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COMPARATIVE NEGLIGENCE ON THE MARCH

E. A. Turk

Part II*

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

III. THE DOCTRINE IN AMERICAN CASE LAW

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

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

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

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

³ See Part I above, pp. 198-9.

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

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

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

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

A. ILLINOIS DEVELOPMENTS

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

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

⁷ 13 Ill. 585 (1852).

⁸ 16 Ill. 198 (1854).

⁹ 16 Ill. 198 at 202.

¹⁰ 13 Ill. 585 at 587.

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

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

¹¹ 20 Ill. 478 (1858).

¹² 20 Ill. 478 at 497. Italics added.

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

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

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

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

¹⁴ 36 Ill. 409 (1865).

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

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

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

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

Professor Green has pointed out other and further reasons

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

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

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

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

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

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

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

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

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

²⁴ Ibid., p. 51.

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

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

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

²⁸ Ibid., pp. 47 and 51.

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

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

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

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

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

³⁰ 115 Ill. 358, 3 N. E. 456 (1885).

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

³² 26 Ill. 373 (1861).

³³ 70 Ill. 211 (1873).

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

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

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

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

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

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

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

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

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

³⁶ 126 Ill. 381, 18 N. E. 548 (1888).

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

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

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

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

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

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

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

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

⁴³ 150 Ill. 546, 37 N. E. 905 (1894).

⁴⁴ 115 Ill. 358, 3 N. E. 456 (1885).

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

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

B. THE TENNESSEE VERSION

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

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

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

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

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

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

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

⁵¹ 38 Tenn. (1 Head) 609 (1858).

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

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

⁵² See note 13, ante.

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

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

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

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

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

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

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

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

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

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

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

⁵⁸ 70 Tenn. (2 Lea) 307 (1879).

⁵⁹ 70 Tenn. (2 Lea) 307 at 309.

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

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

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

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

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

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

⁶⁴ See cases cited in note 62, ante.

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

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

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

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

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

C. THE ERSTWHILE KANSAS VIEW

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

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

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

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

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

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

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

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

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

D. THE LOUISIANA ATTITUDE

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

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

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

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

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

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

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

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

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

⁷⁹ 17 La. Rep. 361 (1841).

⁸⁰ 18 La. Rep. 339 (1841).

⁸¹ 17 La. Rep. 361 at 364.

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

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

⁸² 18 La. 339 at 340.

⁸³ 1 La. Ann. 372 (1846).

⁸⁴ 1 La. Ann. 372 at 374.

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

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

⁸⁷ 32 So. (2d) 853 (La. App., 1947).

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

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

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

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

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

⁸⁸ 32 So. (2d) 853 at 855.

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

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

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

⁹² 14 La. Ann. 115 (1859).

⁹³ 34 La. Ann. 180 (1882).

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

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

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

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

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

⁹⁶ 141 So. 776 (La. App., 1932).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹ Malone, *op. cit.*, p. 129.

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

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

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

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

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

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

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

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

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

E. DEVELOPMENTS IN GEORGIA

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

Before attempting to analyze this doctrine, it might be well

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

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

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

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

The second provision declares:

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

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

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

²¹ Ga. Code Ann. 1936, § 94-703.

²² *Ibid.*, § 105-603.

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

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

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

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

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

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

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

²⁸ 18 Ga. 679 (1855).

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

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

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

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

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

³¹ 18 Ga. 679 at 687.

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

³³ 19 Ga. 440 at 442.

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

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

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

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

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

³⁷ 27 Ga. 358 (1859).

³⁸ 27 Ga. 358 at 362.

³⁹ 28 Ga. 111 (1859).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. AMERICAN STATUTORY LAW.

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

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

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

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

⁵⁷ See cases cited in note 53, ante.

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

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

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

⁶¹ See cases cited in note 53, ante.

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

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

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

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

⁶⁴ See Ga. Code Ann. 1937, § 94-703.

⁶⁵ Md. Acts 1902, Ch. 412, p. 595.

⁶⁶ 34 Stat. 232 (1906).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁰ Alaska Comp. Laws Ann. 1949, § 43-2-52; Ariz. Code Ann. 1933, § 56-805; Fla. Stat. 1941, § 769.03. Oregon, by its Comp. Laws Ann. 1940, § 113-612, first enacted in 1903, had adhered to the contributory negligence defense in its provision as to railroad employees. In its general employers' liability act, enacted in 1911, however, it switched to the comparative negligence doctrine as to employees of designated hazardous occupations: Ore. Comp. Laws Ann. 1940, § 102-160A.

⁸¹ Ark. Stat. Ann. 1947, § 81-1202.

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

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

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

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

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

⁸⁵ Ga. Code Ann. 1936, § 86-402, and also § 105-603.

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

V. CONCLUSION.

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

⁸⁶ Ill. Laws 1911, p. 315, § 1(3).

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

⁸⁸ Ill. Laws 1917, pp. 505-7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ Wis. Stat. 1949, § 331.045.

⁵ Neb. Rev. Stat. 1943, § 25-1151.

⁶ S. D. Laws 1941, Ch. 160, p. 184.

⁷ Miss. Code Ann. 1942, § 1454.

⁸ 45 U. S. C. § 51 et seq.

⁹ Gregory, *op. cit.*, pp. 58 and 72.

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

APPENDIX

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

Proportional Liability for Loss

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

Provided that,—

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

Degree of Fault

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

¹⁰ *Ibid.*, p. 72.

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

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

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

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

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

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

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