part of a reasonable human being, as in ordinary and natural sequence, immediately results in such injury."

Mr. Beach says, "Legal negligence consists for the most part in the breach or omission of a legal duty which may be either unintentional, as is usually the case, or intentional, as is sometimes the case." And further on he says,- "Between negligence and contributory negligence there is the difference between species and genus, and it is accordingly far easier to state with tolerable precision what contributory negligence is, than to construct a satisfactory definition of the simple term 'negligence'. ..... I therefore propose the following:- Contributory negligence in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." (Beach on Contributory Negligence, Secs. 6 - 7) And to constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury.

The American and English Encyclopedia of Law, (Vol. IV, p. 17), defines contributory negligence thus:- "Contributory negligence is a want of ordinary care upon the part of

a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."

Having learned what contributory negligence is, I shall now endeavor to ascertain what its position in the law of obligation is, and what that position amounts to.

When an injury results to one of two parties from the mutual and concurring negligence of both of them, the one who suffers the injury can recover nothing by way of compensation or damages. The contributory negligence of the injured party is a defense, and a complete defense, to the action, because "the law has no scales to determine, in such cases, whose wrong-doing weighed most in the compound that occasioned the mischief. The common law refuses either to apportion the damages as best it may, giving to each man according to his deserts, as far as they can be ascertained, or to divide the damages equally between the parties in fault, as in the rustien judicium of the admiralty, and 'the reason why in cases of mutual concurring negligence, neither party can maintain an action against the other', said Mr. Justice Strong, (41 Pa. St. 499), 'is not that the wrong of the one is set off against the wrong of the other; it is, that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault.'"

The foregoing is substantially a correct exposition of the rule of contributory negligence as it is laid down in

common law jurisdictions today, except that of Georgia.

These principles which govern in the law of contributory negligence were known to the civil law of Rome, (Wharton on Negligence, 2d Ed. Sec. 300; Pollock on Torts 484), and most likely from this source came the rule into the common law. (Beach on Contributory Negligence, Sec. 1) As applicable in cases of tortious injury by negligence, the doctrine of contributory negligence substantially as it now prevails, was first ennunciated in Butterfield v. Forrester, (11 East 60). This case was as follows: It was an action on the case for obstructing a highway, by means of which obstructions the plaintiff, who was riding along the road, was thrown down with his horse and injured. At the trial before Baile, J. it appeared that defendant, for the purpose of making some repairs to his house, which was close by the roadside at one end of the town, had put up a pole across this part of the street, a free passage being left by another branch or street in the same direction: that the plaintiff left a public house not far distant from the place of the injury, at eight o'clock in the evening in August, when they were just lighting the candles, but while there was light enough left to discern the obstruction one hundred yards distant: and the witness who proved this said that if the plaintiff had not been riding very hard he might have observed and avoided the obstruction. The plaintiff, however, who was riding violently, did not observe it, and fell with his horse and was much hurt, in consequence of the accident. On this evidence Bailey, J. direct-

ed the jury, that if any person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely fast, and without ordinary care, they should find a verdict for the defendant, which they did. In the Court of King's Bench it was contended that this decision was wrong, and that plaintiff was entitled to recover. But the case was thus disposed of by Lord Ellenborough, C. J.: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding on what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against him. One person being in fault will not dispense with another's ordinary care for himself. Two things must concur to support this action,- an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid on the part of the plaintiff."

This is the case in which the doctrine of contributory negligence was first announced, and the rule thus laid down in 1809 by the English Court of the King's Bench, is now the authority on this question.

There is another English case which is frequently cited as authority for some of the holdings in the different common law jurisdictions,- Davies v. Mann, (10 M. & W. 546), frequently referred to as the "Donkey Case". Here the plaintiff negligently placed his donkey in a highway with his feet

tethered, so that he could not get out of the way of vehicles. While the donkey was standing in this condition, the defendant's wagon came along at a brisk pace and negligently ran over the donkey and killed him. The rule was laid down,- that if the defendant could, by the exercise of ordinary care, have avoided the effects of plaintiff's negligence, the plaintiff might recover. The jury held this to be the case and the plaintiff was allowed to recover.

This case was decided in 1842, and was thought by some to overrule Butterfield v. Forrester, and Mr. Beach in his book on Contributory Negligence, (Sec. IO), says,- "In this case ..... an entirely different rule is laid down, one which is not only subversive of the reasonable rule declared in Butterfield v. Forrester, but which practically repudiates the entire doctrine of contributory negligence." Butterfield v. Forrester holds:- If plaintiff by the exercise of ordinary care could have avoided the effects of defendant's negligence, he cannot recover. In Davies v. Mann the rule is put thus:- If the defendant could, by the use of ordinary care, have avoided the plaintiff's negligence, the plaintiff can recover. These holdings seem inconsistent, but if each rule be applied to its own statement of facts, then it will be correctly applicable, and the principle of Butterfield v. Forrester will generally apply when the plaintiff's negligence has been subsequent to the defendant's negligence; and the principle of Davies v. Mann will generally apply when defendant's negligence has been subsequent to the plaintiff's

negligence.

If each rule be considered with its own facts and circumstances, it will amount to this:- That he is to be responsible for the injury, whose negligence was the proximate cause of it. The attempt to reconcile these two holdings without considering the approximateness or remoteness of the cause of the injury, led Breese,J. of Illinois to blunder into the quicksands, and Lumpkin, J. of Georgia to entangle himself in the meshes of comparative negligence.

CHAPTER II.

COMPARATIVE NEGLIGENCE.

"Comparative negligence is that doctrine in the law of negligence by which the negligence of the parties is compared in the degrees of 'slight', 'ordinary' and 'gross' negligence, and a recovery permitted, notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant is gross; but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury, or when the negligence of the defendant is not gross, but only ordinary or slight, when compared, under the circumstances of the case, with the contributory negligence of the plaintiff." (Am. & Eng. Ency. of Law, p. 367)

Mr. Beach declares the theory of comparative negligence to be as follows:- "Upon considerations of public policy and general convenience the common law has sturdily refused either to enforce contribution between tort feasors, or to parcel out the damages between the parties in cases of injury from mutual and concurring neglect. In those jurisdictions, however, where the doctrine of comparative negligence obtains, the courts have proceeded upon an exactly contrary theory. They assume it to be at once possible and judicious to compare the negligence of the plaintiff with the negligence of the defendant in these actions, for the purpose of determining where the ultimate liability for the injury

shall rest, and if upon such a comparison judicially instituted , the negligence of the plaintiff appears to have been slight, while that of the defendant was gross, the plaintiff may have his action. This is something more than a modification of the rule of contributory negligence. Under its operation contributory negligence is no longer a defense. It completely ignores the principle of compensation in awarding damages, and proceeds upon the theory of punishment. It contradicts the rule it assumes to qualify. The rule is that contributory negligence is a defense. The qualification is that it is not a defense. Reduced to a canon it amounts to this:- Slight negligence on the part of a plaintiff, although never so much contributory negligence, is not a defense to gross negligence on the part of the defendant." (Beach Con. Neg. Sec. 75)

This is not quite right as to the theory of comparative negligence. The theory of comparative negligence is just the same as the theory of contributory negligence,- not to punish but to indemnify and to allow the person injured to recover when he is not injured by his own fault or wrong. But as to what comparative negligence is, Beach is correct. For this is just what comparative negligence purports to be,- a comparison of the negligent acts of plaintiff and defendant.

The law recognizes only three degrees of negligence, and the negligence of each party is to be measured by a scale of three degrees of negligence. The process of measuring and comparing is to be done with reference to the rights, duties

and obligations of the respective parties, and under the peculiar circumstances in evidence. And the same evidence which determines the one "gross" and the other "ordinary" or "slight", fixes their relative degrees with reference to each other. These degrees of negligence are "slight", "ordinary" and "gross". The negligence of the plaintiff is compared with the negligence of the defendant and if there be one whole degree intervening between the negligence of each, then there may be a recovery.

"The comparison of the negligence of plaintiff and defendant must be made by determining whether under the circumstances, the negligence of each is slight, ordinary or gross, in the technical and legal sense of the terms, and comparing the degree in which the one has been negligent with the degree of negligence on the part of the other." (Vol. III, Am. & En. Enc. of Law, p. 368)

In making this comparison, as above stated, the circumstances of the case must be considered, and the comparison made in the light of the circumstances. (103 Ill. 512; 115 Ill. 358) When, upon such a comparison of the negligence of the plaintiff and the defendant, it appears that the contributory negligence of the plaintiff is slight, and the negligence of the defendant gross; that is, when one whole degree of negligence intervenes between the slight negligence of plaintiff and gross negligence of the defendant,- the plaintiff is entitled to recover.

The plaintiff cannot recover if the negligence of

the defendant be slight or ordinary. The defendant's negligence must be gross. (92 Ill. 351; 92 Ill. 141; 82 Ill. 198) The plaintiff will not be permitted to recover for an injury, the result of mere negligence upon the part of the defendant, when his own failure to exercise ordinary care under the circumstances, contributed to the injury. (103 Ill. 512; 115 Ill. 358)

The doctrine of comparative negligence was first announced by Breese, J. of Supreme Court of Illinois. (20 Ill. 478) He tried to reconcile the holding in the case of Davies v. Mann with the generally accepted rules of contributory negligence. The two essential elements of contributory negligence are, (1) a want of ordinary care on the part of the plaintiff, and (2) the want of this ordinary care must be proximately connected with the injury. He got these two elements mixed up or did not consider the latter at all. Hence his attempt was abortive and comparative negligence was the outcome. Comparative negligence is no longer the law of Illinois. It was practically overruled in Calumet Iron Co. v. Morton, (115 Ill. 358), and expressly denied in Eitz v. Dougherty, (153 Ill. 163). It does not exist in Kentucky, (Beach, Con. Neg. Secs. 99 - 102; Kentucky R. R. v. Administrator, 79 Ky. 160; Adams v. R. R., 21 Am. & Eng. R. R. Cases 380)

A misapprehension of the rule in Kentucky has arisen from the use by the Kentucky court of the terms "gross" and "wilful" negligence, in cases which arose under the Kentucky

statute providing for the recovery of punitive damages when death results from the wilful misconduct of the defendant. In such cases contributory negligence was held no defense. (Beach Con. Neg. Secs. 99 - 102; 79 Ky. 160)

In Tennessee a peculiar modification of the law of contributory negligence exists, but it is not comparative negligence. (Am. & Eng. Ency. of Law, Vol. III, p. 136; Beach, Cont. Neg. Sec. 97) The rule here is, that negligence on the part of the plaintiff contributing to his injury as a proximate cause thereof will bar a recovery, but that although guilty of some negligence, yet if he could not by the exercise of ordinary care, have avoided the consequences of defendant's negligence, he may recover, but his negligence will be taken into consideration in mitigation of damages. But when both parties are equally blamable, there can be no recovery. (R. R. v. Carroll, 6 Heisk. 347; citing Whirly v. Whitehead, 1 Herd. 610)

The Supreme Court of the United States adheres to the rule of contributory negligence, (R. R. v. Lockwood, 17 Wall. 357; R. R. v. Stout, 17 Wall. 66), and the courts of most of the states have expressly repudiated the doctrines of comparative negligence. (O'Keefe v. R. R., 32 Ia. 467; R. R. v. Miller, 25 Mich. 274; Potter v. Warren, 91 Pa. St. 367; Wilds v. R. R., 24 N. Y. 432; R. R. v. Righter, 42 N. J. L. 180; Gothard v. R. R., 67 Ala. 114; 21 Wis. 377; 49 Tex. 573; Marble v. Ross, 124 Mass. 44; Digby v. Iron Co., 8 Bush. (Ky.) 166; Peary v. R. R., 29 Kans. 169; Morgan v. R. R., 31 Kan. 77)

Comparative negligence obtains in no other jurisdiction except that of Georgia, at the present time. And it is not the settled law of that state. It is substantially correct to say that no fixed rule obtains in that state.

CHAPTER III.

I L L I N O I S

Comparative negligence, wedge like, divided the reign of the law of contributory negligence into two periods in this State. Although it is not the law of Illinois at the present time, still it was there first announced and held to be the law. Therefore it is necessary that I should enter into a discussion of the doctrine as interpreted by the Supreme Court of Illinois, before entering into the lair of "this pernicious and pestiferous doctrine",- Georgia.

Previous to the year 1858 the established doctrine of contributory negligence was in vogue in Illinois; as in every other common law jurisdiction. The first intimation of the rule of comparative negligence was given by Breese, C. J. in the Jacobs Case, (20 Ill. 478). This was an action on the case for the use of Frederick Jacobs, for injuries sustained by being run over by a locomotive of defendant company, The Galena and Chicago Union R. R. Co. Breese, J. wrote the opinion. "As this case will be remanded and a new trial had, (the judgment for plaintiff being overruled on other grounds) it becomes necessary for the court to submit some considerations on the question of negligence and the principles which should govern it." After a review and comment on the leading cases of contributory negligence which are authority everywhere for its doctrine, he says,- "Although these cases do not distinctly avow this doctrine in terms, there is a vien

of it very perceptible, running through very many of them, as where there are faults on both sides, the plaintiff shall recover, his fault being measured by the defendant's negligence." He now lays down the rule in the following language: "It will be seen from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. We say then, that in this as well as in all the cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action."

The rule as above remained unchallenged until the Marten Case, (115 Ill. 358), and was followed by a large number of decisions, although a little misunderstood by some of them. In the case of Sweeny v. R. R., (52 Ill. 325), Breese, J., who wrote the opinion in this case also, said,- "As some misapprehension seems to exist in respect to the extent this

court has gone in discussing the doctrine of comparative negligence, it may not be amiss to review the several cases on that subject." He makes practically the same argument for the rule in this case as he did in the Jacobs Case and winds up by laying down the doctrine in the same language used in that case.

Scholfield, J. reannounces the rule in R. R. v. Delaney, (82 Ill. 196),- "the rule of the court" says he, "is that the relative degree of negligence in cases of this kind is matter of comparison and that the plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of the defendant was gross in comparison with each other; and consequently if the intestate's negligence was not slight and that of the defendant gross in comparison with each other, there can be no recovery." So, under the rule as laid down above, the question of proximateness and remoteness of the cause of the injury does not arise. The question seems to be not whose negligence was the proximate cause, but was the negligence of one party slight, and that of the other gross? If this be so, then it means simply, did one whole degree of negligence exist between the negligence of the plaintiff and that of the defendant?

In the case of C. B. & Q. R. R. v. Johnson, (103 Ill. 512), the court clearly states the doctrine and defines the legal meaning of the terms "slight", "ordinary" and "gross" negligence, saying,- "In holding the plaintiff may

recover in an action for negligence, notwithstanding he has been guilty of contributory negligence, when his negligence is but slight and that of the defendant gross, in comparison with each other, it must of course be understood that the terms 'slight' and 'gross' negligence are used in their legal sense, as defined by common law judges and text writers; for otherwise the terms would convey no definite idea of a fixed legal rule. As defined by those judges and writers these terms express the extremes of negligence. Beyond 'gross' or less than 'slight' there is no degree of negligence. 'Gross, gross', and 'grosser, gross' and 'grossest, gross', and 'slight, slight', 'slighter, slight', and 'slightest, slight', are absurd and in a legal sense impossible terms. What is less than slight negligence the law takes no cognizance of as a ground of action; and beyond gross negligence the law, while recognizing that there may be liability for trespass, because of a particular intention to do wrong, or of a degree of wilful and wanton recklessness, which authorizes the presumption of a general intention to do wrong, recognizes no degree of negligence. The definition of gross negligence itself proves that it is not to be the subject of comparison. It is the want of slight diligence. Slight negligence is the want of great diligence, and intermediate there is ordinary negligence, which is defined to be the want of ordinary diligence."

The law of comparative negligence so elaborately worked out by Breese, J. in 1858 and followed through a long line of decisions unchallenged by the Supreme Court of Illi-

nois, (20 Ill. 478; 26 Ill. 373; 26 Ill. 255; 38 Ill. 242; 46 Ill. 76; 52 Ill. 325; 68 Ill. 580; 81 Ill. 450; 82 Ill. 196; 103 Ill. 512), remained the law in that state until 1885, when it received its first impeachment.

In the Morton Case, (Calumet Iron Co. v. Morton, 115 Ill. 358), the law was thus laid down by Scholfield, J.:- "The rule in this state is, that in order to recover for injuries from negligence, it must be shown and alleged that the party injured was, at the time of the injury, observing due or ordinary care for his personal safety; and that when a party while observing due or ordinary care for his personal safety, is injured by the negligent acts of another, there may be a recovery on account of such negligent acts. Nor is it to be understood that the rule of comparative negligence changed or modified the general rule, requiring that the injured party in order to recover for the negligence causing his injury, must have observed due or ordinary care for his personal safety, and authorizing him to recover for such injuries where he has observed such care."

In the case of Villiage v. Mone, (124 Ill. 133), it was held, Mr. Justice Magruder writing the opinion,- "Where a plaintiff has observed ordinary care; he has, even if slightly negligent, observed all the care the law requires of him; and if he is injured by the negligence of another, that will be held guilty of that degree of negligence for which the law charges responsibility." The doctrine came up again, for it seems the last blow was not sufficient to kill the

faith which some of the members of the Illinois bar had in this rule.

In 1894 the case of City v. Dougherty, (153 Ill. 163), was settled by Magruder, J. He says,- "The doctrine of comparative negligence is no longer the law of this State, and instructions which ignore it, and require as the grounds of recovery that the plaintiff shall have exercised ordinary care, and that the defendant shall have been guilty of such negligence as caused the injury, are correct. This is sufficient, without calling the attention of the jury to any nice distinctions between different degrees of care or of negligence."

CHAPTER IV.

G E O R G I A

The doctrine of comparative negligence as it was understood and interpreted by the Supreme Court of Illinois, does not obtain in the State of Georgia. The rule here differs both from the general principle of contributory negligence and the doctrine of comparative negligence. Under the law of contributory negligence, which obtains in all jurisdictions now except that of Georgia, negligence of the plaintiff which is contributory in law, is an absolute defense. And under the rule of comparative negligence, as obtained in Illinois, the plaintiff was not precluded from recovering, even though guilty of contributory negligence, if such negligence, in comparison with defendant's negligence, was slight and defendant's was gross.

In Georgia the slight negligence of the plaintiff, although contributory, is not a defense when the negligence of the defendant is gross, but this contributory negligence of the plaintiff will go towards cutting down the amount of his recovery. This, therefore, is not so much a rule of comparative negligence to bring about the ultimate liability, but a comparison of plaintiff's negligence with that of the defendant's, for the purpose of cutting down plaintiff's recovery.

The law of contributory negligence formerly obtained in this State. (Brown v. May, 17 Ga. 136) In this case

the court held, Lumpkin, J. writing the opinion,- "To maintain an action for an injury received from an obstruction in a highway, two things must concur: An obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff." The rule which now obtains in Georgia, or the want of a rule, really, was first announced by the Supreme Court in R. R. v. Davis, (27 Ga. 113). This is the first case of importance dealing with the question of contributory negligence which had come up before this court. This was an action on the case by Davis, as administrator of the estate of one Willis Brown, against the Macon & Western R. R. Co., to recover the value of a negro man slave and a carriage. The slave was killed and the carriage was destroyed by a collision with defendant's train of cars. When the case first came up it was decided according to the accepted doctrine of contributory negligence. The court laying down the rule:- "In such cases, the plaintiff cannot recover if the injury complained of is with his consent, or caused by his negligence. If both parties, plaintiff and defendant, are in default, the plaintiff cannot recover, unless the injury was intentional on the part of the defendant; or, unless it is impossible <u>with ordinary diligence for plaintiff</u> to avoid the consequences of defendant's neglect." This is a correct holding and in accordance with the law laid down in Brown v. May, (17 Ga. 136). The Davis case came up for a rehearing, (18 Ga. 679), and by this time the attention of the court had been brought to the holding of the

Davies v. Mann case. The law was laid down in these words, modifying the rule as first stated:- "The proprietors, when running their engines over crossings, must use reasonable care and diligence, taking into consideration all the circumstances of the case, and whether there has been negligence or not, depends upon the facts of each particular case, and the question is to be decided by the jury; and notwithstanding the plaintiff may not be without fault, still, if the injury, could have been prevented in the exercise of proper and reasonable precaution on the part of the defendant, and was not, the defendant will be liable." Further on Lumpkin, J., who wrote the opinion, says:- "But it is insisted, that if the injury in the case resulted from the misconduct of the plaintiff's servant, that he cannot recover; and this seems to have been the rule laid down in Butterfield v. Forrester, (II East 60), and Luxford v. Lorge, (24 E. C. L. R. 391). But this doctrine has been modified in later cases, and in Lurch v. Nurden, (41 E. C. L. R. 422), it was held that the defendant was liable in an action on the case, though plaintiff was a trespasser and contributed to the mischief by his own act. ..... We approve of this modification of the principle and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not in the exercise of reasonable diligence have prevented the collision."

This case came up for a second rehearing (27 Ga. 113). When the case first came up, the holding in Butterfield v.

Forrester was applied; on the rehearing this doctrine was modified by the influence of the doctrine of Davies v. Mann, and finally, out of the attempt to reconcile the two holdings and apply them to the facts in this case on its second rehearing the doctrine of comparative negligence was announced and applied. "When it appears that there were mutual faults, the party guilty of the greater wrong or negligence, must be regarded as an original aggressor." This is the rule by which the liability is ascertained.

While the Davis case was being litigated, another action came to issue, which arose out of the same accident. (The Winn Case, 19 Ga. 440) In the carriage which was run over and destroyed by defendant's cars, were four people; Malinda Winn, one of the occupants, was injured, and she brought this action to recover damages. This case came before the court before the final settlement of the Davis Case, and after the decision of the Davis Case, on its first rehearing. Lumpkin, J. wrote this opinion also. He tries to reconcile the holding in the case of Brown v. May, (17 Ga. 136), with the decision in the Davis Case, as held on its first rehearing. "Is there", says he, "any conflict between Brown v. May and Macon & Western R. R. v. Davis? We do not perceive it. The two cases may and do well stand together. To illustrate. Suppose the Company and Mrs. Winn were both in fault; and Mrs. Winn, plaintiff, using all proper care and diligence to prevent the contact. In that case the decision in the Davis Case would have its effect, and the plaintiff

would be entitled to recover. But, again, let us assume, both are primarily negligent and the defendant company puts forth all reasonable exertion to escape disaster, but Mrs. Winn, plaintiff, observes no such care, and madly rushes on to the collision. In this case the ruling in the Brown v. May case would take effect. In the Davis case we held that notwithstanding the plaintiff was not free from fault, still, if the defendant, in the exercise of due care, could have prevented the injury, they would be responsible. But the proposition is now made for the first time, suppose the plaintiff, in the exercise of ordinary diligence, could have avoided the casualty, conceding there was fault on both sides, can there be a recovery?" The holding in this - the Winn case - was that,- "If a collision happens at a crossing of a railroad and a public highway, and both parties are negligent, and the plaintiff in the exercise of common care and caution could have avoided the injury, he shall not be entitled to recover of the defendant, notwithstanding the defendant was also in fault." The jury found that plaintiff was not guilty of contributory negligence and Mrs. Winn was allowed to recover.

This case was decided correctly, in accordance with the general principles of contributory negligence. Subsequently the final hearing of the Davis Case was argued, and the rule of comparative negligence announced.

The Winn Case came up for a rehearing, (26 Ga. 250), and Benning, J., while concurring with the rest of the court

as to the plaintiff's right to recover, dissented from the decision on the point upon which the appeal was based,- the amount of the damages. In his dissenting opinion he introduced and discussed that part of the rule relating to the mitigation of damages, which authorizes a cutting down of the plaintiff's damages, where he has been in fault, but not guilty of such negligence as will preclude his recovering. During the same year in which the Davis case was finally settled, (1859), the case of Floders v. Heath was decided.

In this case was announced the doctrine discussed by Benning, J. in the dissenting opinion of the Winn case. Lumpkin, J., who wrote the opinion, says:- "There was a principle referred to in the case of the Winn girl against the Macon & Western R. R. Co., decided at July term 1858 of this court at this place, which we hold to be sound law, although we did not think it applicable to the facts of that case. When both parties are in fault, but the defendant most so, the fault of plaintiff may go in mitigation of damages."

The law of the State of Georgia on this subject is unsettled. "The latest cases take now one view and now the other, and we must hear further from the Supreme Court before there can be formulated anything exactly and explicitly as the Georgia rule." (Beach, Cont. Neg. Sec. 126; Pro. 27 Ga. 113; 65 Ga. 120; 82 Ga. 109; 78 Ga. 694; Contra the comparative negligence rule, 53 Ga. 488; 56 Ga. 586; 52 Ga. 467; 17 Ga. 136; 18 Ga. 679)

The Supreme Court seems to be kept busy distinguish-

ing, criticizing and reversing decisions on account of this unsettled state of the law on this subject. Most of the recent cases seem to have been decided upon the facts peculiar to them and not upon principle. The Code of Georgia is in a measure responsible for the trouble. There are two sections treating of comparative and contributory negligence.

Section 2972,- "If the plaintiff by ordinary care could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." This section calls for the exercise of ordinary diligence on the part of the plaintiff and defeats recovery in absence of that degree of care: but if there be slight negligence not amounting to lack of ordinary care, the plaintiff may still recover. This section may be termed the contributory negligence section with a partial comparative negligence clause.

The other section of the Code, Sec. 3034,- "No person shall recover damages from a railroad company for injury to himself or property, when the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him," prohibits recovery from railroads when the damage is by plaintiff's consent or caused by his negligence; but if

both plaintiff and railroad are at fault the amount of damages should be decreased according to the amount of default attributable to plaintiff. A case of "tort against tort; fault against fault; and striking a balance." The section is ambiguous, in as much as it forbids a recovery when the plaintiff himself causes the injury, and then throws open the gate for juries to allow damages, but to diminish according to the amount of default attributable to plaintiff.

In conclusion, I think the law under section 2972, (78 Ga. 289; 79 Ga. 45; 87 Ga. 6), is as follows:- When the same degree of care is required of each party and the plaintiff fails to come up to the measure of care imposed upon him then it should be held contributory negligence sufficient to defeat recovery, and under section 3034 when the degree of care required of both parties is the same - that is, ordinary diligence - and the plaintiff is negligent, then there can be no recovery, the same as in the case of private individuals. But in cases where the measure of diligence is unequal, where the degree of care required of the plaintiff is less than that required of the defendant railroad, then if the plaintiff is injured and be slightly at fault, and the defendant railroad greatly at fault, the plaintiff should recover, but the amount of recovery should be diminished because of his negligence. In cases where ordinary diligence is required of both parties, the plaintiff fails to recover if negligent, even though the defendant be negligent. But where ordinary diligence is required of plaintiff, and great diligence of the

defendant, and the plaintiff is negligent, then there may be a recovery, but on a comparative basis. The negligence of the plaintiff going toward cutting down the damages.