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A STUDY OF COMPARATIVE NEGLIGENCE*

A. CHALMERS MOLE and LYMAN P. WILSON†

I. GENERAL STATEMENT

No field of torts offers better illustration of the lack of efficacy of a rule of thumb than is found in the doctrine of contributory negligence. It is, indeed, a high-sounding phrase which announces that no man shall be permitted to base his recovery upon his own fault, and the high moral tone of the statement gains for it such an immediate and complete acquiescence that it at once becomes difficult to realize that injustice may flow from it. Yet, if the signs of the times mean anything, there is a growing feeling that injustice is being worked and that there are situations in which the plaintiff should not be denied a recovery merely because his own fault has to some appreciable degree contributed to his harm. There has been an increasing appreciation that, where the fault of the plaintiff has been slight in comparison with the fault of the defendant, justice may best be done by permitting the plaintiff to recover some compensation for his hurt, and that it is unjust to allow the truly culpable defendant to wholly escape the evil consequences of his acts. So we may well question the desirability of the rule of Butterfield v. Forrester¹ and the much quoted case of Tuff v. Warman.² The few common-law jurisdictions in which the rule has been questioned have invoked the principle which is the subject of investigation in this article. In these jurisdictions we find the courts making much of the terms “slight”, “ordinary” and “gross” negligence, and making comparisons of negligence by determining whether the negligence of the respective parties was slight, ordinary or gross in the technical and legal sense of these terms, and then making a sort of mathematical comparison of the degree in

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¹11 East 60 (1809).

²2 C. B. N. S. 470 (1857), aff’d, 5 C. B. N. S. 573 (1857).
which one has been negligent with the degree of negligence displayed by the other. The absurdity of any attempt to introduce mathematical exactness into the uncertain and shifting problems of negligence needs no exposition.

The attitude of the courts and of commentators with respect to degrees of negligence has been unsatisfactory and at times slipshod and there is active complaint about the use of these terms. For example, we find Thompson3 saying: "Lord Holt, C. J., in a celebrated case,4 divided negligence into three degrees, slight, ordinary and gross. In this he is supposed to have made an attempt to follow the Roman law, but later investigators have pointed out that culpa levissima, or slight negligence, was unknown to the Roman law, but was one of the refinements of the Middle Ages.5 I confess myself careless, ignorant and indifferent upon this whole subject of the degrees of negligence. It is plain that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines." Baron Rolfe, in Wilson v. Brett,6 states that "[t]here is no legal difference between negligence and gross negligence; it is the same thing with the addition of a vituperative epithet, and the question in any case is whether there was culpable negligence." Again, in Perkins v. New York Central Railroad Company,7 the Court of Appeals of New York said, "the difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the other [utter] impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly before cases are made to turn by the verdict of juries, upon any such distinction, the judges should be able to define, with some precision, what they mean by gross negligence, slight negligence and ordinary negligence. It will be seen on examining the many cases reported, where the question has arisen, that this has been found utterly impracticable by the judges, when called upon to instruct juries on the question....Negligence is essentially always a question of fact, and every case depends necessarily upon its own particular circumstances. What is negligent in a given case, may easily be affirmed by a jury; but in what degree the negligence consists, in any scale of classification of degrees of negli-

3 Thompson, NEGLIGENCE (2d ed. 1901) § 18.
5 Supra note 3, § 18, citing Wharton, NEGLIGENCE (2d ed. 1878) §§ 59-63, and acknowledging indebtedness to author of article in (1895) 1 N. Y. L. REV. No. 1.
6 11 M. & W. 113, 115 (1843).
7 24 N. Y. 196, 207 (1862).
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gence, is not so easily determined—will ordinarily be a matter of pure
speculation and of no practical consequence.”

On the other hand, Illinois, for a number of years, applied and
stauchly defended the rule of comparative negligence. In Central
Military Tract Railroad Company v. Rockafellow, the court states,
referring approvingly to Chicago & Mississippi Railroad Company v.
Patchin, “the degrees of care or diligence are three, and are well
defined and illustrated in Story [and] Jones on Bailments. Negligence
is similarly divided, and made or defined to be the counterparts or
opposites of each degree. There is little difficulty in laying down the
rule for care and for neglect, while we are content to state in the lan-
guage long known, familiar to, and used by the courts and profession.
The difficulty is very little greater in determining what degree of each
is applicable to any given state of facts. The great difficulty is the
application of the rule to determine whether the particular facts
show the want of the ascertained degree of care, or the guiltiness
of the negligence applicable to the relation of the parties under the
circumstances.” The Illinois court in 1865 said, “negligence is
relative, and the plaintiff, although guilty of negligence which may
have contributed to the injury, may hold the defendant liable if
he has been guilty of a greater degree of negligence. The fact that
the plaintiff is guilty of slight negligence does not absolve the de-
fendant from the use of care and the use of reasonable efforts to
avoid the injury.” Until 1885 the Illinois court upheld the doctrine
that in proportion to the negligence of the defendant should be
measured the degree of care required of the plaintiff—that is, the
greater the negligence manifested by defendant, the less degree of
care will be required of the plaintiff to recover; that “the degrees
of negligence must be measured and considered, 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.”

*In Hinton v. Dibbin, 2 Q. B. 646 (1842), Lord Denman says, at 661, “It may
well be doubted whether between “gross negligence” and negligence merely, any
intelligible distinction exists.” Judge Curtis, in Steamboat New World v. King,
16 How. 472, 474 (U. S. 1853) says, “it may be doubted whether these terms
[“slight”, “ordinary” and “gross”] can be usefully applied in practice.”

**Explanation of the doctrine, 20 R. C. L. § 119, 120; 45 C. J. 1036; 6 AM. &
ENG. ENCY. 360; BOUVIER, LAW DICTIONARY (Century ed.), “Negligence”; cf.
intra notes 11–13; FEDERAL EMPLOYERS’ LIABILITY ACT, infra note 13.

187 Ill. 541, 550 (1893).

16 Ill. 198 (1854).


Payne, 59 Ill. 534 (1871); Atchison, T. & S. F. R. R. v. Feehan, 149 Ill. 202
(1893); Chic. B. & Q. R. R. v. Hazzard, 26 Ill. 373 (1861) Schmidt v. C. & N. Ry.,
On February 19, 1930, a bill to amend the local Civil Practice Act was introduced in the New York Assembly, which, if enacted, would have introduced the doctrine of comparative negligence into the law of this state. The proposed bill, which was killed in committee, applied to damages in personal injury and death cases and cases for injury to property arising from negligence. Its language was as follows:

“In all actions hereafter brought either at common law or pursuant to any statute general or special to recover damages resulting from negligence for personal injury or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence, where that question may by law be litigated, shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or to the owner of the property, or the person having control over the property.”

Although the bill did not provide for recognition of degrees of negligence in New York, it did provide for a measuring and a comparison of the negligences of the parties, and an apportioning of the damages, and clearly would have involved the whole problem of comparative negligence.

Referring to the history of the law of negligence, one notes that the common-law rule for negligent injury,14 which prevails in England and in all but a few American jurisdictions, has never taken into account the relative degree in which each of the parties may be shown to have been responsible for the injury. If the plaintiff can be said to have been at fault in any appreciable degree, he has been precluded from recovery, and contributory negligence forms a complete defense to an action to recover damages for injuries thus inflicted.15


15§ 53, at p. 1037, containing list of cases from jurisdictions expressly repudiating the doctrine of comparative negligence.
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Under the civil law, the principle generally obtains that, where both parties have been guilty of negligence which contributed to the injury, both must share responsibility, and the plaintiff may recover a proportion of the damages suffered varying inversely according to the negligence attributable to him. Justinian's Digest, followed by various Civil Codes, provided that one party chargeable with an accident should assume damages in proportion to his fault; where the proportion is not ascertainable, the damages should be equally divided between the parties. Switzerland's Code of Obligations and Spain's Civil Code authorize the use of the doctrine of comparative negligence and proportional damages; Portugal, Persia, Austria and Germany, under their respective codes, make liability depend upon whether the injury has been caused mainly by one party or the other, with the provision that damages are to be apportioned according to the respective negligences of the parties involved. The Canadian Provinces of Ontario and Quebec hold that plaintiff's contributory negligence does not exonerate defendant whose negligence was the immediate cause of the accident; under the Ontario Negligence Act of 1930, "each shall be liable to make

16Justinian, Dig. 1, XVII, 203; Dig. Book 50, tit. 17, Rule 203.
16bContradictions, art. 1902 of Civil Code of Spain authorizes use of the comparative negligence doctrine; but see 102 Jur. Civ., disallowing recovery to contributorily negligent plaintiff; see 76 Jur. Civ. No. 134.
16cArt. 2398, § 2, Code of Portugal, providing that in case of negligence or fault on the part of the injured, indemnity shall be reduced, and if on part of another, it shall be apportioned.
16dPersian Code, arts. 2199, 2202.
16eCivil Codes Austria, art. 1304, allowing proportional damages according to the degree of fault of respective parties.
16fGerman Civ. Code, art. 254, making liability depend on whether injury was caused mainly by one party or the other.
contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.” In France, contributory negligence on the part of an injured plaintiff has the effect only of reducing damages recoverable. Both Porto Rico and the Philippines hold that, unless it were the immediate cause of the accident, plaintiff’s negligence merely reduces damages; each party is chargeable with damages in proportion to his fault. Thus it is seen that the majority of civil law jurisdictions never recognized the common-law doctrine of contributory negligence, although among them there appears to be a conflict of authority as to the recognition of degrees of negligence.

These widely divergent views have led to the conviction that profit is to be found in a detailed study of the various attempts which have been made to modify the rigors of the common-law doctrine of contributory negligence.

Contributory negligence has effect of reducing damages only. See Case of Marquant, Aug. 20, 1879; Case of Laugier, Nov. 11, 1896; Fuzier-Herman, **Title Responsibilite Civile**, 411, 412; Dalloz (Vol. 18, 1896) **Title Travail** 363, 364 and (Vol. 15, 1895) **Title Responsibilite**, 193, 198; see also, concerning French, German and Civil Law generally, Beaudry Lancaeterie, **Precis Du Droit Civil, Obligations**, No. 2881; Schuster, **Principles of German Private Law** (1907) 383; 2 Sherman, **Modern Roman Law** (1917) 383; **Bürgerliches Gesetzbuch** (Ger. Civ. Code) 254 (2).


II. The Rule in Admiralty

Courts of admiralty early showed their displeasure over the practical working of the common-law rule of contributory negligence, and, desiring to overcome the obvious hardships that arose from its application, formulated more just rules for determining who should bear the loss. The present discussion will deal chiefly with cases of collision between two ships, touching only incidentally on cases of personal tort or of tort arising from contract in the field of admiralty.

It is not the province of this discussion to argue the desirability of adoption of the rule of proportionate damages, with an eye to bringing the United States into conformity with major shipping nations of the world on the subject of collision, but rather to show the similarity between the rules of admiralty and the doctrine of comparative negligence. The primary object is to indicate that as fairness and justice have been approximated in admiralty by more lenient rules of apportioning the damage where both parties have been guilty of fault, so also is it possible that the courts of common law may find it desirable to adopt the more lenient rule of comparative negligence.

Two rules to determine on which party the loss, or the greater part of the loss, should fall are now in use. The United States Courts of Admiralty apply the rule of equal "division of loss", which provides that, where two ships have collided and both are guilty of fault in some degree, the total damage is to be assessed and each party is to pay one-half of the sum. The rule is applied only where both parties are clearly at fault, or in cases of so-called "inscrutable fault". All other leading shipping nations have adopted the rule of

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20See an excellent article on the subject, Franck, Collisions at Sea in Relation to International Maritime Law (1896) 12 L. Q. Rev. 260. M. Louis Franck, Advocate in Antwerp, Professor of Maritime Law at Brussels, Pres. International Maritime Committee, states clearly and concisely the several rules of damages operative in Admiralty Courts, and compares the relative value of the rules. See also an article by him in (1926) 42 L. Q. Rev. 25 as to the advance made since 1896 as concerns the proportionate rule. The authors wish to acknowledge indebtedness to Professor George C. Sprague for his excellent article on Divided Damages in (1929) 6 N. Y. U. L. Rev. 15; see infra note 72.

21There is a marked distinction between "inevitable accident" and "inscrutable fault". Only three cases of "inscrutable fault" are to be found in the United States reports, the last occurring in 1872. Where the court is satisfied that both vessels are at fault, but is uncertain as to the amount of fault attributable to each, or is unable on the evidence to find the specific faults of each, the case is one of "inscrutable fault". Lucas v. The Thomas Swann, Fed. Cas. No. 8, 588, 6 McLean 282 (1854); cf. The Tracy J. Bronson, Fed. Cas. No. 14, 131, 3 Ben. 341 (1869); The Breeze, Fed. Cas. No. 1, 829, 6 Ben. 14 (1872). "Inevitable accident" is often used as a defence, and if established, exonerates from liability,
apportionment,\textsuperscript{22} which "enables the court to apportion the total of the damage done to ships in collision, when both are in fault, in proportion to the gravity of the faults committed by them respectively."\textsuperscript{23}

\textit{Cayzer v. Carron Company}\textsuperscript{24} satisfactorily explains the distinction between the common-law rule and that of division of damages: "there is no difference between the rules of Law and the rules of Admiralty to this extent, that where one transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense, . . . and thereby an accident happens of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both in Law and in Admiralty. If the accident is a purely inevitable accident not occasioned by the fault of either party, then Common Law and Admiralty equally say the loss shall lie where it falls, each party shall bear his own loss. Where the cause of the accident is the fault of one party, and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all,

whereas "inscrutable fault" merely causes a division of damages. The Anna C. Minch, 271 Fed. 192 (C. C. A. 2d, 1921). The former term means an accident which both parties have tried to prevent by every means within their power, with due care and caution. The Old Reliable, 269 Fed. 725 (C. C. A. 3d, 1921); The Mary T. Tracy, 8 F. (2d) 591 (C. C. A. 2d, 1925); The Sea King, 14 F. (2d) 684 (S. D. N. Y. 1926); The Osceola & The Hercules, 18 F. (2d) 415 (S. D. N. Y. 1927), aff'd, 18 F. (2d) 418 (C. C. A. 2d, 1927); cf. The H. Herberman, 33 F. (2d) 332 (E. D. N. Y. 1929); The Mendocino, 34 F. (2d) 783 (E. D. La. 1929); The Michael Tracy, 40 F. (2d) 70 (S. D. N. Y. 1929), rev'd, 43 F. (2d) 965 (C. C. A. 2d, 1930); The Paris, 39 F. (2d) 734 (S. D. N. Y. 1930), aff'd, 44 F. (2d) 1018 (C. C. A. 2d, 1930). "Inscrutable fault" is thus the case where the faults are so equal that one cannot tell which preponderates, which calls for an equal division of damages, while "inevitable accident" is a defense setting up an entire lack of fault in defendant and a corresponding lack of liability on his part.

\textsuperscript{22}Argentine, Russia, Sweden, Japan, Mexico, Norway, Portugal, Austria, Belgium, Nicaragua, Germany, Great Britain, Brazil, Roumania, Greece, Holland, Denmark, Hungary, and France have ratified the \textbf{BRUSSELS MARITIME CONVENTION of 1909–1910}, which adopted the proportionate rule. Cuba, Chile, Italy and Spain have yet to take action on the proposed rule.

\textsuperscript{23}Rule established by the \textbf{BRUSSELS MARITIME CONVENTION}, and incorporated into the \textbf{ENGLISH MARITIME CONVENTIONS ACT of 1911} (1 & 2 Geo. V, c. 57).

\textsuperscript{24}9 App. Cas. 873, 880 (1884).
and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss, it shall be brought into hotchpotch and divided between the two.”

Courts of Admiralty of the United States have of late uniformly followed the statements in this case, although there has been a powerful movement for many years to bring about a change from the division of loss rule to the proportionate rule.

The admiralty rule of the United States may well be looked upon as a midway stepping-stone between the common-law rule of contributory negligence, which bars recovery where plaintiff’s fault has contributed to the total injury, and the rule of comparative negligence. As the common-law rule worked injustice in that it put all the blame on but one of the parties at fault, so also in a lesser degree equal division of damages may operate to cause more harm to one of the wrong-doers than he deserves. The history of apportionment of loss is of considerable interest as an illustration of the steady pressure by which we may expect the doctrine of comparative negligence to be established in the courts of common law.

a. Proportional Division in England

Among the Laws of Oleron we find several articles bearing upon the subject of division of damages; one provided that damages were to be divided equally not only in cases of mutual fault, and not only among the vessels directly concerned, but also among the vessels and the cargoes, whether negligent or not, unless the element of intentional harm entered. These latter were later incorporated in the Black Book of the Admiralty in England. In 1266, the Code of Wisby, article 26, apportioned the loss as between two ships in collision. Article 70 of the same Code demanded that the master and mariners of both ships swear that there was no element of intent in the collision, in which case there would be an equal division of damages, but if they would not so swear, the damage was to be “paid by the ship that did it.” The Danish and Swedish Codes of 1508, 1561, and 1683 divided the loss in case of accidental collision according to the rulings

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26See Hay v. Le Neve, 2 Shaw, Sc. App. 395 (1824), which settled the English rule of division of damages, adhered to until the provisions of the MARITIME CONVENTIONS ACT took effect.
27Art. 10, 14, LAWS OF OLERON. See Marsden, COLLISIONS AT SEA (8th ed. 1923) 154.
29See 3 PARDESS, COLLECTION DES LOIS MARITIME (1831) 237, 261, 289; Marsden, loc. cit. supra note 26.
of arbitrators.29 The Ordonnance of Louis XIV, Section 10, Title 720 and the Consolato del Mare31 provided for division of damages in special cases.

In England, in the 15th and 16th centuries, we find only two decisions bearing upon the subject.32 In 1614 appears the first decision for division of the damages.33 From then on until 1647 there are decisions which fluctuate from the equal division of damages to apportionment of damages according to the degree of fault, and finally revert to the rule of division of damages. In 1647 the first really clear-cut decision of half-damages, awarded in a case where the cause of the loss was uncertain, appears.34 In 1690, a certificate of Sir Charles Hedges, Judge of the Admiralty, states that at that date the rule of division of loss was applied in all cases where the cause of loss was uncertain.35

The eighteenth century found the English courts of admiralty leaning strongly toward the rule of equal division of loss in cases of uncertain fault, or even where the fault was considerably greater on the part of one of the colliding ships.36 All during this time the courts were having difficulty in determining which of several rules of damages to apply in cases of collision.37 In 1815 and 1816, two famous cases appear, The Woodrup-Sims38 and The Lord Melville.39 In The Woodrup-Sims, one vessel alone was found guilty of fault, and al-

29In case of collision between a ship at anchor and one under way, the DANISH CODE (1508, 1561, 1683) provided for a one-third, two-thirds division, without arbitration.
30(1486). "In case of ships running aboard each other, the damage shall be equally suffered by those that have suffered and done it, whether during the course, in a road or in a harbor." Section 11 provided: "But if the damage be occasioned by either of the masters, it shall be repaired by him." 2 PARDESS, op. cit. supra note 28, at 174 et seq.; MARSDEN, loc. cit. supra note 26; 30 Fed. Cas. p. 1215.
312 PARDESS, op. cit. supra note 28, at 174 et seq.; MARSDEN, op. cit. supra note 26, at 155.
32Annals of Ipswich, N. Bacon (1884) 421, 425, 539.
34File 108, No. 342 (1647). See MARSDEN, op. cit. supra note 26, at 157, for additional citations.
36Noden c. Ashton, Ass. Book, 20th June, 1706; The Petersfield and The Judith Randolph, (1789) K. B. East., 27 Geo. III, rot. 1416; many others, cited in MARSDEN, op. cit. supra note 26, at 160, 161. The authors wish to acknowledge the aid given by Marsden's excellent historical analysis of this subject.
37MARSSEN, op. cit. supra note 26, at 155-160.
382 Dodson Adm. 83 (1815).
39Cited in Hay v. Le Neve, supra note 25, at 402.
though the rules discussed in the case were not there applied, the opinion is very valuable for the dicta laid down by Sir William Scott, who said there were four possibilities of fault in collision cases:

1. Without fault on either vessel, in which case the loss should rest where it fell.
2. Where both parties were to blame, when the loss should be apportioned between them.
3. By fault of the suffering party only, in which case he was to bear the loss.
4. By the sole fault of one ship running the other down, in which case the injured party should be entitled to full compensation from the party at fault.

The House of Lords approved these dicta in *Hay v. Le Neve* in 1824, a collision case in which the lower court found one of the ships more at fault than the other, and awarded two-thirds damages against the greater and one-third against the lesser delinquent. The House of Lords varied the decision by dividing the damages equally. Since *Hay v. Le Neve*, the dicta in *The Woodrup-Sims* have acquired, through continual citation and application, the force of decision, and up to a comparatively recent time, settled English law in favor of equal division of damages where both parties were at fault, regardless of the degree in which the ships were found to be at fault.

It should here be mentioned that where both vessels were at fault in a collision and death resulted to an innocent passenger on one of the vessels, the lower court and later the House of Lords held that an action for damages would lie against one vessel, though both were at fault. The courts also held that as actions for wrongful death under Lord Campbell’s Act were not admiralty actions, the rule of division of loss would not apply; this meant that for a considerable time, plaintiff could recover different measures of damage according as he brought his action in the admiralty or in the common-law court. The divergence was abolished by the Judicature Act of 1873 which provided that in any cause or proceeding for damages arising out of collision between two ships, where both were at fault, the rules hitherto in force in admiralty, so far as they had been at variance with the rules of the courts of common law, should prevail. Thus the history of the topic indicates that the early English and present

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40 *Supra* note 25.
41 The *Monarch*, 1 W. Rob. 21 (1839); The *Bernina*, 12 P. D. 58 (1887); The *Seringapatam*, 3 W. Rob. 38 (1848); The *Margaret*, 6 P. D. 76 (1879); see also *supra* notes 24, 25 and 38.
42 The *Avon*, 22 Fed. 705 (N. D. Ill. 1885); The *Bernina*, *supra* note 41.
43 *Judicature Act* of 1873, 36 & 37 Vict. c. 25, § 9.
American cases apply but an arbitrary formula of equal division of loss.

At the end of the 19th century, lawyers, judges and shippers began to agitate for proportional division of the damages. At that time several leading countries had adopted the rule, were using it successfully, and were attempting to bring the United States and Great Britain into accord, so as to make its application universal. International meetings were being held on the subject, the obvious intention being to persuade other nations to adopt it.

In 1885, the Commercial Congress of Brussels and the Meeting of the Institut de Droit International at Lausanne, and in 1892, the Commercial Congress at Genoa, had met and had adopted the proportional rule, although there were some who favored the rule of equal division of loss. England became much interested in the proposed change and impetus was given to the movement, at the turn of the century, by Englishmen whose experience entitled their opinions to the greatest respect; among them we find representatives of the Liverpool and London Steamship Protection Associations, the American Chamber of Commerce of Liverpool, the London Steamship Owners' Mutual Insurance Association and numerous other shipping associations. In 1895 the Brussels Conference of the International Law Association, in 1896 the Chamber of Shipping in the United Kingdom, and in 1899 the International Marine Committee (London Conference) all went on record in favor of the change from the rule of equal division of loss to the proportionate rule. The Brussels Conference of 1895, called to discuss international maritime problems, stated that the United States and the (then) British rule was but a rule of thumb, and often did great injustice, and that "mathematical accuracy was impracticable, but it was easy to get nearer to justice than an equal division of damages in all cases." The International Maritime Committee has held many conferences, the first in Brussels

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4 France, Norway, Sweden, Denmark, Belgium, Greece, Portugal and Roumania adopted and were successfully using the rule. It is interesting to note that none of these countries have reverted to the rule of division of loss, and that there are no complaints heard as to the satisfactory working of the rule.

43 Franck's article, supra note 20, and an article, Scott, Collisions at Sea Where Both Ships are at Fault (1897) 13 L. Q. Rev. 17, state the representative type of arguments in favor of the proposed rule.

44 Bynkershoek describes the strong dissent of his fellow-judges sitting on the Supreme Court of the Netherlands, when he attempted to persuade them in 1629 to apply the proportionate rather than the equal division rule, "memini me senatore et de geometrica proportione perorante reliquos senatores obstupuisset atque si Jovis ignibus icti essent." Bynk., Quaest. Jur. Priv. i. IV. c. 20 (1629); see also Marsden, op. cit. supra note 26, at 155.
in 1897, and has attempted consistently to make the proportionate rule universal in its application. Also the British Diplomatic Conference, which held its first meeting in 1905, has thrown its weight toward the proportionate rule.

Although at the turn of the twentieth century there had been in England much agitation for and against the proportionate rule, it was, nevertheless, a huge surprise for the maritime world when England finally adopted the proposed rule. In the face of its settled rule of division of loss, and the legislative action which appeared in the Judicature Act of 1873, and despite the grapple-hold that the idea of division of loss in admiralty seemed to have on the nation, England in one fell swoop overturned its past policies by the Maritime Conventions Act of 1911. The Act provides: "Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel is at fault." Several provisions and exceptions are made, one of which is: "If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally."

It has accordingly been decided that where the evidence does not clearly establish that a preponderance of guilt rests upon one ship, the division of damages should be half and half. To quote Lord Sumner, "The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do; a general leaning in favour of one ship rather than of the other will not do; sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do."

The law as to division of loss has thus been greatly altered in England by the Maritime Conventions Act. It establishes an entirely different basis for the division of loss. The liability of the owner of a vessel in fault may be increased or decreased from the half damages for which he would have been liable before the Act; the Act does away with English statutes which had provided that a vessel which had violated a Sea Regulation was, in case of a collision, conclusively presumed to have been at fault; it affects the kind of damages which the owner of a vessel can claim to share with the

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49Cf. supra note 21.
50The Peter Benoit, 13 Asp. Mar. L. Cas. (n. s.) 203, 208 (1915).
51Supra note 48, § 1.
52Supra note 48, § 4.
owner of another vessel. Claims for loss of life under Lord Camp-
bell's Act or for personal injuries, which did not come under the rule
of division of damages before the passing of the Act, are now under
the rule; also, the Act places a time limit on certain actions arising
out of collision.

England having joined all other leading nations, with the sole
exception of the United States, as to apportionment of loss in
collision cases, it is quite probable that this nation will sooner or
later move to the more equitable rule. From the latest obtainable
reports those nations which have adopted the proportionate rule are
entirely satisfied and apparently no difficulty is experienced in its
administration.

b. Equal Division of Loss in the United States

The admiralty courts of the United States had no established
rule of damages in collision cases until the middle of the nineteenth
century. We find before that time many cases of division of loss,
showing the court's disapproval of the common-law rule of con-
tributory negligence; a few cases applied the common-law rule

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68 Fatal Accidents Act, 9 & 10 Vict. c. 93 (1846).
69 The Circe, 10 Asp. Mar. L. Cas. (N. S.) 149 (1905); The General Havelock, 21
T. L. R. 438 (1905).
70 Supra note 48, § 3; cf. id. § 2.
71 Supra note 48, § 8. The court may, in its discretion, extend the time limit,
The Cambric, 29 T. L. R. 69 (1912).
72 Supra note 22.
73 Enactment of legislation similar to the Maritime Conventions Act would
cause little procedural change in the law of collisions in the United States, and it is
submitted that the more desirable rule of proportionate damages would not in-
volve the greatly feared results set forth in arguments of its opponents.
74 The sole argument against the present operation of the rule appears to be
that the courts do not apportion costs according to negligence, as well as the
278, for the statement that Great Britain is eminently satisfied with the operation
of the rule, and has found no difficulty in its application to cases of mutual fault.
75 Massachusetts divided the damages in a case of mutual fault. The Rival, 1
Sprague 128, 20 Fed. Cas. No. 11, 867 (1846). In Maine, Judge Ware said the
rule applied in cases of inscrutable, uncertain or mutual fault. The Scioto, 21
rule to cases of mutual fault. The Bay State, Abb. Adm. 239 (1848). In 1852, the
question of division of damages came before the Supreme Court of the United
States for the first time in a case of inevitable accident, and the court allowed the
loss to lie where it fell. Stainback v. Rae, 14 How. 532 (U. S. 1852); cf. Smith v.
Condry, 1 How. 28 (U. S. 1843). In 1854, damages were divided in cases of
inscrutable or uncertain fault, Lucas v. The Thomas Swann, supra note 21.
while others ventured to apply the proportionate rule. Of this last group, *The Mary Ida* is a good example. The court held that in cross suits growing out of a collision of vessels, there being fault proved on both sides, damages were to be apportioned according to the disparity of fault, and the ratio decided upon was one-fourth to three-fourths. Our admiralty courts finally adopted the dicta in *The Woodrup-Sims*, and in 1854 it was settled, in *The Schooner Catherine*, that where both ships were at fault, the damages were to be divided equally, regardless of the degree of fault. All that is necessary is to prove that mutual fault has concurred in producing the injury complained of, and although one vessel has been guilty of but slight fault, she may be held liable for one-half of the damages.

The history of the attempt to make the United States an adherent of the proportionate rule is much the same as that in Great Britain, although as yet our federal courts and legislature refuse to change the settled rule of equal division of loss. Arguments in favor of the change have been heard from all sides during the past forty years, and the Maritime Law Association of the United States has for some time considered the desirability of changing to the proportionate rule. A meeting of the latter group held in 1922 reported favorably upon its adoption, but in 1927 a new special committee having been appointed, another report was presented in which the majority was against the adoption of the rule, and the meeting upheld the report. The American Bar Association has interested itself in the problem for some years past, but as yet has accomplished little, although it definitely

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62*Supra* note 38.
6317 How. 170 (U. S. 1854).
66Wilhelmus Mynderse of New York, admiralty lawyer of great repute, was an active representative in favor of the proportionate rule in 1899. See Report International Maritime Committee, London Conference, 1899.
67The arguments advanced in the report are practically the same as those advanced in the 1929 Report of the Committee on Admiralty of the American Bar Association, *supra* note 59, discussed later.
succeeded in bringing brilliant legal minds of the country to bear upon the desirability of a change. In 1911, the President of the United States and the Secretary of State were considering the problem, but there were many protests against adoption of the rule, and they discontinued their efforts in its behalf and in behalf of an international convention to formulate some provision such as that of the English Maritime Conventions Act of 1911.\footnote{Supra note 48.}

Little further action was taken on the subject until 1925, but since that time there has been a greatly increased interest in the proposed change, and it seems predictable that sometime in the not distant future Congress may provide for the application of the proportionate rule in ship collision cases of mutual fault. In 1925, the meeting of the American Bar Association adopted a resolution directing the Committee on Commerce and the Committee on Admiralty to prepare a bill providing for the proportionate rule of damages “thus bringing our laws into conformity with those of all other maritime nations.” In 1926 a Committee on Collisions reported adversely to adoption of the rule, but in 1927 it did not make further report on it. None of the above committees reported on the subject in 1928. In 1929, in its report to the convention, the Committee on Commerce and on Admiralty stated that it had inquired into the working of the rule in other countries and had elicited the information that in general “the rule is working with entire satisfaction. Indeed, the only adverse criticism respects the failure of the British rule to apportion costs also in accordance with the apportionment of damages.”

However, the Committee, having given great consideration to the subject, ended by proposing the following resolution: \footnote{Report of the Committee on Admiralty of the American Bar Association, supra note 59.} “Be it resolved, By this Association that as the present maritime law of the United States relative to division of damages in collision cases has operated satisfactorily for a long number of years, no change in such law should be approved by this Association.” The Committee assigned five major reasons for recommending that the present rule be kept in force, namely:

(a) That the rule of proportionate damages will impose too great a burden on our judges.
(b) That the \textit{City of New York} rule,\footnote{The City of New York, 147 U. S. 72, 13 Sup. Ct. 211 (1893).} that courts should not look for minor faults, is sufficient for practical purposes.
(c) That the \textit{in extremis} rule would be emasculated.
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(d) That collision litigation would be carried to common-law courts.

(e) That appeals would be increased and compromises made more difficult.

Since these same reasons, which have offered the chief resistance to the adoption of more liberal rules in admiralty, will be levelled with equal force at any attempt by the courts of common law to adopt the rule of comparative negligence, it will be profitable to examine each of them in turn.

(i) Objections to the Adoption of the Proportional Rule

As to the imposition of too great a burden on our judges, the experience of other countries applying the rule of proportionate damages shows strongly that no difficulty has been encountered on this point. The Maritime Conventions Act of 1911 in England has provided, and any sensible legislation on the subject would provide, that where it is difficult or impossible to allocate the degrees of blame on both ships, but where it is proven that both were in fault in some degree, the rule of division of loss would not be altered, and that each wrongdoer should bear one-half of the total loss. But in the majority of cases it is possible to find blame greater on one side than on the other, and in such cases it is only fair that there should be an apportioning of the loss, so that one would not be held liable for greater damages, and the other for less damages than he deserves. The American Bar Association Committee on Admiralty, in recommending an equal division, even where degrees of fault are unequal, followed the reasoning of Dr. Lushington, who considered that it is impossible to accurately apportion the damages under such circumstances, and that, as a result, much difficulty will be introduced into collision litigation; that no two judges would agree as the exact proportion to be made, and it would prove impossible for counsel in

7Supra note 48, ART. 1: "If there is mutual fault, the liability of each vessel is in proportion to the gravity of the faults respectively committed; but, if, according to the circumstances, the proportion cannot be established, or if it appears that the faults are equal, the liability is apportioned equally."

73Alfred Huger, Proportional Damage Rule in Collisions at Sea (1927) 13 CORNELL LAW QUARTERLY 531, 547, gives figures of total number of collisions in England 1922–1927, and number of cases in which it was possible to find proportional negligence. Leslie Scott, supra note 45, gives list of cases illustrating the unfairness attendant upon the rule of dividing the loss. Franck, supra note 20, at 263, shows briefly the practical value of the proportional rule. See also The Margaret, infra note 113, and discussion of the case in the body of this article infra.

7The Milan, Lush. 388 (Adm. 1861).
any collision case to advise with accuracy. Grant that it is not always possible to make an accurate apportionment; yet in many cases it would be far easier to say which was to blame in the greater degree than to tell which fault was the proximate cause of the collision. Besides, even the most rabid proponent of the proportionate rule would not demand absolute accuracy in the division; all that is hoped for is an approximately correct apportionment, and it is respectfully submitted that a half and half division is often anything but a fair or just apportionment. Franck says that the change in Britain to the rule of division of loss was largely dictated by a feeling that the adopted rule was fairer than the rule of leaving the loss to lie where it fell, and, as Franck says, "division of loss by halves is one step on the road to proportional division of loss."

At first glance it might appear that the task of apportioning the blame is an impossible one; but the proportional rule is to be applied only to those cases in which it clearly appears that there are distinctly different degrees of negligence, and where this does appear, it is not unduly difficult to determine in rough proportions of one-third or one-fourth how much more negligent one ship has been than the other. In most of the border-line cases it is probable that neither ship is entirely blameless, and that one ship is much more to blame than the other. The law should be an instrument of justice, and since under our present admiralty rule justice obviously cannot be done in these border-line cases, the reason given by the committee, that it would place too great a burden on our judges, sounds suspiciously like a sluggish unwillingness to expend effort to remedy an unsatisfactory condition. Much better that mistakes be made occasionally in the application of the rule of apportionment than that frequently the less culpable ship be mulcted in a greater share, and the more culpable in a less share, of the total damage.

Franck effectively refutes this argument of the committee: "My experience is that in collision cases the fault is very often more on the one side than the other; but even if such difference happened but

Franck, op. cit. supra note 20.

Franck, op. cit. supra note 20, at 264: "I have often been told by judges that it is much easier to make such a comparison than to decide what was the operative cause of the collision, with a view of fixing one ship with the whole responsibility and holding the other blameless.... [T]he Court acts...exactly as in penal matters, where it fixes the penalty at some point between the maximum and the minimum allowed by law, to suit the gravity of the offense." The usual fractions are thirds, fourths, or fifths, in the countries which have adopted the proportionate rule; where more than two ships are at fault, the fractions may be smaller.
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once in twenty cases, the most elementary sense of justice would demand a difference in treatment of the two parties. If a pair of scales is the emblem of maritime justice they are strange scales, in which the slightest neglect—\textit{minima culpa}—less even than that, a statutory presumption of fault—weighs as many pounds sterling as the grossest misconduct.\footnote{Franck, \textit{op. cit. supra} note 20, at 266. In England, by 36 & 37 Vict. c. 85, § 17 (1873), a ship was deemed to be in fault unless she could show that the violation of the rule could not have caused or contributed causally to the collision. The Stoomvaart, 5 App. Cas. 876 (1880); The Imbro, 14 P. D. 73 (1889). In the United States, a violation of a statutory rule to prevent collision raises a presumption of culpability, and a ship guilty of such violation must show that it could not have been one of the causes of collision. The Greystoke Castle, 199 Fed. 521 (N. D. Cal. 1912); The Eagle Wing, 135 Fed. 826 (E. D. Va. 1905); The Arthur M. Palmer, 115 Fed. 417 (E. D. N. Y. 1902); extensive list of cases, 11 C. J. 1181 n. 71.} He continues, “It is impossible to understand why a law which recognizes the principle of dividing the liability should decide that in every case the division should be by halves. That is purely arbitrary. Either the principle of division is just, and then it should be complete, that is proportional; or it is unjust, and there should be no division, by halves any more than by quarters.\footnote{Franck, \textit{op. cit. supra} note 20, at 264. The point is also excellently considered by Leslie Scott, \textit{supra} note 45.} The system is not an attempt to convert a collision case into a mathematical problem. It is a question not of algebra but of common sense. And justice fails when the judge, although seeing negligence which ought not to remain unblamed, cannot or will not keep it in sight because he cannot bring himself to punish a trifling fault with liability for half of the total loss. Surely the proportional rule which avoids extremes is the fair one.\footnote{\textit{Supra} note 20, at 264.} And, as Judge Simonton says, “there are cases in which it would seem to be manifestly inequitable to assess equally the loss. How long will such manifest inequity remain the law of this country?”\footnote{The Victory, 68 Fed. 395 (C. C. A. 4th, 1895).}

In penal cases, where the court fixes the penalty at some point between the minimum and the maximum allowed by law, it must vary its every judgment to suit the gravity of the offence, but we hear no argument concerning any huge burden placed on our judges in fixing penalties. In fact, it is far better to allow the court a little leeway in which to exercise its reasoned judgment, than to impose upon it the arbitrary rule of division of loss.

It is difficult to perceive why the Committee on Admiralty fears change in the effect of the “\textit{in extremis}” rule by the adoption of pro-
portionate division of damages. Under the "in extremis" rule, if a vessel, by her negligence, places another vessel in a perilous situation, and the latter, because of the excitement, takes the wrong course, the negligence of the first is considered the efficient proximate cause, and that ship is liable for the entire loss.\textsuperscript{80} It is universally recognized that in the face of imminent danger, not created by or contributed to by him, one is not required to act with the same amount of care and caution as is demanded under normal circumstances.\textsuperscript{81} The application of this doctrine of error in extremis should be precisely the same under either the proportionate or division of loss rule.

The defense of contributory negligence and the defense of error in extremis are very different; if the former is proved, it goes merely to reduction of damages in admiralty, while the latter, if proved, absolves from all fault and liability. The vessel which pleads error in extremis must show that she herself was not in initial fault; if her previous improper maneuvers have caused in any way the perilous situation, she cannot claim freedom from fault at the last moment because she must act in the face of that same imminent peril.\textsuperscript{82} Application of the rule of proportionate negligence would result in a much more equitable allocation of the damages where the ship pleading error in extremis is shown to have been guilty of some slight initial negligence creating the perilous situation. The rule of equal division of loss in such case either holds this wrong-doer entirely free from all guilt and liability, thus condoning slight but nevertheless real contributory negligence, or it charges her with one-half of the total loss, in effect holding her as guilty as the other party, whose negligence may have been gross and inexcusable.\textsuperscript{83} An allocation of the damages in the ratio of, say, one-fifth to four-fifths, appeals much more strongly to our sense of justice.

\textsuperscript{80}Hughes, Admiralty (2d ed. Hornbook Ser. 1920) 331; The Lucille, 15 Wall. 674 (U. S. 1872); The Chatham, 52 Fed. 396 (C. C. A. 4th, 1892); E. Luckenbach, 93 Fed. 841 (C. C. A. 4th, 1899); Bonn v. Lakeside S. S. Co., 221 Fed. 40 (C. C. A. 5th, 1915).


\textsuperscript{83}Scott, \textit{supra} note 45, has cases showing the unfairness; see The Claire & The Chinook, 34 F. (2d) 614 (C. C. A. 2d, 1929), \textit{aff'd}, 29 F. (2d) 765 (S. D. N. Y. 1928). \textit{Cf.} cases cited in note 82.
The argument that collision litigation would be carried into common-law courts should have little weight. In the United States it is true that collision cases may be litigated in the State courts as well as in the federal courts. The peculiar anomaly of the co-existence of two diverse sets of rules, admiralty and common law, to govern the same case, should have been corrected long ago. Great Britain early saw that the disposition of the case should not depend on the mere choice of the forum, and she provided in the Judicature Act of 1873 that in cases of mutual fault, the rules in admiralty, when at variance with the rules of common law, should prevail. In Canada also, the admiralty rule is applied both in admiralty and common-law courts.

Legislation should provide either that rules of admiralty should prevail in collision cases, regardless of the court in which suit is brought, or the common-law courts should be influenced to follow the advice of the more experienced federal courts on the subject. As was said by District Judge Hale in The Devona, "It is not for me to determine the duty of a state court; but I think a state court in case of a maritime tort should also be controlled by the same maritime rule laid down by the Supreme Court of the United States, and that it should not follow the common-law rule of procedure which it would follow in a case not maritime in its nature, for, as I have said, 'courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit.' " The Supreme Court decided in 1890 the famous case of The Max Morris, which held that in admiralty cases the rules of admiralty should prevail, where one was injured on a vessel through a maritime tort arising partly from his own negligence and partly from the negligence of the officers of the ship, and that contributory negligence would be no bar to recovery.

But the cases have been in conflict where suit was brought in a

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84See an admirable exposition of this confusing and unsettled topic by Robinson, op. cit. supra note 64, at 244.
85Supra note 47, § 25, sub-section 9.
8643 Vict. c. 29, § 8 (1879); The Eliza Keith, 3 Que. L. R. 143 (1877); The Dorothy, 10 Can. Exch. 163 (1906).
87F. (2d) 482, 484 (D. Me. 1924); see also The Hamilton, 207 U. S. 398, 28 Sup. Ct. 135 (1907).
88137 U. S. 1, 11 Sup. Ct. 29 (1890).
court of common law. *Ailee v. Packet Company,* a suit in admiralty, contained a dictum that if suit had been brought at common law, the rules of that forum would apply. *Belden v. Chase* adopted the above dictum in a decision rendered by the United States Supreme Court on error from the New York Court of Appeals. *Port of New York Stevedoring Company v. Castagna* applied the admiralty rule, the court saying, "The right to recover [damages for a maritime tort] irrespective of contributory negligence is a right, and not a matter of procedure, nor governed by the choice of a forum." So that the fact that an injured employee sought his remedy at common law, instead of in admiralty, did not make his contributory negligence a bar to recovery. Unfortunately, the New York Courts have reached a different result in *Maleeny v. Standard Shipbuilding Corporation* and in *Ward v. Turner & Blanchard,* both of which hold that the common law rule of contributory negligence applies to actions in state courts for a maritime tort.

The Court of Appeals of Virginia in a 1928 case applied admiralty rules and regarded it as settled beyond question that in maritime torts maritime law applies to the exclusion of state law, so far as matters of substance are concerned. The Virginia Court cites *Messel v. Foundation Company,* which held, reversing the state court, that plaintiff might prosecute his remedy in the state court for the tort, but that the principles applicable to the recovery "must be limited to those which the admiralty law of the United States prescribes." The Virginia Court says of the *Messel* case, "This case, as we understand it, closes the discussion. When one suffers an injury under such circumstances as to be a maritime tort, his rights are fixed by the admiralty law; but he may choose the forum in which to assert those rights. He has his remedy at common law, but his recovery and the precise relief to be afforded him are determined by the admiralty law which is applied, whether he sues in the common law or admiralty court. He may pursue his remedy at common law in the

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3921 Wall. 389 (U. S. 1874).
39The court stated that "the admiralty rule commends itself quite as favorably in its influence in securing practical justice as the other [divided damages]."
31150 U. S. 674, 14 Sup. Ct. 264 (1893).
33237 N. Y. 250, 142 N. E. 602 (1923).
37Supra note 95, at 358.
State court, but that court must administer the admiralty law." In 1922, in *Carlisle Packing Co. v. Sandanger*, we find the United States Supreme Court unequivocally saying, "The general rules of maritime law apply whether the proceeding be instituted in an admiralty or common-law court." In view of the fact that the Supreme Court has consistently indicated of late that there should be uniformity in application of rules in such maritime cases, and that it advises the use of admiralty rather than common-law rules, it would appear that this is a fit subject for legislative action.

The risk of multiplied appeals has been the main stumbling-block to the adoption of the proportionate rule, and the Committee on Admiralty restates it in the recent report. In 1897, an excellent article by Mr. Leslie Scott, in commenting on Mr. Franck's article, stated that the opponents of the rule believed it would lead to an increase of appeals, and said, "It is difficult to know the cause of this belief, but the following considerations seem to afford a sufficient

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98*Carlisle Packing Co. v. Sandanger*, supra note 97 and cases cited therein; Sprague, supra note 20; So. Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524 (1917); L. R. A. 1918C, 451, ANN. CAS. 1917E, 900; see also note L. R. A. 1917F, 678, showing conflict as it existed in 1917; Messel v. Foundation Co., supra note 96; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, L. R. A. 1918F, 991 (1918); Robins Dry Dock Co. v. Dahl, 266 U. S. 449, 45 Sup. Ct. 157 (1925); The Osceola, 189 U. S. 158, 23 Sup. Ct. 483 (1903); The Devona, 1 F. (2d) 482 (D. Me. 1924); Johnson v. U. S. Shipping Board, 24 F. (2d) 963 (C. C. A. 2d, 1928). In United States v. Norfolk Berkley Bridge Corp., 29 F. (2d) 115, 132 (C. C. A. 2d, 1928), the court said, "When it is borne in mind that the court, in such a collision case [ship colliding with bridge], is considering the cross-claims of the parties involved, it shocks one's sense of justice to conclude that, if the damages of the ship exceed the damages suffered by the bridge, the ship may recover one-half the difference between the damages on the respective sides, but, if the damages of the bridge exceed those of the ship, the bridge may have no recovery whatsoever. It could not have been the intention of Congress that such an anomalous situation should arise." The admiralty rule was applied.

99REPoRT OF THE Committee ON ADMIRALTY, supra note 59.

100Scott, supra note 45, considers the subject of appeals further, but along the same lines as Franck, supra note 20, who says, at 270, in 1896, "On the question of the effects which the proportional rule has upon the frequency of appeals, no unfavorable evidence is forthcoming, either in Belgium, or any other country where the proportional rule applies. There is no reason to think that the law of apportioning the damage to the fault gives rise to more litigation or appeals on the continent than the rule of division of loss in Great Britain." In view of the fact that Mr. Franck later was made President of the International Maritime Committee, his word is authoritative on such matters.

101*Supra* note 20.
answer. Firstly, appeals on the proportions, in which blame is allocated by the court, are appeals on a question of fact, and must be subject to the restrictions which limit other appeals on questions of fact. Secondly, being appeals against the amount of damages, they are appeals from the discretion of the court below, and subject to even greater restrictions. Thirdly, there are grounds for thinking that appeals under the proportional rule will be treated by the Court of Appeal much as it now treats appeals against the quantum of salvage awards.” Scott likens the probable dealing with appeals in cases of proportionate negligence with that of appeals in salvage cases, and says, “appeals from the quantitative estimate, made in the discretion of the court, of the value of salvage services, are discouraged by the court, so, it is submitted, will appeals be discouraged from the quantitative estimate of the blame, which takes the form of an apportionment under the proportionate rule.” He cites *The Clarisse* and *The Star of Persia* as supporting his contention. In the former it was said, “It is a settled rule, and one of great utility with reference to cases of this description, that the difference [between the lower court’s award and what the appellate court may think ought to have been awarded] must be very considerable to induce a court of appeal to interfere upon a question of mere discretion.” In the latter, Lord Esher said, “The rule has been correctly stated that if this court cannot say that he has acted contrary to any principle, then, if the amount does not seem unreasonable, it cannot interfere.”

In 1927, Mr. Huger states, in an article on Proportionate Damages in Admiralty, “there is not likely to be more divergence of view than now exists when appeals are prosecuted in mutual fault cases. The English courts have held, in cases since adoption of the Convention rule, that the decision of the judge of first instance should not lightly be interfered with...”

It is submitted, therefore, that dealings with appeals would be little changed by adopting the proportionate rule. At present, the courts hold that on appeal, every presumption is in favor of the award of the court below, and it will not be reversed except for manifest error, and findings of fact will not be disturbed when not against...
the preponderance of the evidence.\textsuperscript{107} In \textit{The Sabine},\textsuperscript{108} the Supreme Court held that it would not review the action of the lower court upon questions of fact, and a long line of cases follow this decision.\textsuperscript{109} In view of such holdings, it would appear that an appeal based on the finding of the trial court on the degree of negligence would be likely to avail an appellant very little. England, under the proportionate rule, has not experienced an increase of appeals, and it is but reasonable to believe that experience in this country would be similar.\textsuperscript{110}

The primary argument of the Committee on Admiralty against the adoption of the proportionate rule is that the rule in \textit{The City of New York},\textsuperscript{111} that the court should not look for minor faults, is sufficient for all practical purposes. Let it be conceded that for most purposes, and for the majority of collision cases, the rule of division of loss is reasonably satisfactory, works substantial justice, is fairly easy of application, and fairly allocates the damages, yet every year there are a few cases of mutual but quantitatively varying fault, and it is in such cases that the courts should be able to invoke a more flexible rule than that of equal division of loss. Those familiar with admiralty proceedings and decisions will admit that there is a tendency wholly to ignore cases of slight negligence in order to avoid inflicting on the slightly negligent a penalty of half damages. In such cases the negligence of the one goes unrebuked while the other party is held to a higher measure of damages than he deserves.\textsuperscript{112}

\textsuperscript{107}The Curtin, 217 Fed. 245 (C. C. A. 4th, 1914), aff'd, 205 Fed. 989 (E. D. Va. 1913); The Captain Weber, 89 Fed. 957 (C. C. A. 9th, 1898); The Buffalo, 55 Fed. 1019 (C. C. A. 2d, 1893); The Juniata, 93 U. S. 337 (1876).
\textsuperscript{108}103 U. S. 540 (1880).
\textsuperscript{110}Supra note 59. Apparently collision litigation has not increased perceptibly since England's adoption of the rule, and there was no adverse report on the number of appeals in the \textit{Report of Committee on Admiralty and Collision} supra note 59.
\textsuperscript{111}Supra note 70.
\textsuperscript{112}Scott, supra note 45, gives examples of the unfairness of the operation of the rule. The Umbria, 166 U. S. 404, 17 Sup. Ct. 610 (1897); The Ludvig Holberg,
A good example of the need for a more flexible rule in collision cases is the case of The Margaret, decided in 1929. In this case The Merchant was found to have been at fault in persisting to force a port to port passing, after signals had been exchanged for a starboard passing, and in not slowing down her engines or reversing when danger of collision became apparent; The Margaret was found at fault for keeping on her course without slackening speed or reversing after she should have seen that The Merchant was disregarding passing signals, and that danger was imminent. The Circuit Court of Appeals, Third District, found that the primary and major fault was The Merchant's, The Margaret being at fault in a lesser degree; damages were apportioned one-fourth to three-fourths. On rehearing on the matter of damages, the court said, "There developed a situation of mutual faults to which it seemed that the rule of mutual liability should not, in view of the found inequality of fault, be applied; but rather that the damages should be apportioned to the negligence respectively attributable to the two ships, when, as here, it can be fairly ascertained. Therefore the court, in an attempt to conform the decree to its fact findings and to do justice to the ship least offending, directed apportionment of the damages in the manner indicated." The court then cites cases on the equal division of loss rule and concludes that it cannot do otherwise than follow the rule. It therefore reversed the decree of proportionate division.

A desire to effectuate substantial justice would dictate that, in a case such as The Margaret, where faults are obviously unequal and yet ascertainable, there is real need for a more flexible rule which the court may apply in its discretion. To bind the court to a rule which both lawyers and judges admit may work injustice and hardship to either or both litigants is to force the rendition of a decision which it recognizes as based on the fallacy of equal fault; where it has already been determined that the faults are unequal, it follows naturally that the parties should be assessed in accordance with the quantum of fault committed by them respectively.

The various arguments set up against the proportionate rule in admiralty are similar to those put forth against adoption of the rule of comparative negligence in the courts of common law. If these arguments have been in the least refuted in the field of admiralty,
which now operates under the rule of division of loss, they should be wholly ineffectual in the field of common-law, which entertains the extreme rule of contributory negligence. If equal division of loss works obvious hardship where both parties are at fault, though in varying degrees, how true it is that an entire lack of apportioning of damages at common law, where contributory negligence on the part of a slightly negligent plaintiff is proved, brings about great injustice. Fairness to the parties litigant demands that, in cases of unequal fault, each party should be required to stand that portion of the total loss which corresponds with his amount of fault.

As the courts of admiralty of the United States have found the equal division of loss rule sufficiently inequitable in certain cases to express the desire that admiralty adopt a more flexible rule, that of proportionate negligence, so also should the courts of common law demand that they be allowed some latitude in determining, in cases of mutual fault, to what extent each party should bear the total loss.

Since the United States is the only major shipping nation which applies a rule of damages other than proportionate damages, and since it is highly desirable in international law that all nations conform to similar procedure and remedies in their courts of justice, it is to be hoped that the Committee on Admiralty and the American Bar Association will recognize the need of the more flexible rule of proportionate negligence and will use their influence to effect adoption of the rule.

III. THE FEDERAL EMPLOYERS’ LIABILITY ACT

In fields other than admiralty, the common law doctrine of contributory negligence has been found to be too harsh, and attempts have been made to modify it. For instance, the Second Federal Employers’ Liability Act provides that, in actions against inter-state railroad carriers to recover damages for death or personal injury to an employee, a recovery is not prevented by contributory negligence. The statute adopts a system based on comparative negligence, whereby the damages are to be diminished in the proportion which the negligence of the employee bears to the combined negligence of that employee and the defendant carrier; in other words, the carrier is to be exonerated from a proportional part of the damages corre-
sponding to the amount of negligence attributable to the employee.116 The language of the bill which was introduced in the New York Assembly is so like that in the Federal Employers’ Liability Act that it seems obvious that the phrasing was taken from that Act.116 Since the provisions of the Federal Act have been enforced in the courts for a number of years, without any appreciable difficulty, without noticeable increase of appeals, without too great a burden upon our judges or too great a mental strain upon our juries, it is submitted that an act like the New York bill should operate as easily, without an increase of difficulties in trials, and with far greater justice and fairness to the parties.

As was said of the Federal Employer’s Liability Act in Southern R. R. Co. v. Hill,117 “The statute contains three propositions which stand out in bold relief; the first is, that a carrier is liable for the injury or death of an employee resulting in part from the carrier’s negligence; secondly, the employee’s contributory negligence does not cut off the right of action; and thirdly, there is to be a diminution of damages in proportion to the employee’s negligence. It would seem that the clear intent of Congress was to allow some damages for every injury or death caused by the carrier’s negligence; to adopt an approximation of the rule of the admiralty courts.” It is, to be sure, an approximation of the rule in admiralty, but the disadvantages of the equal division of loss rule have been pointed out, and this so-called “approximation” under the Federal Employers’ Liability Act is more just than the rule used in admiralty in the United States. There is no necessity of finding the degree of negligence of the parties in a case coming within the provisions of the Federal Employers’

11635 Stat. 66 (1908), 45 U. S. C. § 53 (1926), “In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in death, 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 who may be injured or killed 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.”

117Note that the words “in all actions hereafter brought...to recover damages for personal injuries...or where such injuries have resulted in death...the fact that the person injured [or 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 [the person injured]” are identical in both the Federal Employers’ Liability Act and the proposed comparative negligence bill in New York.

119139 Ga. 549, 551, 77 S. E. 803, 804 (1913).
COMPARATIVE NEGLIGENCE

Liability Act; all that is necessary is that the amount of negligence of the carrier and the employee should be ascertained, and the damages will be apportioned according to that finding; the employee's recovery will be reduced in proportion to the amount of default attributable to him.

In *Norfolk & Western Railway v. Earnesty*, the court said, "[T]he statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employé' means... that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employé."

In such cases, contributory negligence has no effect other than to diminish the damages recoverable, and it is only when the employee's act is the sole cause of the injury, the employer's act being no part of the causation, that the employer is free from liability. The
question of comparative negligence does not arise when the negligence consists in the violation of a federal statute, for in such cases the defense of contributory negligence is entirely abrogated by a provision of the Act.\textsuperscript{121}

It is to be noticed that legislation forced the doctrine of comparative negligence into this employer-employee relationship. The bill as originally framed in 1906\textsuperscript{122} differed considerably in form and wording from the Act as finally adopted in that year. A battle as to the constitutionality of the 1906 Act ensued, and both because it extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress, it was declared invalid.\textsuperscript{123} The Act as reframed in 1908 was held constitutional by a unanimous court.\textsuperscript{124} From the date of inception of the second Federal Employers' Liability Act,\textsuperscript{125} the courts were obliged to apportion damages in cases of personal injury and death due to the mutual negligence of carrier and employee, and state courts are bound by the opinion, construction and interpretation of the Act by the Supreme Court.\textsuperscript{126} So,

\begin{itemize}
  \item 678 (Ark. 1928); Koofus v. Gt. N. Ry., 41 N. D. 176, 170 N. W. 859 (1918); Davis v. Kennedy, 266 U. S. 147, 45 Sup. Ct. 33 (1924); Unadilla V. Ry. v. Cal dine, 278 U. S. 139, 49 Sup. Ct. 91 (1928); Bradley v. N. W. Pac. Ry., 44 F. (2d) 683 (C. C. A. 9th, 1930); lengthy note (1931) 72 A. L. R. 1345, Comparative Negligence Rule of Federal Employers' Liability Act as Supporting Recovery Where Injured Employee Participated in Violation of Order or Rule of Defendant.
  \item The Act was passed in 1906, ch. 3073, 34 Stat. 232; \textit{Second Employers' Liability Act} of April 22, 1908 (herein referred to as "The Act") was amended April 5, 1910, 36 Stat. 291, c. 143.
  \item Decision was five to four, Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141 (1907), aff'g, 148 Fed. 986 (W. D. Ky. 1906).
  \item Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44 (1912), rev'g, 82 Conn. 373, 73 Atl. 762 (1912); see also Walker v. Iowa Cent. R. R., 241 Fed. 395 (S. D. Iowa 1917); Bolch v. Chic. etc. R. R., 99 Wash. 47, 155 Pac. 422 (1916); Preble v. Union Stockyards Co., 110 Neb. 383, 193 N. W. 910 (1923); Wallace v. N. Y. etc. R. R., 99 Conn. 404, 121 Atl. 878 (1917); St. Louis, etc. R. R. v. Steel, 129 Ark. 520, 197 S. W. 288 (1917); see extensive list of cases, 45 U. S. C. p. 105.
  \item Supra note 122.
  \item Second Employers' Liability Cases, supra note 124.
\end{itemize}
in this special field, the "common-law doctrine of contributory negligence is abrogated in the interest of the employé and the doctrine of comparative negligence substituted, which, pro tanto, encourages care and diligence on the part of the employee."127

Since a state court cannot on the ground of inconvenience or confusion refuse to enforce the remedy given by the Act,128 the subject being clearly within the domain of Congress, the Act has been consistently applied by both federal and state courts. In these applications there appears to have been no insuperable, or even considerable, difficulty in determining the respective amounts of negligence; the courts simply take it as a matter of course that they shall as accurately as possible determine relative negligence and allocate damages accordingly. Where a jury is used, the court must and does instruct on the special provision129 of the Act, and juries apparently have found no greater difficulty in determining the proportions in which the parties were at fault. There has been no increase in appeals because of the adoption of the rule. Both in admiralty and at common law, appellate courts refuse to upset the finding of the lower courts on a question of fact such as this, where palpable error does not clearly appear, and the fairness of allocating damages according to the amount of fault seems not to be questioned. Since the doctrine has worked with general satisfaction in these carrier cases, as evidenced by the total lack of complaint about its operation, the fears and arguments of the Committee on Admiralty in that field have less weight than they would have without this practical and satisfactory test.

IV. THE MERCHANT MARINE (JONES) ACT

The application of the Federal Employers' Liability Act130 was so eminently successful in both state and federal courts that Congress in 1920 passed the Jones or Merchant Marine Act,131 which adopts

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130Supra note 114; see also supra notes 118-123, 129. Generally, on recovery of seamen, see (1922) 36 Harv. L. Rev. 777; (1921) 21 Col. L. Rev. 647; (1919) 53 Am. L. Rev. 749; (1921) 55 Am. L. Rev. 685.
the doctrine of comparative negligence in actions for damages brought by seamen or their personal representatives against their employers in injury or death cases. The provisions of the Jones Act bridge the gap between the application of the rule of equal division of damages in collision cases in the admiralty courts and the comparative negligence doctrine applied in railroad employee-employer cases in the common-law courts, in that the action, whether brought in common-law courts, state or federal, or in admiralty, if it falls within the terms of the statute, must be governed by the statute; the common-law defense of contributory negligence is modified, and trial by jury in a common-law court, with damages diminished according to the degree of fault, is sanctioned. The Jones Act reads, “Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees shall apply; and in case of the death of any seaman as a result of such personal injuries the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action, all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.” By the generic reference to “all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injuries to railway employees”, the Jones Act incorporates the Federal Employers’ Liability Act bodily, including of course Section 53, which provides for the rule of comparative negligence.132

Lindgren v. United States,133 decided recently, sums up the operation of the Jones Act in a well-considered paragraph, “[W]e conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers’ Liability Act—establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all the States and is as comprehensive of those instances in which it by reference to the Federal Employers’ Liability Act excludes liability, as of those in which liability is imposed; and that, as it covers the

133Supra note 132, at 46, 50 Sup. Ct., at 211.
entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject."

Panama R. R. Co. v. Johnson, a pioneer case on the subject, held that the statute is to be construed not as restricting enforcement of the new rights to actions at law, but as allowing the injured seaman to sue either on the common-law side of the United States District Court, with right of trial by jury, or on the admiralty side, with trial to the court. Contributory negligence is only an element in determining what the damages shall be. In Engel v. Davenport, the court said, "having been brought after the passage of the Merchant Marine Act, we think that the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based on negligence—in which he not only assumes the burden of proving negligence, but also, under Section 3 of the Employers' Liability Act, subjects himself to a reduction of damages in proportion to any contributory negligence on his part." Any suit brought under the Merchant Marine Act, regardless of the forum or of local statutes bearing upon the subject, must be governed by provisions of the Act.

See also Nelson Co. v. Curtis, 1 F. (2d) 774 (C. C. A. 9th, 1924); rev'd, 294 Fed. 926 (N. D. Cal. 1924); and cf. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501 (1918); Engel v. Davenport, supra note 132. The United States Supreme Court points out, at p. 37, that where action is brought in the state court, and local state law would bar the cause of action, "it is clear that the state courts have jurisdiction concurrently with the federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law," and such suits are governed by the federal acts rather than by state law. Lindgren v. United States, supra note 132; Second Employers' Liability Cases, supra note 124; Patrone v. Howlett, 237 N. Y. 394, 143 N. E. 232 (1924); Northern Coal Co. v. Strand, 278 U. S. 142, 49 Sup. Ct. 88 (1928); Erie R. R. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556 (1916); New York Central R. R. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546 (1916). Since the Merchant Marine Act by reference incorporates the provisions of and the interpretation of The Federal Employers' Liability Act, the railroad cases above are applicable.
It is to be noted that the Federal Employers' Liability Act was in constant use for some twelve years before the passing of the Jones Act.\textsuperscript{139} Every presumption is in favor of both the practicability and desirability of the former, since its terms were incorporated bodily into the latter.\textsuperscript{140} Therefore, as the section modifying the common-law defense of contributory negligence was one of the outstanding provisions of the Federal Employers' Liability Act, its re-enactment amounts to a legislative declaration of satisfaction in the operation of that rule. Certain it is that no affirmative argument has been voiced against the adoption of the doctrine on grounds of an increase in appeals, arising from uncertainty in allocating respective degrees of fault, nor has litigation itself been increased. Apparently trial judges are having no difficulty in allocating the fault in various cases.  

\textit{(To be concluded in the June issue)}

\textsuperscript{139}The reference is to the Second Employers' Liability Act, \textit{supra} note 114; \textit{cf. supra} notes 122, 123, 125.

\textsuperscript{140}Congress passed, March 4, 1927, the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424, 33 U. S. C. §§ 901-950 (1931 Supp.), to provide "compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring on navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. Employers are bound to secure the payment of the prescribed benefits to those of their employees whose employment is covered by the act, and this compensation is to be payable irrespective of fault as a cause of the injury." Noguiera v. New York, N. H. & H. R. R., 281 U. S. 128, 131, 50 Sup. Ct. 303 (1930), aff'd, 32 F. (2d) 179 (C. C. A. 2d, 1930). "The Merchant Marine Act is not repealed by this more recent enactment. The former still embraces employees that the latter does not, as witness the section 902 (3) of the latter which excludes 'a master or member of a crew of any vessel', and 'any person engaged by the master to load, unload or repair any small vessel under eighteen tons net', (citing the Noguiera case \textit{supra})...The Act expressly provides that liability thereunder 'shall be exclusive and in place of all other liability of such employer to the employee or his personal representative...at law or in admiralty.' Obrecht-Lynch Corp. v. Clark, 30 F. (2d) 144 (D. Md. 1929). \textit{Cf. The Pacific Pine}, 31 F. (2d) 152 (W. D. Wash. 1929) and 33 U. S. C. § 905 (1931 Supp.) (44 Stat. 1426) for provision as to exclusiveness of suit. State law, such as state workmen's compensation acts, conflicting with maritime law, is inapplicable in a suit in personam under the Jones' Act, Merchants' & Miners' Transp. Co. v. Norton, 32 F. (2d) 513 (E. D. Pa. 1929), as is also the Federal Employers' Liability Act, Noguiera v. New York, N. H. & H. R. R., \textit{supra}. In Hunt v. Bank Line Ltd., 35 F. (2d) 137 (C. C. A. 4th, 1929), an employee who had accepted compensation under the Harbo"