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LEGISLATION

Estate Tax–Marital Deduction–Compliance With Revenue Procedure 64-19

In those cases where an executor or trustee is directed by the governing instrument to satisfy a pecuniary bequest or transfer in trust by a distribution of the property in kind,[1] with assets at values as finally determined for federal estate tax purposes, there is the possibility that the surviving spouse will receive property the fair market value of which at the time of distribution is less than the amount of the marital deduction.[2] The problem arises when there is a decline in the fair market value of the property between the date of valuation for federal estate tax purposes[3] and the date of distribution for purposes of state probate law. In such a case, if the fiduciary has discretion to divide the property solely according to its fair market value at the time of valuation, theoretically he can give the widow property which has become worthless and transfer all valuable assets to the remaining heirs. Thus, the heirs could receive disproportionately more and the widow disproportionately less of the decedent's actual estate, resulting in a frustration of the purpose of Congress in providing for the deduction[4] by depriving the govern-

1. In the absence of some provision in the instrument directing the executor to make a distribution in kind, the weight of authority imposes a duty upon him to convert such property into cash. *In re* Lazar's Estate, 139 Misc. 261, 247 N.Y. Supp. 230 (Surr. Ct. 1930).

2. INT. REV. CODE OF 1954, § 2056, provides that the maximum marital deduction shall be equal to one-half of the adjusted gross estate. Rev. Proc. 64-19 is aimed at removing the functional problem heretofore present in the pecuniary formula–the realization of a capital gain by the executor or administrator in the event of an appreciation in the estate. This functional problem prompted fiduciaries to use the fractional share formula, but now that the appreciation or depreciation will be accounted for in distribution to the beneficiaries under Rev. Proc. 64-19, the pecuniary formula appears to be most appealing. CASNER, ESTATE PLANNING 84-91 (3d ed. 1961).

3. INT. REV. CODE OF 1954, § 2032, provides for an alternate valuation allowing the executor to elect between date of death or one year from date of death. In a period of inflation, date of death would be the likely choice for valuation purposes.

4. The objective of the drafters of § 2056 was to place residents of common law jurisdictions on an equal basis with residents of community property states. Since the estate of the deceased husband in a common law jurisdiction was taxed on the full amount of his property, while a similar estate in a community property jurisdiction was taxed only on the deceased's one-half interest (the remaining one-half being taxed in the widow's estate), the resident in a common law jurisdiction was at a distinct tax disadvantage. For example, a $300,000 estate in a common law jurisdiction was taxed once on the full amount, while the same estate in a community property state was taxed twice on the amount of $150,000. To eliminate this disadvantage, Congress provided for a maximum marital deduction equivalent to one-half of the

ment of a portion of the tax collectible at the widow's death.[5]

In order to clarify this situation and provide an acceptable interpretation, Revenue Procedure 64-19 was promulgated.[6] In it the Service takes the position that the deduction will be allowed "where, by virtue of the duties imposed on the fiduciary either by applicable state law or by the express or implied provisions of the instrument, it is clear that the fiduciary . . . must distribute [the] assets" (1) so as to spread the appreciation or depreciation proportionately among the beneficiaries or (2) give the spouse assets the fair market value of which at date of distribution is as great as the fair market value at date of valuation.[7] If the requirements set forth by the Service are not met, it follows that the deduction will be disallowed. Recognizing that in many instances the provisions of the instrument or applicable state law are not clear as to whether the discretion of the fiduciary was limited in the manner[8] prescribed by the Internal Revenue Service, the procedure further provides that the deduction will be allowed under an instrument executed prior to October 1, 1964, if the Internal Revenue Service receives appropriate agreements from the fiduciary and surviving spouse as outlined in the procedure.[9]

While it may be argued that Revenue Procedure 64-19 is unnecessary because upon general principles of equity such action by a fiduciary would be an abuse of discretion, there is a striking absence of decisional law on this point.[10] Though such an absence may indi-

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adjusted gross estate, de Funiak, *A Review In Brief of Principles of Community Property*, 32 KY. L.J. 63 (1943).

5. The marital deduction rests on the assumption that one-half of the deceased's property will be taxed in his estate and the remaining one-half in the widow's estate. If, by exercise of discretion, the fiduciary is able to give the benefit of the marital deduction to the remaining heirs by giving them the appreciated property, then the government stands to lose on its tax collections. Though not implicitly stated, the Service is only concerned when there has been a depreciation of the assets since an appreciation will not adversely affect the tax revenue. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097 (1948).

6. Rev. Proc. 64-19, INT. REV. BULL. No. 15, at 30 (1964).

7. Rev. Proc. 64-19, INT. REV. BULL. No. 15, at 31 (1964).

8. *Ibid.*

9. Rev. Proc. 64-19, INT. REV. BULL. No. 15 at 32, 33 (1964), sets forth the standard form agreements which the fiduciary and surviving spouse must execute with the Service. The provisions of the forms are substantially the same as the requirements for a pro rata distribution of assets.

10. *In re* Stutzer's Estate, 155 Misc. 301, 279 N.Y. Supp. 221 (Surr. Ct. 1935), would suggest that the duty of *uberrima fides* might prohibit the fiduciary from distributing the assets to the detriment of the widow. This case was decided prior to N.Y. DECEDENT ESTATE LAW § 125, which made such action by a fiduciary violative of public policy. Other New York decisions subsequent to this public policy statement are generally an application of the enactment on a case by case basis. *In re* Bush's Will, 2 App. Div. 2d 526, 156 N.Y.S.2d 897 (1956); *In re* James' Estate, 189 Misc. 24, 65 N.Y.S.2d 756 (Surr. Ct. 1946); *In re* Farley's Estate, 176 Misc. 772, 29

cate that the principle is so well established that litigation has not been forthcoming, it is equally possible that the Internal Revenue Service was correct in recognizing the need for a definitive statement of the fiduciary power such as that set forth in Revenue Procedure 64-19. While New York has made the exercise of such discretion violative of public policy,[11] it has not specified a method for implementation. It is likely, however, that the implementation is implicit in the nature of the probate proceeding so that a general statement of public policy makes it clear that the state will not sanction the kind of action on the part of a fiduciary which Revenue Procedure 64-19 is designed to discourage. The Mississippi legislature has recently enacted two statutes to satisfy the requirement of the procedure.[12] The first statute limits the discretion of the fiduciary but provides that either of the two alternatives outlined by the Internal Revenue Service may be employed by the fiduciary.[13] The

N.Y.S. 2d 221 (Surr. Ct. 1941). Another indication that such action on the fiduciary's part might be an abuse of discretion is found in a Pennsylvania case: Hildreth Estate, 30 Pa. D. & C.2d 797 (1963). But this case involved a will construction and was merely interpreting a will clause rather than stating a general common law principle. Thus it cannot be doubted that the decisional law in this area is scant and what does exist is confused by statutory enactments and will clauses. In practice, the widow may never object because she is frequently the income beneficiary of both the marital and non-marital deduction part and possesses a power of testamentary disposition over both. Thus, in the typical case of the close-knit family, the widow may desire to take the depreciated assets in order to minimize the future tax on her own estate.

11. N.Y. DECEDENT ESTATE LAW § 125.

12. MISS. GEN. ACTS 1964, S. No. 2059, § 1. "That whenever under any last will and testament the executor or other fiduciary is required to, or has an option to, satisfy a pecuniary bequest to the surviving spouse of the testator, or to a trust for the benefit of a surviving spouse, by a transfer of assets of the estate in kind at values determined for federal estate tax purposes, the executor or other fiduciary shall be required to satisfy such pecuniary bequest by the distribution to the surviving spouse or trustee of either: (1) assets having an aggregate fair market value, on the dates of distribution, not less than the amount of the pecuniary bequest or transfer in trust as finally determined for federal estate tax purposes, or (2) assets fairly representative of appreciation or depreciation in the value of all property available for distribution in satisfaction of the pecuniary bequest or transfer."

MISS. GEN. ACTS 1964, S. No. 2060, § 1. "That the executor, trustee, or other fiduciary having discretionary powers under a last will and testament or transfer in trust shall be authorized to enter into agreements with the Commissioner of Internal Revenue of the United States of Ameriea, and other taxing authorities, to exercise the fiduciary's discretion so that the assets to be distributed in satisfaction of a bequest or transfer in trust will be selected in such a manner that cash and other properties distributed will have an aggregate fair market value representative of the pecuniary legatee's or transferee's proportionate share of the appreciation or depreciation in value to the date, or dates, of distribution of all property then available for distribution in satisfaction of such bequest or transfer. It being the purpose of this act to authorize sueh fiduciary to enter into any agreement that may be necessary or advisable in order to secure for Federal estate tax purposes the maximum marital deduction available under the Internal Revenue Laws of the United States of America and to do and perform all acts incident to such purpose."

13. MISS. GEN. ACTS 1964, S. No. 2059.

companion provision is an enabling statute providing that the fiduciary and surviving spouse, under an instrument executed prior to October 1, 1964, may enter into appropriate agreements with the Service to assure that the assets will be distributed in the manner provided by the procedure.[14] It has been suggested that the first statute, by permitting the fiduciary to choose between either of the alternatives and by failing to specify that one rather than the other of the alternatives is applicable, may not meet the requirements of Revenue Procedure 64-19.[15] A careful reading of section 2.03 of the procedure seems to indicate that the Service has imposed no such selection requirement and that it is unnecessary to specify that one rather than the other is applicable.[16] Thus, any criticism of the Mississippi statute based on this suggestion seems questionable and it appears that the statute does satisfy the requirements of Revenue Procedure 64-19.[17] Conflicting interpretations of Revenue Procedure

14. MISS. GEN. ACTS 1964, S. No. 2060.

15. 15 P-H FED. TAX REP. BULL. ¶ 32,361 (No. 29, July 16, 1964). "It is clear that [the] requirements of *Rev. Proc. 64-19* will be satisfied if the fiduciary must distribute assets with a date of distribution value equal to the amount of the marital bequest. It is equally clear that its requirements will also be satisfied if he must distribute assets fairly representative of the appreciation or depreciation of the estate. What is not clear is whether the requirements are satisfied if the fiduciary can choose between the two alternatives. Section 2.03 of *Rev. Proc. 64-19* seems to say that it must be clear under the instrument or state law 'that one rather than the other [of the two alternatives] is applicable.' If the instrument or state law allows the exeeutor to use either approach, can it be said that it's clear 'that one rather than the other is applicable'? Until this question is cleared up by further rulings, it would appear best to give the fiduciary only one of these alternatives."

16. Rev. Proc. 64-19, INT. REV. BULL. No. 15, at 31 (1964) reads: "In many instances . . . it cannot be determined that he would be required to make distribution in conformance with one or the other of the above requirements or that one rather than the other is applicable." The interpretation of this section by Prentice-Hall looks only to the second portion of the "or proposition," thereby failing to consider it as a whole. When considered as a whole, this section is essentially saying that when one or the other of the alternatives is set forth (as illustrated by the Mississippi statute) or where only one of the alternatives is set forth (and it is not important as to which one is chosen) then this is sufficient.

17. At present there are no cases or articles discussing the recent Mississippi statute. While on its face the statute may appear to give the fiduciary absolute discretion to choose between the alternatives in such a manner as to treat certain beneficiaries in a manner detrimental to others, generally, state probate law (which is equitable in nature), would prohibit such discretion. To illustrate: if at date of valuation Chrysler common stock has a market value per share of $50; the maximum amount of the marital deduction is $25 (½ of the adjusted gross estate); suppose Chrysler falls to $40 at time of distribution. Under alternative 1, the fiduciary must give the spouse $25, whereas, under alternative 2 he could give the spouse $20. If Chrysler goes up to $60, under alternative 1 the fiduciary must give the spouse $25, but under alternative 2 he may give the spouse $30. While probate law may vary from state to state, there is a duty imposed on the fiduciary to deal impartially with the beneficiaries. Thus, the probate law would seem to require that alternative which would be commensurate with the best interests of all the beneficiaries in the particular case. A grant of authority in the trust instrument which permits the fiduciary to exercise discretion must

64-19, however, has prompted the drafting of a statute including only the alternative of a "distribution fairly representative of appreciation or depreciation in the value of all property thus available for distribution in satisfaction of such pecuniary bequest or transfer."[18] The second alternative has been chosen because it promotes equality among the several beneficiaries and provides for ease in administration, as all parties share equally in any gains or losses in the estate.

Thus the following model statute is proposed:

> Whenever, under the terms of a will or trust, an executor or trustee is empowered to satisfy a pecuniary bequest or transfer in trust to a decedent's surviving spouse by a transfer in kind of assets of the estate at values as finally determined for federal estate tax purposes, the executor or trustee shall be required to satisfy such pecuniary bequest by the distributions of assets, including cash, having an aggregate fair market value at the date, or dates, of distribution fairly representative of appreciation or depreciation in the value of all property thus available for distribution in satisfaction of such pecuniary bequest or transfer.

In those states where the legislature has not enacted appropriate legislation, the estate planner can comply with Revenue Procedure 64-19 by a clause in the instrument itself. After authorizing a distribution in kind in satisfaction of a pecuniary bequest to the widow with assets at values as finally determined for federal estate tax purposes, the following clause may be inserted:

> The assets to be distributed in satisfaction of this bequest shall be selected in such manner that the cash and other property distributed will have an aggregate fair market value fairly representative of the distributee's proportionate share of the appreciation or depreciation in the value to the date, or dates, of distribution of all property then available for distribution.[19]

Legislation—Good Samaritan Protection

The common law does not legally obligate a stranger to respond to cries for help from the suffering or to attempt the rescue of anyone in immediate danger,[1] although exceptions to this general rule have

nevertheless be exercised under the fiduciary obligations of fairness and impartiality. 2 SCOTT, TRUSTS § 183 (2d ed. 1956).

18. Colson, *The Marital Deduction and Revenue Procedure 64-19*, 10 PRAC. LAW 70 (1964).

19. Suggested by Professor Herman L. Trautman, Vanderbilt University School of Law.

1. O'Keefe v. William J. Barry Co., 311 Mass. 517, 42 N.E.2d 267 (1942). See generally, PROSSER, TORTS § 54 (3d ed. 1964).

been recognized because of special relationships between the parties such as master-servant[2] or carrier-passenger.[3] The reluctance of courts to impose affirmative duties on the individual has been attributed to the common law's high regard for personal freedom and to the view that everyone is able to take care of himself.[4] However, the good samaritan who chooses to abide by his moral obligation to aid the distressed must exercise reasonable care in his efforts if he is to avoid civil liability as a consequence of his assumption of a legal relationship toward his charge.[5] Such a volunteer must take care not negligently to injure the victim or leave him in a worse condition than he was found.[6]

A number of state legislatures have recently concluded that fear of civil liability, and of medical malpractice suits in particular, has probably deterred those who would otherwise administer emergency assistance at the scene of an accident—especially physicians[7] and other licensed medical workers. Though these fears have been discounted by several commentators who have stressed the relative scarcity of reported suits of this nature[8] and the reasonableness of those decisions that have imposed liability on intervenors,[9] an increasing public apprehension of the danger of becoming involved in litigation has prompted the passage of a series of remedial statutes. The first good samaritan law was enacted by California in 1959, and to date, twenty-eight states have adopted some variation of this act.[10]

2. Rival v. Atchison, T. & S.F. Ry., 62 N.M. 159, 306 P.2d 648 (1957).

3. Continental So. Lines, Inc. v. Robertson, 241 Miss. 796, 133 So. 2d 543 (1961).

4. Note, 52 COLUM. L. REV. 631, 632 (1952).

5. Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941); RESTATEMENT (SECOND), TORTS § 322 (Tent. Draft No. 5, 1960).

6. Lindgren v. Shepard S.S. Co., 108 F.2d 806 (2d Cir. 1940).

7. "[D]octors, with ample reason, are increasingly afraid to act as Cood Samaritans. In such cases, the threat of a malpractice suit hangs over their heads like a Sword of Damocles. And malpractice insurance does not necessarily cover 'acts of mercy.'" Kearney, *Why Doctors are "Bad" Samaritans*, Reader's Digest, May 1963, pp. 87-88.

8. *E.g.*, United States v. Lawter, 219 F.2d 559 (5th Cir. 1955) (inexperienced crewman's delay in attempting to raise victim into helicopter caused her to lose her grip and fall, although more experienced personnel were available).

9. REGAN, DOCTOR AND PATIENT AND THE LAW 334 (4th ed. 1962); Averbach, *Good Samaritan Laws*, Case & Comment, March-April 1964, pp. 13, 18.

10. ALASKA STAT. § 08.64.365 (1962); ARK. STAT. ANN. § 72-624 (Supp. 1963); CAL. BUS. & PROF. CODE § 2144 (1960) (doctors); CAL. BUS. & PROF. CODE § 2727.5 (Supp. 1963) (nurses); CONN. GEN. STAT. REV. § 52-5776 (Supp. 1963); GA. CODE ANN. § 84-930 (Supp. 1963); IND. ANN. STAT. § 63-1361 (Supp. 1964); ME. REV. STAT. ANN. ch. 66, § 9-A (Supp. 1963) (doctors); ME. REV. STAT. ANN. ch. 71, § 14 (Supp. 1963) (osteopaths); MD. ANN. CODE art. 43, § 149A (Supp. 1964); MASS. GEN. LAWS ANN. ch. 112, § 12B (Supp. 1963); MICH. STAT. ANN. § 14.563 (Supp. 1963); MISS. CODE ANN. § 8893.5 (Supp. 1962); MONT. REV. CODES ANN. § 17-410 (Snpp. 1963); NEB. REV. STAT. § 25-1152 (Supp. 1963); NEV. REV. STAT. § 41.500 (Supp. 1963); N.H. REV. STAT. ANN. § 329.25 (Supp. 1963); N.J. STAT. ANN. § 2A:62A-1 (Supp. 1964); N.M. STAT. ANN. §§ 12-12-3, 12-12-4 (Supp. 1963); N.D.

The Tennessee good samaritan law is fairly typical of most of these statutes:

> Any person, including those licensed to practice medicine and surgery and including any person licensed to render service ancillary thereto, who in good faith renders emergency care at the scene of an accident and/or disaster, to the victim or victims thereof without making a charge therefor, shall not be liable for any civil damages as a result of any act or omission by such person in rendering the emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person, except such damages as may result from the gross negligence to the person rendering such emergency care.[11]

The most significant feature of this law is the more limited standard of care required of intervenors, whether they be physicians or laymen,[12] as compared to the common law's familiar rule requiring the degree of care expected of a reasonable man under the same or similar emergency circumstances. Because it has apparently excused all conduct short of gross negligence, so long as the volunteer acts in good faith, the legislature must have felt that the good samaritan had been held to an unreasonably high standard of performance by the common law rule, even though the reasonableness of his acts was measured by the circumstances of the emergency. Nevertheless, if this change from the usual standard of negligence is interpreted as imposing only a minimal standard of care, the statute should offer protection, and therefore encouragement, to hesitant rescuers without resorting to the extreme measure of punishing failure to take affirmative action to aid imperiled strangers. Although encouragement of some type of affirmative action by all passers-by is an admirable goal, it is questionable whether the first aid services rendered by laymen who would not otherwise attempt treatment of serious injuries would not aggravate the original injury in more cases than they would improve the injured person's condition. Accordingly, the wisdom of a marked departure from the time-honored rule of

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CENT. CODE §§ 43-17-37, 43-17-38 (Supp. 1963); OHIO REV. CODE ANN. § 2305.23 (Supp. 1964); OKLA. STAT. ANN. tit. 76, § 5 (Supp. 1964); PA. STAT. ANN. tit. 12, §§ 1641, 1642 (Supp. 1963); S.D. SESS. LAWS 1961, ch. 137, No. 509; TENN. CODE ANN. § 63-622 (Supp. 1964); TEX. REV. CIV. STAT. art. 1a (Supp. 1964); UTAH CODE ANN. § 58-12-23 (1963); VA. CODE ANN. § 54-276.9 (Supp. 1964); WIS. STAT. ANN. § 147.17(7) (Supp. 1964) (doctors); WIS. STAT. ANN. § 149.06(5) (Supp. 1964) (nurses); WYO. STAT. ANN. § 33-343.1 (Supp. 1963).

For an excellent analysis and criticism of these laws see Note, 42 ORE. L. REV. 328 (1963).

11. TENN. CODE ANN. § 63-622 (Supp. 1964).

12. The statutes of Arkansas, Georgia, Montana, New Mexico, Ohio, Oklahoma, Tennessee, Texas, and Wyoming offer protection to anyone who renders aid at the scene of an emergency. The remaining nineteen states have restricted immunity from civil liability to licensed medical practitioners and registered nurses.

due care on the part of laymen seems doubtful, especially when it is considered that the primary motivating factor for the recent surge of good samaritan legislation apparently has been to relieve medically trained volunteers from the threat of medical malpractice suits.[13]

The Tennessee law does not alter the liability of doctors who expect to be paid for their services,[14] but it seems improbable that this factor is foremost in the minds of those confronted with the sudden spectacle of persons too seriously injured to seek out medical assistance in the conventional manner. Notwithstanding a presumption of expectation of payment, the good samaritan physician can avail himself of the statute's protection against acts negligently performed during an emergency by seeking remuneration at such time as he becomes satisfied that liability will not result as a consequence of his assistance. Regardless of the statute's literal applicability to gratuitous service cases only, this procedure by the physician seems justified when balanced against the positive benefits to be derived from intervention by competent volunteers who, but for the statute, would decline to offer their services to strangers, thereby depriving them of what could be their best chance for survival.

Unlike most of the statutes of sister states, the Tennessee law is not subject to the criticism that it embraces only acts performed at the scene of an emergency or disaster, for it also protects the rescuer from adverse consequences of his subsequent "act or failure to act to provide or arrange for further medical treatment or care for the injured person."[15] This provision apparently includes care that is rendered enroute to a hospital, but could also afford protection to an intervenor who abandons his charge before his task is fulfilled. In any case the statute's imposition of liability for gross negligence would seem to afford a remedy for abandonment, at least in gross disregard of obvious consequences.

Although the Tennessee statute offers several refinements not found in earlier good samaritan laws, it is still subject to the basic criticism that this remedy is not warranted in the first instance. If the problem of witnesses indifferent to human suffering at scenes of emergencies is sufficient to merit legislative attention, it is submitted that the public could be reassured that their acts would be judged from a favorable perspective by something less than the complete

13. "[T]his [California] law has been heartily endorsed by the American College of Surgeons, the American Association for the Surgery of Trauma, and the National Safety Council. These three organizations have worked together in a joint action program to foster such legislation elsewhere." Kearney, *supra* note 7, at 89.

14. The rendering of emergency care creates the presumption that the doctor expects to be paid, even in the absence of an express contract. RESTATEMENT, RESTITUTION § 116 (1937).

15. TENN. CODE ANN. § 63-622 (Supp. 1964).

abandonment of the traditional common law test for negligence. Such a statutory provision could require that in all cases of voluntary assistance in emergency situations the judge must call to the attention of the jury the fact that the intervenor acted voluntarily and gratuitously, and that his acts were performed under emergency conditions. While such a charge in jury cases would not essentially change the common law standard, it is submitted that this form of legislative action would insure its application in every state court and, more important, would publicly declare legislative awareness that circumstances of an emergency must be considered in determining the reasonableness of actions taken in response to that emergency.

An incorporation of the present Tennessee good samaritan law's provisions into a legislative declaration of the common law rule could take the following form:

PROPOSED STATUTE

> In all civil cases in which any person, including those licensed to practice medicine and surgery in any state of the United States and including any person licensed to render service ancillary thereto in any state of the United States, renders emergency care at the scene of an accident or disaster to the victim or victims thereof, when he has no legal obligation to act, or who acts or fails to act to provide or arrange for further medical treatment or care for the injured person, without making a charge therefor, the judge as trier of fact in non-jury trials, or the jury, upon the judge's instructions, shall take into consideration the fact that such acts or omissions were gratuitously and voluntarily performed under emergency conditions, and that liability is not to be imposed if the trier of fact finds that such person acted with the due care and diligence of a reasonable man under the same or similar emergency conditions.

Tort–Comparative Negligence Statute

In the opinion of many, the doctrine of contributory negligence[1] is an unjust and outmoded concept. In its stead it has been suggested that a system of comparative negligence be established, whereby damages are apportioned according to the fault of the parties involved.

1. The doctrine had its origin in the case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809), where it was said that one man's negligence does not preclude the necessity of another's taking ordinary precautions to safeguard himself. By 1854 courts in the United States were citing the doctrine as a fixed rule of law. Pennsylvania R.R. v. Aspell, 23 Pa. 147 (1854).

I. OBJECTIONS TO THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE

Critics of the doctrine of contributory negligence contend that the conditions surrounding its birth and growth are no longer present, and hence its reasons for existence no longer valid. The doctrine developed during the industrial revolution when it was necessary to restrict the liabilities of rapidly growing industry.[2] This need was particularly acute since there was no liability insurance and no provision for spreading industrial risks.[3] The courts utilized the doctrine to control and sometimes even eliminate the jury, which often seemed unable to deal fairly with a corporate defendant.[4] Critics maintain that economic, industrial, and social changes have taken place in our society which not only make the doctrine unnecessary, but indeed make it unjust. Today workmen's compensation and liability insurance take care of most employer-employee problems, and the really large and difficult area of negligence litigation involves automobile accidents. Here, use of the doctrine can only cause injustice.

The main objection to the doctrine of contributory negligence is that, when plaintiff and defendant are both proximately negligent, it is unjust to place the whole loss on either one of them alone.[5] Under a system of comparative negligence, each party would be liable only for that portion of the damages for which he was responsible, and no injured plaintiff would go uncompensated simply because in some small way he had contributed to the cause of his damages.

In a large number of negligence cases where there may be contributory negligence, juries will often disregard their instructions and

2. Eldredge, *Contributory Negligence: An Outmoded Defense that Should be Abolished*, 43 A.B.A.J. 52 (1957); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468 (1953).

3. This doctrine "plus two other rules, *i.e.*, the fellow-servant doctrine and voluntary assumption of risk, greatly limited the tort liability of manufacturers and other employers to injured *employees*. The liability of manufacturers and contractors to *third persons* was restricted by the rule that there was no tort liability in the absence of privity of contract." Eldredge, *supra* note 2, at 52.

4. Malone points out that when simple disputes between neighbors had formed the bulk of tort litigation, juries had had no trouble disposing of them in a just and proper manner. However, when large and remote corporate defendants began to appear, the average juror, often regarding such corporations as intruders as well as very rich, became much more plaintiff-minded. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 157 (1946). See also Gair, *The Contributory Negligence Rule: An Offense to Justice*, 35 N.Y.S.B.J. 392, 395 (1963).

5. "The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot-free. No one has ever succeeded in justifying that as a policy, and no one ever will." Prosser, *supra* note 2, at 469. See also Atten, *Should Illinois Adopt a Comparative Negligence Statute? Yes!*, 51 ILL. B.J. 194, 196 (1962).

either return a compromise verdict or disregard the plaintiff's contributory negligence altogether.[6] It can truthfully be said that juries have their own system of comparative negligence. Critics of contributory negligence readily concede that such *ad hoc* apportionment of damages by juries does at times go on. However, they point out that when a jury makes such an unauthorized apportionment of damages in the face of the court's instructions, the result can only be loss of respect for the law and injustice for other plaintiffs who do not receive like treatment in similar cases.[7] It is further asserted that "approval of the covert violation of the present rule, in the interests of justice, suggests that perhaps the rule should be changed to conform to the practice."[8]

II. Benefits of a Comparative Negligence System

Proponents of comparative negligence contend that its adoption would do more than eliminate the injustice of contributory negligence; it would go far toward alleviating the long delays between injury and trial.[9] The long delays are, to a large extent, a direct product of the court congestion resulting from the large volume of negligence litigation, especially that involving automobile accidents. It is contended that the possibility of convincing a jury of the existence

6. Harkavy, *Comparative Negligence: The Reflections of a Skeptic,* 43 A.B.A.J. 1115, 1116 (1957); Powell, *Contributory Negligence: A Necessary Check on the American Jury,* 43 A.B.A.J. 1005, 1006 (1957).

The Supreme Court of Pennsylvania, in a rare display of court candor on this topic, recognized the prevalence of such compromise verdicts in Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150, 154 (1955).

7. 1 Vill. L. Rev. 115, 121 (1956); Eldredge, *supra* note 2, at 54; Prosser, *supra* note 2, at 469. "It should not be left to the caprice of jury make-up whether justice is done between parties in comparison with their behavior." Gair, *supra* note 4, at 398.

8. Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts,* 19 Albany L. Rev. 4, 11 (1955).

Proponents of the contributory negligeuce doctrine point out other qualifications of the doctrine which have been made by the courts. First, the plaintiff's negligence will not prohibit recovery if his conduct is not the proximate cause of his injury. Nor will contributory negligence bar recovery when the defendaut's conduct is "wilful, wanton, or reckless." The same is true in some jurisdictions when the defendant has violated a statute. Furthermore, the doctrine of last clear chance is available in most states. Critics, however, reply that such qualifications merely have the effect of shifting the entire burden of loss to the defendant, an arrangement which, when both parties are negligent, is no less unjust than placing the burden entirely on the plaintiff. See Turk, *Comparative Negligence on the March,* 28 Chi.-Kent L. Rev. 189, 304, (1950).

9. There is much truth to the statement that justice delayed may be the equivalent of justice denied. "A person whose rights are violated should have the aid of a court in securing redress. If he is compelled to forego that aid, merely because it was obviously not going to be available in time to do much good, he may legitimately complain that the courts have failed. The failure becomes egregious when the injured party is compelled to settle his claims on unjust terms." Averbach, *supra* note 8, at 5.

of contributory negligence is one of the greatest obstacles to settlement of these negligence actions. Hence, elimination of the doctrine of contributory negligence would facilitate such settlements and substantially reduce court congestion.[10] A second factor compounding the problem of court congestion in some locales is the heavy reliance on a relatively small number of trial specialists to try practically all negligence actions. In these areas court calendars must be accommodated to meet the schedules of such counsel, and further delay is the inevitable result. It has been maintained that under a system of comparative negligence, trials of negligence actions would be less complex, and such specialists would no longer be required,[11] thus eliminating many delays.

III. PRESENT EXAMPLES OF COMPARATIVE NEGLIGENCE SYSTEMS

Comparative negligence is not an untried theory. It has supplanted the doctrine of contributory negligence in Great Britain,[12] Canada,[13] and also on the continent.[14] In fact, the United States stands almost alone in not having abolished the old doctrine of *Butterfield v. Forrester*.[15] Even in the United States, however, acceptance of comparative negligence has been more widespread than is often realized. In 1908, the Federal Employers' Liability Act[16] inaugurated comparative negligence on a nationwide scale. It called for the apportionment of damages in all negligence actions for injuries to railroad employees engaged in interstate commerce. Subsequently, numerous states passed similar statutes which applied to limited situations both in and beyond the labor field.[17] The idea of apportionment was also incorporated in 1920 into the Merchant Marine Act applicable to injuries to maritime employees.[18] All of the above statutes applied only in limited circumstances, and to limited parties. However, seven states now apply some form of apportionment to negligence cases generally. Their systems of comparative negligence have taken several forms.[19]

A unique common law system of apportionment,[20] known as the

10. *Id.* at 8. But see text at note 59 *infra*.
11. Atten, *supra* note 5, at 197; see also Averbach, *supra* note 8, at 12, 17.
12. Law Reform Act of 1945, 8 & 9 Geo. VI, c. 28.
13. See Prosser, *supra* note 2, at 467 n.9.
14. See Turk, *supra* note 8, at 238-44, for a good review of the European history.
15. *Supra* note 1.
16. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958).
17. See Prosser, *supra* note 2, at 478-80.
18. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).
19. See text accompanying notes 20-27 *infra* & notes 30, 33, 39 *infra*.
20. Illinois and Kansas at one time had a form of common law comparative negligence which involved the comparison of degrees of negligence, but the courts later repudiated it. Turk, *supra* note 8, at 305, 317.

doctrine of remote contributory negligence, has evolved in Tennessee.[21] Under this doctrine an apportionment is made in only one very limited situation: when the plaintiff's negligence is found to have contributed only *remotely* to his injury.[22] Thus the old doctrine of contributory negligence is still given full effect—negligence on the part of a plaintiff which is a proximate cause of his injury will bar any recovery. It must be noted that the jury is given broad discretion in determining whether there was contributory negligence, and if so whether it was remote or proximate. However, proponents of comparative negligence see the Tennessee approach as at best an incomplete solution for the alleged injustices wrought by contributory negligence.

The Georgia system is also largely a creature of the common law, though it is based on two statutes.[23] The first of these,[24] though seeming to allow apportionment only in cases of injuries arising out of railroading, has been broadly interpreted to apply to all negligence actions, whether involving personal or property damage.[25] As thus interpreted, this statute would establish a comprehensive system of comparative negligence.[26] However, the second statute,[27] which asserts the principle that the plaintiff's failure to use his last clear chance to avoid harm should serve to defeat his recovery, has also come to be generally applied in all negligence actions, and serves to limit the number of cases in which an apportionment will be allowed. This imposition of the last clear chance doctrine upon Georgia's system of apportionment[28] draws criticism from those who

21. Writers trace the doctrine either from Nashville & Chattanooga R.R. v. Carroll, 53 Tenn. 347 (1871), or Whirley v. Whiteman, 38 Tenn. 610 (1858). See 22 TENN. L. REV. 1030, 1035 (1953).

22. 22 TENN. L. REV. 1030 (1953). Under the common law of most states remote negligence on the plaintiff's part is not contributory negligence and has no effect on his recovery.

23. "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him." GA. CODE ANN. § 94-703 (1936).

"If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." GA. CODE ANN. § 105-603 (1936).

24. GA. CODE ANN. § 94-703 (1936).

25. The Georgia courts have also construed § 94-703 to mean that apportionment will be allowed only if plaintiff's negligence is less than that of the defendant.

26. See for example, Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214 (1941); Lamon v. Perry, 33 Ga. App. 248, 125 S.E. 907 (1924).

27. GA. CODE ANN. § 105-603 (1936).

28. Georgia is the only comparative negligence state which has a statute dealing with last clear chance in favor of either the plaintiff or the defendant.

favor comparative negligence, for in the end the result is often the same as if the defense of contributory negligence remained.[29] Furthermore, a by-product of this complicated doctrine is jury confusion and numerous appeals.

Aside from the above apportionment systems, each of which is something of a hybrid product of the common law, there are several types of comparative negligence statutes which have been enacted in the United States. One form of comparative negligence statute recognizes degrees of negligence.[30] Under this type a plaintiff's negligence reduces his recovery if such negligence was "slight" and that of the defendant was "gross" in comparison. The courts of Nebraska and South Dakota—the only two states with such a statute in force—have refused to define the terms "slight" and "gross" with any degree of precision. Moreover, they have construed the statutes to mean that if the negligence of the plaintiff is more than "slight," or that of the defendant less than "gross," no apportionment will be made, and the contributory negligence of the plaintiff will bar his recovery in spite of the fact that his negligence was less than that of the defendant. This construction has led to jury confusion and a large number of appeals. A majority of these appeals have resulted in no apportionment being allowed.[31] Even proponents of comparative negligence criticize the use of degrees of negligence because it has resulted in apportionment in such a small number of cases.[32]

A second type of comparative negligence statute is that which allows apportionment on the basis of fault so long as plaintiff's contributory negligence is *less than* that of the defendant.[33] If plain-

29. PROSSER, TORTS § 65, at 439 (3d ed. 1964).

30. NEB. REV. STAT. § 25-1151 (1943): "In all actions brought to recover damages to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of the contributory negligence attributable to the plaintiff . . . ." S.D. CODE § 47.0304-1 (Supp. 1952), is identical.

31. For example, a plaintiff has been found guilty of more than "slight" negligence for failure to drive at a reasonable speed, Anderson v. Altschuler, 125 Neb. 853, 252 N.W. 310 (1934), or for driving at such a speed that he could not stop within his range of vision, Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N.W.2d 559 (1945). See Prosser, *supra* note 2, at 488.

32. *Id.* at 487.

33. "Contributory negligeuce shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering." WIS. STAT. ANN. § 331.045 (1957).

"In all actions hereafter accruing for negligence resulting in personal injuries or

tiff's negligence is greater than that of the defendant it will bar any recovery. Statutes of this type are in force in Wisconsin[34] and Arkansas.[35] Here again, the critics say that apportionment is not made in all cases where it should be.[36] Moreover, it seems illogical to allow a plaintiff to recover fifty-one per cent of his damages if he is found to be forty-nine per cent negligent, but nothing if he is fifty per cent negligent. Dean Prosser suggests that such a rule is the result of pure political compromise.[37] The "lesser" negligence rule also has the practical result of causing a great number of appeals where the court is asked to ascertain whether the conduct of the plaintiff was "fault" at least equal to that of the defendant.[38]

The "pure" comparative negligence statute[39] is the ideal of most proponents of apportionment. Under such a "pure" statute there will in every case be an apportionment of damages according to fault, regardless of the fact that plaintiff may have been guilty of a greater quantum of negligence than the defendant.[40] In the United States, only Mississippi has such a "pure" statute applicable to negligence actions generally.[41]

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wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of less degree than any negligence of the person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged, or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence. ARK. STAT. ANN. § 27-1730.2 (Supp. 1961).

34. WIS. STAT. ANN. § 331.045 (1957).

35. ARK. STAT. ANN. § 27-1730.2 (Supp. 1961). Arkansas's first comparative negligence statute, passed in 1955, had no such limitation. Ark. Acts 1955, No. 191, § 1. It was a "pure" statute similar to the one in Mississippi, MISS. CODE ANN. § 1454 (1942). That 1955 statute was superseded in 1957 by the present one.

36. Knoeller, *Review of the Wisconsin Comparative Negligence Act—Suggested Amendment*, 41 MARQ. L. REV. 397, 415 (1958).

37. Prosser, *supra* note 2, at 494.

38. *Id.* at 491.

39. "In all actions hereafter brought for personal injuries, 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 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 the owner of the property, or the person having control over the property." MISS. CODE ANN. § 1454 (1942).

40. Of course, the defendant can also recover a portion of his damages, for the statute cannot be construed to defeat a counterclaim. Note, 30 N.D.L. REV. 105, 114 (1954).

41. The FELA is also a "pure" act, but of course it applies only where plaintiff and defendant occupy an employer-employee relationship.

In practice the Mississippi system has the disadvantage of requiring a defendant to specifically request the court for an instruction to the jury that they should take the negligence of the plaintiff into consideration in arriving at a verdict. Defense counsel are often reluctant to make such specific requests, which may seem to a jury to imply an admission of guilt on the defendant's part. Powell, *supra* note 6, at 1062 (1957).

A statutory provision which may be used in conjunction with any form of comparative negligence statute is one calling for the use of special verdicts or interrogatories, rather than the general verdict. Of the states with some system of comparative negligence, only Wisconsin makes use of special verdicts.[42] Use of such special verdicts provides a check on the jury; it allows at least a limited review as to whether the court's instructions have been followed.[43]

IV. EVALUATION OF VARIOUS COMPARATIVE NEGLIGENCE SYSTEMS

From the experiences of these various states under their comparative negligence statutes, certain observations can be made. For one thing, the use of degrees of negligence should be avoided.[44] A system such as that of Nebraska[45] and South Dakota,[46] which allows apportionment only where plaintiff's negligence was "slight" and defendant's "gross," serves only to cause jury confusion and a large number of appeals. Moreover, the use of such degrees leaves the damages undivided in most cases. It is a closer question as to whether a statute should be completely "pure," that is, whether it should allow a plaintiff to make an apportioned recovery where he has been guilty of a greater quantum of negligence than the defendant. However, the "pure," or comprehensive, statute seems preferable. Besides providing consistency and cutting the number of appeals, a "pure" statute may eliminate a source of injustice possible under a limited or "impure" statute. A jury with a very sympathetic plaintiff before it must often feel the temptation to find contributory negligence to be less than fifty per cent in order that such plaintiff might recover. There should be fewer such temptations under a "pure" statute, where even a ninety-nine per cent negligent plaintiff may be allowed a "recovery" of a portion of his damages.[47]

Certain of the old common law defenses should be abolished in a state which has a system of comparative negligence. The doctrine of "gross" negligence, under which contributory negligence will not

42. WIS. CODE ANN. § 270.27 (1957), requires the use of special verdicts when so requested by either party. Under the 1955 comparative negligence law of Arkansas, *supra* note 34, special verdicts were mandatory. The 1957 law dispensed with special verdicts however.

43. See Prosser, *supra* note 2, at 497, for an example of typical questions to be submitted to the jury.

44. Prosser, *supra* note 2, at 508.

45. *Supra* note 30.

46. *Ibid.*

47. Of course such "recovery" will be deducted from defendant's recovery on a crossclaim. However, under the use of a system of special verdicts, the jury will probably not have to actually make this deduction.

prevent a full and unapportioned recovery by the plaintiff wherever the defendant's negligence may be characterized as "gross,"[48] should be eliminated. Conduct previously characterized as "gross" negligence should be subject to comparison just as is ordinary negligence.[49] Similarly the doctrine of last clear chance should be abolished.[50] This rule arose out of a desire to ease the hardship of a plaintiff under the contributory negligence doctrine. In a state with comparative negligence, the retention of the rule tends to shift the balance too much in favor of the plaintiff, allowing the injustice of non-apportionment to fall upon the defendant in cases where there has in fact been proximate contributory negligence on the plaintiff's part. Likewise the doctrine of assumption of risk might well be dispensed with as a complete defense.[51] Although in theory assumption of the risk of an undertaking seems quite easily distinguishable from contributory negligence, in practice it is quite often almost impossible to distinguish "venturousness" from "carelessness."[52] Juries are particularly hard pressed to make such hairline distinctions. It would seem wise therefore to allow a jury to regard "venturousness" on the part of a plaintiff as a form of carelessness or negligence which a jury could compare with that of the defendant. The abolition of all three of these doctrines as complete defenses would seem most consistent with the main purpose of comparative negligence: the apportionment of loss among guilty parties in as nearly true a proportion to their fault as possible. Their elimination would also have the salutary effect of simplifying jury instructions, eliminating jury confusion, and reducing the number of appeals.

Finally, and perhaps most important, some form of special verdicts or special interrogatories[53] should be used in connection with a system of comparative negligence.[54] Special verdicts and interrogatories are

48. "Gross" usually designates conduct which is willful, wanton, or reckless.

49. Wisconsin abolished the doctrine of gross negligence in 1962. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

50. Prosser, *supra* note 2, at 496. But see, Shell and Bufkin, *Comparative Negligence in Mississippi*, 27 Miss. L.J. 105, 111 (1956).

51. Wisconsin abolished the assumption of risk doctrine in 1962. McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

52. See Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

53. Where a special verdict is used, no general verdict is returned; the jury merely returns answers to specific questions on the issues. Where special interrogatories are used, there is a regular instruction to the jury and a general verdict is returned. In addition, however, the jury also answers questions submitted along with their instructions. These answers serve as a check upon the jury's conclusions.

54. Lipscomb, *Comparative Negligence*, 1951 Ins. L.J. 667, 673 (1951); Atten, *supra* note 5, at 202.

Some states still hold that all controverted facts not found specifically must be taken to be found against the party having the burden of proof. In such states special verdicts become unwieldy and unworkable, and special interrogatories will serve better.

designed to reveal failures to follow the court's instructions. Under the cloak of secrecy, which a general verdict provides, a jury is often free to completely disregard their instructions. Elimination of the general verdict will not absolutely insure jury conformity to instructions,[55] but, at least the court knows whether the jury has found contributory negligence at all, and if so, in what proportions. Perhaps just as important is the fact that, under such a system, a jury is at least forced to give detailed consideration to the precise legal and factual issues presented.[56] Finally, the use of special verdicts will often eliminate the need for long and complicated instructions, which are themselves a fertile source of error and appeals.[57]

VIII. CONCLUSIONS

It is suggested that the utilization of the above recommendations will help insure a successful comparative negligence system. There are, however, certain problem areas under comparative negligence for which no simple solutions can be given. First, there is evidence that insurance rates increase substantially in states which have a comparative negligence system.[58] Second, court congestion may actually increase under a system of comparative negligence, since lawyers may be willing under an apportionment statute—especially a "pure" one—to accept cases they would not have bothered with before.[59] Finally, no adequate solution to the problem of how to handle apportionment in multiple party situations has been advanced.[60] The problem is particularly acute in regard to contribution between joint tort-feasors. It is not equitable or consistent with the principle of comparative negligence not to allow contribution. Neither would it be equitable to allow equal contribution. However, even such an authority as Dean Prosser recommends leaving multiple party appor-

However, other states hold that facts not found specifically must be deemed to support the judgment if there was any evidence to sustain it. In these states special verdicts are probably preferable since they eliminate the need for instructions, which might be long and complicated. See note 57 *infra* and accompanying text. See also FED. R. CIV. P. 49(a).

55. In fact, with juries being compelled to agree on percentages of negligence for plaintiff and defendant, quotient verdicts may well multiply.

56. Juries which might be tempted to return verdicts in favor of small children or pretty girls and against large corporations, may hesitate to return special findings which they know to be against the evidence.

57. Prosser, *supra* note 2, at 502. Special interrogatories do not have this advantage, since they are submitted along with regular instructions. See note 53 *supra*.

58. *Supra* note 40, at 117.

59. See Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 98 (1959).

60. Prosser, *supra* note 2; Burns, *Comparative Negligence: A Law Professor Dissents*, 51 ILL. B.J. 708 (1963).

tionment "theoretically perfect as it may be, to the Canadians until the American jury is eliminated or at least improved, for the reason that the game is not worth the candle."[61]

Here it is only our purpose to recommend what might be a workable comparative negligence system, it being beyond the scope of this paper to debate and determine the ultimate issue of whether such a system should be adopted.[62] Despite the problems which arise under even the best apportionment system,[63] it is submitted that a pure comparative negligence statute, coupled with the abolition of certain common law complete defenses[64] and the use of special verdicts, has much to recommend its adoption.

Voting Rights—Residence Requirements for Voting in Presidential Elections

In the 1960 presidential election, between five and eight million American citizens, otherwise qualified to vote, were disenfranchised by virtue of their having changed place of residence during the year preceding the election.[1] At the present time, state residence requirements vary widely.[2] The most popular requirements are one year in the state, three months in the county, and thirty days in the locality.[3] The justification for these requirements is that they tend to prevent fraud, give the citizens sufficient time to acquaint themselves with the local candidates and issues, and allow them to become cognizant of their stake in community affairs.[4] These considerations may be applicable to local elections, but the prevention of fraud is the only one applicable to presidential elections, and it would seem that an efficient registration system would greatly reduce this prob-

61. Prosser, *supra* note 2, at 508. *Contra,* Knoeller, *supra* note 36, at 416.

62. For arguments against adopting such a system see Body, *Comparative Negligence: The Views of a Trial Lawyer,* 44 A.B.A.J. 346 (1958); Burns, *supra* note 60; Harkavy, *supra* note 6; Powell, *supra* note 6. In favor of such a system see Atten, *supra* note 5; Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress,* 43 A.B.A.J. 127 (1957); Eldredge, *supra* note 2; Gair, *supra* note 4; Prosser, *supra* note 2.

63. See text accompanying notes 58-60 *supra.*

64. See text accompanying notes 48-52 *supra.*

1. Scammon, *The Electoral Process,* 27 LAW & CONTEMP. PROB. 299, 304 (1962).

2. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 18 (1964-65).

3. *Hearings Before the Senate Judiciary Subcommittee on Constitutional Amendments on Nomination and Election of President and Vice President and Qualifications for Voting,* 87th Cong., 1st Sess. 846 (1961) [hereinafter cited as *Hearings*].

4. *Id.* at 850.

lem. The victims of these outmoded residence requirements include many citizens who are best equipped to exercise the right of voting, such as educators, clergymen, and professional people. "Apart from the possible effects upon election results . . . [these archaic residence requirements] produce apathy and bitterness in such people toward governments which cheat them of their democratic birthright merely because they move their residence."[5]

There have been encouraging trends to liberalize residence requirements in recent years. Some states have reduced their county or precinct residence requirements,[6] while others have reduced the restrictions on intrastate movement.[7] However, the remedy which seems to be winning the greatest acceptance is that of enacting special legislation to safeguard the right of those who have moved from one state to another[8] to vote in presidential elections. The first step in this direction was taken in 1953 when Connecticut adopted a statute which extended absentee voting to a person who left Connecticut to take up residence in another state. This statute permits such a person to cast an absentee ballot in Connecticut for President and Vice-President for a period of twenty-four months, unless he has met the voting residence requirements in the new state.[9] In 1954, Wisconsin adopted a method which is the reverse of the Connecticut approach.[10] This method permits a new resident of Wisconsin having less than one year of legal residence to vote for President and Vice-President if he was a qualified voter in the state of prior residence or if he would have been eligible had he remained there until the election date.[11] Each of these approaches has merit,[12] but if some

5. S. REP. No. 80, 88th Cong., 1st Sess. 13 (1963).

6. Alabama, Louisiana, New Jersey, North Carolina, Rhode Island, and Tennessee.

7. California, Delaware, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota and Tennessee.

8. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 2, at 16. At the present time 21 states have enacted some type of special legislation to protect the right of our mobile citizens to vote in presidential elections.

9. CONN. GEN. STAT. REV. §§ 9-158 to -163 (1958). (For the purposes of this article, whenever the Connecticut approach is mentioned, it refers to this statutory plan). Similar statutes were also adopted in Massachusetts, Vermont, and Wisconsin. Mass. Acts 1961, ch. 582, §§ 1-2, at 490 (repealed); VT. STAT. ANN. tit. 17, § 67 (1959); WIS. STAT. ANN. § 9.047 (Supp. 1963). In 1963, Connecticut enacted legislation which permits new residents to vote in Connecticut in presidential elections. CONN. GEN. STAT. REV. §§ 9-163a to -163j (1964). This legislation does not affect the provisions which permit persons who have moved from Connecticut to vote in presidential elections by absentee ballot.

10. WIS. STAT. ANN. §§ 9.045 to -.046 (1961).

11. The Wisconsin plan, which has found wider acceptance than the Connecticut plan, has been adopted in Arizona, California, Massachusetts, Missouri, Ohio, and Oregon. CAL. CONST. art. 2, § 1-½; CAL. ELECTIONS CODE §§ 750-65 (54 days); MASS. GEN. LAWS ANN. ch. 51 §§ 1A-1B (Supp. 1962) (repealing 1961 Connecticut type statute); MO. CONST. art. VIII, § 2, MO. REV. STAT. §§ 111.063 to -.067 (1959)

states followed the Connecticut approach while other states followed the Wisconsin approach the situation could arise in which many citizens who changed their residence would still be unable to vote. For example, the Connecticut approach takes care of former residents who move out of the state, but it has no provision to grant voting rights to new residents. On the other hand, the Wisconsin approach takes care of new residents but has no provision to help former residents. Recognizing the need for a uniform approach to the problem, the Council of State Governments in 1955 recommended the adoption of a statute following the Connecticut plan;[13] however, it now appears that they are supporting either approach.[14]

In 1961 the National Conference of Commissioners on Uniform State Laws directed its attention to the problem and at its annual meeting in 1962 promulgated the Uniform Act for Voting by New Residents in Presidential Elections[15] which, in general, follows the Wisconsin approach.[16] The Uniform Act waives the requirement for an extended period of residence so that the new residents will be

(60 days); OHIO REV. CODE ANN. §§ 3504.01 to -.07 (1960) (40 days); ORE. CONST. art. II, § 2; ORE. REV. STAT. §§ 247.410 to .-47 (1961) (30 days).

12. See *Hearings* 31-38.

13. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 79 (1955).

14. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 76 (1962).

15. UNIFORM ACT FOR VOTING BY NEW RESIDENTS IN PRESIDENTIAL ELECTIONS, 71 ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1 (1962). The major provisions of the act are:
§ 1 (Eligibility of New Residents to Vote): "Each citizen of the United States who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for less than [insert period of required residence for voting] prior to a presidential election is entitled to vote for presidential and vice presidential electors at that election, but for no other offices, if (1) he otherwise possesses the substantive qualifications to vote in this state, except the requirement of residence [and registration], and (2) he complies with all the provisions of this act."
§ 2 (application for Presidential Ballot by New Residents): "A person desiring to qualify under this Act . . . [is not required to register but] on or before [insert last date for registration or some other date sufficiently in advance of the election] shall make an application in the form of an affidavit executed in duplicate in the presence of [appropriate official] . . . ."

16. Six states have enacted provisions substantially similar to the Uniform Act. CONN. GEN. STAT. REV. §§ 9-163a to -163j (1964) (60 days residence in State and town); IDAHO CODE ANN. §§ 34-408 to -421 (1963) (apply on or before 10 days before election); ILL. ANN. STAT. ch. 46, § 3-1 (Smith-Hurd Supp. 1963) (60 days residence in election district); KAN. SESS. LAWS 1963, ch. 232, at 396; ME. REV. STAT. ANN. ch. 3-A, §§ 29-A to -0 (Supp. 1963) (apply on or before 30 days before election); NEB. REV. STAT. §§ 32-1301 to .1314 (Supp. 1963). The Illinois statute differs substantially from the Uniform Act in two ways: (1) it has incorporated the cumbersome Wisconsin requirement that the applicant either have been a qualified voter in his state of prior residence or that he would have been had he remained there and, (2) a person who has made an intrastate change of residence and who has not qualified under the general residence requirements (90 days in the county) will be permitted to vote for the presidential and vice presidential electors if he qualifies under this act (60 days in the election district).

allowed to vote, if otherwise qualified, provided they apply for a ballot within a specified number of days prior to the election. The application for a ballot is in the form of an affidavit certifying that the applicant has not and will not vote in any other manner. Election officials are to be given ample time to process the application and are required to mail a duplicate of the application to an appropriate official of the state in which the applicant last resided. If satisfied that the applicant is qualified to vote, the official shall deliver to the applicant a special ballot for presidential and vice presidential electors which is to be filled out and sealed in the election official's presence.

The approach adopted by the Uniform Act seems to be preferable to the Connecticut plan, and the recommended act improves the cumbersome procedures of the Wisconsin Act. The Connecticut approach which merely extends the absentee voting privileges ignores the inconvenience, administrative difficulties, and the possibility of fraud.[17] The Uniform Act, unlike the Wisconsin statute, does not require a certificate to be sent to the former state of residence for verification of the applicant's qualifications in that state. The removal of this cumbersome procedure is certainly desirable, and it would seem that the provisions of the Uniform Act requiring that the election official send a duplicate of the application to the state in which the applicant last resided and that application for the ballot be made a stated number of days before the election are adequate safeguards against the possibility of fraud. At the present time, fifteen states, including Connecticut, have adopted statutes or constitutional amendments which allow new residents to vote for presidential and vice presidential electors,[18] but there has not been sufficient time nor statistics since most of these states have adopted these provisions to determine to what extent people will exercise their voting privileges under them.[19]

The acts in some of the states are open to criticism because of the inconvenience of voting under their provisions. In most states the voter not only has to go to a central county office to make application, but, after receiving his ballot, he must return to the same central office to mark his ballot and sign another affidavit.[20] Such

17. *Hearings* 38; 77 HARV. L. REV. 575 (1964).

18. Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Maine, Massachusetts, Missouri, Nebraska, New Jersey, Ohio, Oregon, and Wisconsin.

19. Wisconsin has had experience in three national elections where new residents were allowed to vote for presidential electors but no state wide statistics are available. In the 1960 election 465 new resident votes were cast under the special procedure in Madison, Wisconsin (population 96,000). California and Ohio keep state wide statistics on the votes cast under their new resident procedures, and in the 1960 election there were 11,635 such votes cast in California and 8,648 in Ohio. *Hearings* 483.

20. 9C UNIFORM LAWS ANN. 141 (Supp. 1963). In a large county the applicant

inconvenience probably will not inhibit the truly dedicated citizen; but it will act as a barrier to many on the fringes. It would seem that once the applicant has made application, been approved, and received his ballot, it would be sufficient to have the ballot witnessed by a notary public and then mailed to the appropriate official.

The Uniform Act is also open to criticism in that it does not spell out the effect which it is to have on local residence requirements. Most states have, in addition to the within-the-state residence requirement, local residence requirements which vary from thirty days to one year.[21] To effectuate the purpose of the Uniform Act, these requirements should be waived. These local residence requirements present one additional problem. If a state adopted a new resident voting statute with a period of required residence shorter than the local residence requirement, a qualified voter who made an intrastate change of residence might not be permitted to vote because he had not satisfied the local residence requirement,[22] while a new resident of the state would be allowed to vote. To eliminate the discrimination against intrastate change of residence, Kansas, for example, has added a within-the-state residence requirement of forty-five days to the Uniform Act.[23] This period is slightly in excess of the thirty-day local requirement and, therefore, discriminates against the interstate mover. Where local residence requirements exist, it would seem preferable to place the interstate and intrastate movers on an equal basis for voting in presidential elections.

In some states, residence requirements are set forth in the state constitution, and several of these constitutions deal specifically with voting in presidential elections.[24] However, states wishing to enact legislation reducing the residence requirements for voting for presidential electors may find that they can do so without constitutional change. That residence requirements can be reduced by state legislative action without a constitutional amendment is based upon the proposition that qualifications for voting in presidential elections are governed by article II, section 1, of the federal constitution which reads "Each state shall appoint, in such manner as the *legislature* there of

may live as far as thirty miles from the designated office. Requiring two trips to the office—one to make application and one to vote—is an inconvenience which may keep many persons from voting.

21. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 829 (1963).

22. Illinois has solved this problem by permitting intrastate movers who do not satisfy general state residence requirements to vote for presidential electors on the same basis as new state residents. ILL. ANN. STAT. ch. 46, § 3-1 (Smith-Hurd Supp. 1963). See the discussion in note 15 *supra*.

23. Kan. Sess. Laws 1963, ch. 232, at 396.

24. CAL. CONST. art. II, § 1-½; MO. CONST. art. VIII, § 2; OHIO CONST. art. V, § 1; ORE. CONST. art. II, § 2.

may direct, a number of electors . . . ."[25] Although the Supreme Court has not ruled on this precise point, in *McPherson v. Blacker*[26] it was suggested in dictum that the power of state legislatures over the method of selecting presidential electors "is plenary and cannot be limited by state constitutions."[27] Although not deciding this particular issue, recent Supreme Court decisions have cited *McPherson v. Blacker*, with approval,[28] and a number of state courts have taken a similar position in upholding the validity of legislation allowing servicemen to vote by absentee ballot[29] and legislation granting voting rights to women[30] even though such legislation violated provisions of the state constitutions. This view, however, has not gained universal acceptance as is evidenced by one state governor's veto of a bill extending absentee voting privileges to nonresidents on the ground that it violated the state constitution.[31] The governor, recognizing the contrary dictum of *McPherson v. Blacker*, concluded that "in absence of a definitive decision . . . we should not lightly assume that the legislature can override our Constitution in this respect."[32] This view is contrary to the conclusion of the Commissioners on Uniform State Laws[33] and the few writers who have considered the problem.[34] It seems safe to conclude that the choosing of presidential electors is within the power of the state legislatures, in whatever manner they deem proper, and that this power is not limited by state constitutional provisions; however, the state legislatures are probably subject to such procedural limitations as veto, referendum, and initiative.[35] Even if there is some doubt as to the constitutional limita-

25. U.S. CONST. art. II, § 1. (Emphasis added.)

26. 146 U.S. 1 (1892).

27. Kirby, *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROB. 495, 500 (1962). Professor Kirby, formerly Chief Counsel Senate Judiciary Subcommittee on Constitutional Amendments, examines state constitutional limitations and concludes that these provisions have no limiting authority over the state legislatures' power to prescribe lesser requirements for those voting for presidential electors. See also, Lugg, *State Legislatures' Authority Over the Selection of Presidential Electors*, 37 CONN. B.J. 7 (1963).

28. Lassiter v. Northampton Election Bd., 360 U.S. 45, 51 (1958); Ray v. Blair, 343 U.S. 214, 223 (1952); Colegrove v. Green, 328 U.S. 549, 568 (1946).

29. Commonwealth *ex rel.* Dummitt v. O'Connell, 298 Ky. 44, 181 S.W.2d 691 (1944); Opinion of the Justices, 80 N.H. 595, 113 Atl. 293 (1921); Opinion of the Justices, 45 N.H. 595 (1864); Opinion of the Justices, 37 Vt. 665 (1864). *But see* Hawke v. Smith, 253 U.S. 221 (1920).

30. Scown v. Czarnecki, 264 Ill. 305, 106 N.E. 276 (1914).

31. Message of Governor Robert B. Meyner to the General Assembly of New Jersey Accompanying Assembly Bill No. 684, December 19, 1960.

32. *Ibid.*

33. 9C UNIFORM LAWS ANN. 135, 137 (Supp. 1963).

34. Kirby, *supra* note 27; Lugg, *supra* note 27.

35. Smiley v. Holm, 285 U.S. 355 (1932) (under article I, section 4, the legislatures' power is subject to the governor's veto). In Commonwealth *ex rel.* Dummitt v. O'Connell, note 29 *supra*, the court interpreted *Smiley v. Holm* as meaning only that

tions, this should not deter state legislatures from acting. As one writer has pointed out,[36] both the Uniform Act and the Connecticut method contemplate the use of a special ballot which could easily be separated from the regular ballots in the event that such statutes should be declared unconstitutional. In adopting such legislation, state legislatures should carefully examine the state's general residence requirements and make any changes necessary to put intrastate and interstate movers on an equal basis for voting in presidential elections. All states should adopt the Uniform Act and thereby minimize disenfranchisement of the mobile members of our society.

a legislature must function "in the method prescribed by the State Constitution," but that when the legislature functions in the prescribed manner, "the scope of its enactment" is not also limited. 298 Ky. at 50, 181 S.W.2d at 694.

36. 77 HARV. L. REV. 574, 578 (1964).