

tract is discussed.<sup>24</sup> Professor McCormick reads the rule in *Hadley v. Baxendale* as being restrictive. As we understand the English law on the subject, however, the effect of *Hadley v. Baxendale* was the exact opposite as it increased the measure of a promisor's liability in case of breach, making him also liable for those exceptional consequences which were in his contemplation. In other words, "the measure of damages in cases of tort are the same as those in cases of contract, with the exception that in cases of tort the Court has only got to consider the first rule in *Hadley v. Baxendale*, whereas in cases of contract there may be, under the second rule in *Hadley v. Baxendale*, a larger measure of damages."<sup>25</sup> In section 141 the author discusses the federal rule that contemplation of the exceptional consequences is not by itself enough to make the promisor liable: there must also be a tacit agreement to assume the particular risk. In fact the English rule is the same as the federal one, for in *Hall v. Pim (Junior) & Co.*,<sup>26</sup> Lord Haldane said: "I do not think that the real question is one of probability or of circumstances foreseen by the seller. It is to my mind a pure question of the terms of the contract itself." It is only if this gloss on "contemplation" is kept in mind that the various English cases can be reconciled.

Finally in chapter 28, discussing land sale contracts and covenants of title, every English reader will agree with the author's criticism of *Flureau v. Thornhill*<sup>27</sup> and *Bain v. Fothergill*.<sup>28</sup> Recent English decisions have done much to reverse the old rule, but such piece-meal changes tend to leave the law in confusion. It is unfortunate that the opportunity was not taken in 1925, when the English property law was reformed, to bring the rules concerning damages up-to-date.

This lengthy review, if it has not accomplished anything else, will at least have shown how interesting we have found Professor McCormick's book. His work is so stimulating that it ought to encourage others to write on a subject which has been unfairly neglected by legal authors. His readers may not invariably agree with all the various conclusions he has reached, but they will find them stated in clear and vivid language: in a branch of the law which has been especially corrupted by vague phrases, his practical and accurate style is like a breath of fresh air.

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**Legislative Loss Distribution in Negligence Actions.** By Charles O. Gregory. Chicago: University of Chicago Press, 1936. Pp. xiii, 198. \$2.00.

This book seeks to explore the possibilities of devising a system for distributing, through litigation, the loss arising out of an accident among all those involved in it, in proportion to their fault. Then it concretely suggests a system calculated to do this, and sets forth in detail the legislation necessary to accomplish it. What it sought to do it has done in a thorough and scholarly manner. Mr. Gregory reviews the existing attempts to distribute loss in that way, ably criticizes each, then takes up the various problems which any such system raises and follows each one through to a conclusion. He has been very acute in perceiving these problems, in the fields both of substantive law and procedure, and in tracing out the possible solutions and their manifold impli-

<sup>24</sup> C. 22.

<sup>25</sup> Greer, L. J., in *The Arpad*, [1934] p. 189, 216.

<sup>26</sup> *Hall v. Pim*, 33 Com. Cas. 327.

<sup>27</sup> 2 W.B. 1078 (1776).

<sup>28</sup> L.R. 7 H.L. 158 (1874).

cations. On the basis of the premises he has adopted and within the limitations of his undertaking he has done an admirable piece of work—one, moreover, which had to be done before an intelligent evaluation of his premises could be made, since he has clearly indicated the consequences which their adoption would entail for our legal structure.

The limitation I have mentioned lies in this: that Mr. Gregory has confined himself entirely to a study of the problems raised by his scheme in the field of actual litigation, while the vast majority of negligence claims are adjusted without recourse to litigation, or before the process of litigation is complete. The present work could well be taken as a point of departure for investigation along this line. Pre-trial disposition of a case would probably not be complicated by an adoption of the proposed scheme where only one defendant is involved. In the case where two people contribute to causing the plaintiff's injury, however, the difficulty would be acute. The author does mention one aspect of this problem<sup>1</sup> and, in the only paragraph devoted to it, suggests that if the plaintiff settles with one tortfeasor this fact should not bar the other's possible right of contribution against him in case that other is later compelled by judgment to pay more than his proportionate share of the damages. This, however, would virtually prevent the possibility of the plaintiff's settling his case unless *both* tortfeasors agree upon a compromise with him. A defendant will settle only because he can do so at a figure which he thinks is less than the amount he will have to pay if judgment goes against him. But he must have a final and effective release;<sup>2</sup> the possibility that he will eventually have to pay his full share of the judgment anyway would take away all incentive for making any present payment. This much seems clear. It may be unimportant; but further study may show that the way to adjustment of a case like this is usually paved by settlement with a single defendant first, or at least by the fear on the part of each that if he does not come into a settlement he will be left "holding the bag." If that is true, the adoption of Mr. Gregory's solution might cripple the plaintiff's bargaining strength in the early stages of his case in a way that would be no less than cruel, particularly where calendars are congested. There is little enough as it is to induce defendants to make prompt adjustment when the law's delays afford them at least a moratorium and possibly collateral advantages. Perhaps the difficulties along this line could be dissipated by a simple modification of the proposed plan,<sup>3</sup> but they deserve very serious consideration.

Mr. Gregory's entire argument proceeds on the assumptions that (1) liability should be based on fault, and (2) it would be a fair and desirable thing to distribute the burden of a loss among all those whose fault contributed to produce it, in proportion to their fault. These, of course, are legitimate assumptions. Probably they would command wide support. But other points of view might be taken. Some, for instance, reason thus: Fault is a rather tenuous thing in all these cases. So far as civil damage goes, it is not so important to find out whose "fault" contributed to it as to recognize that a tremendous amount of such damage occurs, falls on those unable to bear it causing a serious social problem, and is the inevitable consequence of our having so many auto-

<sup>1</sup> P. 19.

<sup>2</sup> In most states it is perfectly possible at present for a release to be drawn so as effectually and finally to discharge the releasee, and at the same time to preserve the releasor's rights against all other persons.

<sup>3</sup> See the suggestion in this connection in Bohlen, Book Review, 45 Yale L.J. 1528, 1531 (1936).

mobiles. Such people conclude that the social problem can best be solved by assuring injured parties of compensation and spreading their loss among those of us who benefit from the use of automobiles, and we all do. Mr. Gregory thinks there is little practical likelihood of getting courts and legislatures at this time to build a system of accident compensation which is frankly based on any such point of view as this. Perhaps that is true. None the less the point of view is gaining wider currency and seems already to have become subtly interwoven with our existing system. For one thing courts have stretched legal doctrine to the breaking point in helping injured plaintiffs to hold classes of defendants most likely to contain financially responsible persons.<sup>4</sup> This has a double aspect. It obviously makes it more likely that plaintiffs will get compensation. Less obviously, but just as certainly, it makes for a spreading of the risk over society at large because such defendants are either insured against the risk incurred or operate on so large a scale that they are warranted in setting up their own reserves against it. On the whole these defendants have doubtless had to see that the loss was distributed in this way or else to bear it themselves. They and their insurance companies have probably been unable to shift any of it back again to others whose "fault" contributed to the accident because (1) the rule against contribution between tortfeasors prevented them, or (2) where this rule did not apply it was because such defendants were being held vicariously liable and the basis of this liability was a relationship which in effect prevented suit—after all people do not press indemnity claims against their employees or their wives or children, nor would they buy "liability" insurance from companies that insisted on being subrogated to such claims. The net result ought to please those who think there should be something like social insurance against loss through accident. It is not clear that Mr. Gregory's system would not in actual practice disturb this trend. If there is any ground whatever for apprehension on this score, further thought and study should be directed towards determining whether it would and, if so, towards making an intelligent choice between the two objectives in any field where they appear to conflict.

The danger of conflict which I fear is in the suggestion that there be full opportunity for one sued as a tortfeasor to bring into the suit all other possible tortfeasors and ultimately to compel them all to share the plaintiff's loss provided their fault is found to have contributed to it. The rule against contribution has a harsh sound and may not be defensible on any rational legal theory. That does not mean, however, that it works out badly in practice. It is very possible that the situation is about like this: an injured plaintiff will in most cases sue *all* those whom a jury might find liable to him. His reasons for this are obvious; it gives him a wider choice of proof and it forestalls his having to meet the contention, often forcefully made, that some person not sued is the one really to blame for the accident. There may be a tendency for juries to hold whatever defendant is actually before them, but there is a chance they will not and the plaintiff will not take this chance unless there is a good reason for it. Why, then, would a plaintiff omit a possible defendant from his suit? It is suggested that the most frequently recurring reasons will be found to be these: (1) that the plaintiff has settled with the defendant not sued; (2) that the defendant not sued has no insurance and is not amply solvent. In the latter case the defendant is omitted from suit *not* so much to save the cost of adding him (this would generally be about \$10) but

<sup>4</sup> See, for example, Nixon, *Changing Rules of Liability in Automobile Accident Litigation* (Oct. 1936) 3 *Law & Cont. Problems*; Recent Cases (1936) 3 *Univ. Chi. L. Rev.* 673.

because the plaintiff fears a jury, ignorant of the fact that one of the defendants is less responsible than the others, might bring in a verdict against the former defendant *alone*. The risk of this is practically much greater than the risk of failing to get a verdict against one or more of the amply solvent defendants if they are sued alone.

As a result of this, all the insured and amply solvent tortfeasors who have not settled with the plaintiff are generally joined in the suit. And among them there is actually contribution. Those that settle (before or after suit) do so roughly on the basis of proportional fault, tempered by bargaining skill. Those who suffer judgment to go against them have an arrangement among themselves as to the share of it each will pay. But if they had not, would it greatly matter? As among insurance companies and corporations large enough to be self-insurers—for it comes down to that—cross-claims for contribution would cancel out in the long run.<sup>5</sup>

How would the author's scheme affect this situation? In the first place it would obviously force an injured man to take a chance of getting an uncollectible—or only partially collectible—judgment which he may now avoid by taking the much smaller chance of suffering an adverse verdict. To that extent it would diminish certainty of compensation for injury. In the second place the right to contribution which it gives would have a general tendency to enable large corporations and insurance companies to shift part of the loss from accident to a relatively small group of individuals, instead of compelling them to distribute this loss over the whole of society as they are so peculiarly well fitted to do. That is certainly true if the defendants who are now sued and made to satisfy judgments (in cases where there is a choice of defendants), generally belong to the former class while those in the latter class constitute the bulk of those who are not now proceeded against. To be sure the right to contribution might not be used very often where it would work this way. If not, it would have a very limited usefulness indeed since it is probably largely unnecessary in most other situations. My guess is that insurance companies would insist on being subrogated to these claims and on pressing them for what they were worth (at least against those strangers to the assureds).<sup>6</sup> Perhaps the people thus adversely affected deserve very little sympathy. After all they have failed to insure themselves and have been found guilty of some kind of "fault." Perhaps they would be no more than justly punished. But this is a backhanded and unsatisfactory way to administer punishment, and the present system ought not to be changed merely to do such a thing. The innovation might put some pressure on people to become insured but one who is not constrained to take this precaution through fear of a judgment against himself alone is not likely to be affected by the relatively slight additional hazard that he may be made to pay contribution—even if he has any notion at all of the law as to co-tortfeasors. Likewise it is hard to see how the proposed change would be effective to promote accident prevention. Indeed there may be reason to suppose that insurers and big companies can do more about this than any other class with which we are concerned in this discussion.

Obviously enough, those who still believe that fault is the ideal basis for liability can embrace Mr. Gregory's scheme without worrying about the considerations here put forth. Nevertheless the proposals—in fact any proposal for contribution between

<sup>5</sup> Therefore under a system of compulsory "liability" insurance provisions for contribution would be quite unimportant.

<sup>6</sup> Many tortfeasors who are not amply solvent have enough property or income (often wages) to make suit against them worth while from an insurance company's point of view.

tortfeasors—may compel a choice between the premises which the author has adopted and those which are beginning to find expression in the present system as it is now actually developing. This may not be so, but serious consideration and study should be given to determining whether it is. The facts assumed in this review are mere guesses (based on some experience, however). They should be verified or shown to be inaccurate. If they are true, those who welcome the trend towards social insurance will regard any scheme providing for contribution between tortfeasors as something like a device for enabling workmen's compensation insurance carriers to shift a part of their burden to those fellow servants of the injured employee whose "fault" happened to contribute to the injury.

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*Law of Future Interests.* By Lewis M. Simes. Kansas City, Mo.: Vernon Law Book Co., 1936. Three volumes. Pp. xv, 527; xv, 556; xv, 583.

The writer of a legal treatise on any except the narrowest subjects has the intrinsically difficult task of steering a satisfactory route between the Scylla of details, historical, analytical, and factual, that characterize a law review article and the Charybdis of generalities, accurate as far as they go but not helpful in the situation where help is needed. It is not an easy task and no two navigators would in all respects lay the same course.

The general point of view of Professor Simes is indicated by the statement in his preface that ". . . judicial innovations in this field [Future Interests] in the twentieth century are likely to be far more significant than those of the four centuries immediately preceding." Consonantly with the idea thus expressed, Professor Simes uses the older material sparingly. It is there to give a background for, or to throw light upon, the modern law of future interests. There is a liberal use of statutory material throughout the whole work, and without making any extensive computation I should say that the distinct majority of the cases are of the last seventy-five years.

The work is divided into five parts. The first part is an outline and discussion of the classic division of future interests from reversions to expectancies, considered both historically and in their modern aspects. Part II deals largely with construction, and Parts III, IV and V cover what may be called the essential law of future interests; that is, the legal relations that go to make up the various future interests.

Part I gives Professor Simes an opportunity to express his attitude toward many of the underlying problems of Future Interests. He recognizes the survivals of distinctions which at present have mainly only a nuisance value, but contributes his effort toward the minimization of them. A noticeable illustration of this point of view is his discussion of the distinctions between vested and contingent remainders. His analysis of the different degrees of vestedness of remainders and of the various (and often confused) elements of contingency is illuminative and modern. Chapter 6 on Contingent Remainders distinguished from Executory Interests is equally stimulating and modern in its point of view, although his statement<sup>2</sup> of the difference between a remainder and an executory interest while professedly only in general terms might, it is believed, have

<sup>2</sup> Vol. I, p. 164.