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CASE COMMENTS

CONFLICTING STATUTES PASSED AT SAME SESSION OF LEGISLATURE—WHICH STATUTE PREVAILS.—In May, 1930 the Board of Council of Sturgis, a city of the fourth class, passed an Ordinance authorizing the construction of a water system for the city and providing for the issuance of $75,000 of water revenue bonds. The contract for the construction of the water system was made in July, 1930, and the parties brought an action for a declaration of their rights in view of two seemingly conflicting statutes.

Chapter 133 of the Acts of 1926 authorized cities of the second, third, and fourth classes to acquire waterworks systems, and to issue bonds therefor payable from the revenues of such works. Chapter 92 of the Acts of 1930 reenacted this law and applied it to cities of the fifth and sixth classes. This Act contained an emergency clause and took effect immediately on March 17, 1930. At the same session, the General Assembly passed an Act providing that no city of the fourth, fifth, or sixth classes, being the owner of any waterworks or lighting system, should sell, convey, lease, mortgage, or otherwise incumber such systems without a two-thirds vote of those voting in an election held for that purpose. Acts of 1930, Chapter 103.

In the above mentioned action, the court held that the two statutes were not conflicting, and that no election was necessary before the issuance of bonds for the acquisition of a waterworks system. City of Sturgis v. Christenson Bros. Co., 235 Ky. 346, 31 S. W. 2nd 386.

On the question of conflicting statutes the court said, “It is the rule in this State that where two conflicting Acts upon the same subject are passed at the same session of the legislature, and their conflict is such that they cannot be harmonized or made to stand together, the one containing the emergency clause will prevail over the one containing no such clause.”

An earlier case cited in support of this statement held that statutes on the same subject passed at the same session of the legislature should receive a construction if possible which will give effect to each of them. Naylor et al. v. Board of Education of Fulton County et al., 216 Ky. 766, 288 S. W. 690 (1924).

As to statutes on the same subject passed at the same session of the legislature which are inconsistent, cannot be harmonized, and neither of which contains an emergency clause, the one of latest enactment will prevail where it is impossible to give effect to both. People v. I. C. Railroad Co., 337 Ill. 276, 169 N. E. 178; Fidelity Deposit Co. of Maryland v. Logan, 230 Ky. 776, 20 S. W. 2nd 753. (1929).

Another point which must be considered in determining which of two conflicting statutes prevails, neither containing an emergency clause, is the distinction between special and general statutes.

A 1917 Kentucky case says in a situation in which one statute is local, relating to particular places and persons, and another is gen-
eral, they will both be held to be in force and construed as forming one consistent law. *Ingram v. Commonwealth*, 176 Ky. 706 (1917), 197 S. W. 411. A California case of 1929 held that generally, a statute having special application controls a general one without regard to their dates of passage. *Chilson v. Jerome*, 283 Pac. 862, (Cal.) The rule held in a Federal case is that specific provisions of special legislation on a subject must be given effect as against a general statute on that subject, and an earlier special statute must be considered as an exception to the later general one.

However, there is a limitation to this rule found in a Minnesota case which held that special provisions of a statute are affected by a later general statute which expressly modifies or amends the former act. *State v. Babcock*, 175 Minn. 583, 222 N. W. 285, (1928). It is submitted, with no other cases found, that this is necessarily true in every jurisdiction.

A proper conclusion is that statutes on the same subject will be considered together in determining the intent of the legislature, and will be construed if possible so as to give effect to both acts. But if there are two conflicting statutes which cannot be harmonized, the one containing an emergency clause, if either does, will prevail, and if neither contains such a clause, the one of latest enactment will prevail. However, when one of the conflicting statutes is a special act and the other is a general one, the special act will control as to its special application unless the general act is of a later enactment and expressly modifies or amends the former act

G. B. F.

CRIMES—Killing in Defense of Another.—As officers approached defendant with a warrant for his arrest, deceased attempted to assault defendant with a knife. The officers arrested deceased and turned to take him away. Defendant then appeared with a shotgun, and shot deceased in the back. His claim was that he shot in defense of one of the officers. He was given a life sentence. While the instructions on the question at the trial were correct, so that accused could not rest his appeal on that ground, the court stated that “a killing may be excused on the ground that it was done in the necessary defense of another,” citing *Wheat v. Commonwealth*, 118 S. W. 264 and *Miller v. Commonwealth*, 234 Ky. 135, 27 S. W. (2d) 633. *Brummett v. Commonwealth*, 235 Ky. 322, 31 S. W. (2d) 391. It is the aim of this comment to determine when one is justified in killing in defense of another.

In *Stanley v. Commonwealth*, 86 Ky. 440, 6 S. W. 155, probably one of the earliest Kentucky cases in point, the court announced the doctrine that one may take the life of another, provided such extremity be necessary to prevent a killing or bodily injury to the killer’s uncle. An instruction to that effect, it was said, “confined the right of accused to act in defense of his uncle’s life, to the existence of
actual danger to it, and did not allow defendant to act in good faith on appearances, however reasonable."

The Miller case, cited above, holds that an accused who assumes to defend another takes his chances on the merits of the controversy into which he interposes, and, if the one whom he seeks to protect was not justified under the circumstances in taking life in his own defense, another cannot do so for him and obtain any greater right. This doctrine of criminal "identification" has been followed in many Kentucky cases. *McIntire v. Commonwealth*, 191 Ky. 299, 230 S. W. 41; *Utterback v. Commonwealth*, 105 Ky. 723, 49 S. W. 479.

The Stanley case seems to be modified by *Mullins v. Commonwealth*, 185 Ky. 336, 215 S. W. 56, where it is held, in negative language, that one may not kill in defense of another unless he believed and had reasonable grounds to believe, that the other was then and there in danger of death or the infliction of great bodily injury at the hands of deceased. All of the above cases agree that one may not kill in defense of another where that other had no right to kill in self-defense.

A great majority of other courts are in accord with the prevailing rule in Kentucky, and agree that the right of one to defend another is coextensive with the right of that other to defend himself. *Cain v. State*, 17 Ala. App. 530; 86 So. 106; *Coart v. State*, 156 Ga.; 536, 119 S. E. 723; *People v. Scott*, 234 Ill. 465, 120 N. E. 553; *Shine v. State*, 9 Tex. Cr. Rep. 418, 269 S. W. 804.

Two cases, *People v. Curtis*, 152 Mich. 616, 18 N. W. 385 and *Monson v. State*, 63 S. W. 147 (Texas), are to some extent contra to the Kentucky decisions. The Curtis case held that one may kill in defense of his brother even when his brother was not entirely blameless and could not avail himself of self-defense. The Monson case decided that the culpability of one who slays in defense of another is measured by the intent with which he acted, and not by the intent with which such other party was actuated, unless he knew or might reasonably have known such intent.

In Kentucky one cannot kill to defend an aggressor, since the aggressor cannot plead self-defense. *Hawley v. Commonwealth*, 191 Ky. 380, 230 S. W. 296. Since the doctrine is based on the rule that one may interfere to prevent an atrocious felony, it follows that one who aids an aggressor does not prevent, but actually assists in the commission of a felony.

C. S.

**DAMAGES FOR MENTAL INJURY ALONE.—** Plaintiff, a passenger in defendant's street car, received a sudden jerk just as she was arising from her seat to alight. Physician's examination showed no physical injury. The lower court refused to instruct that plaintiff could not recover for her nervous conditions since there was no evidence of physical injury. Held, refusal to so instruct was error. *Blackford v. St. Joseph Ry., Light, Heat, & Power Co.*, 21 S. W. (2d), 491 (Mo.).
At common law mere injury to feelings or affections did not constitute an independent basis for recovery. *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 56 N. W. 973, 41 A. S. R. 17. This is a stock statement of the common law rule which is not wholly true. It is true in so far as the common law has never recognized freedom from mental injury as a substantive right. The trouble was that the party complaining could not state a cause of action. But recovery has been allowed under the guise of some recognized cause of action. "In other words they deny a recovery and allow it in the same breath where the demand for a recovery is imperative." 17 Mich. L. Rev. 407. Thus, mental injury is an element of damages in assault, malicious prosecution, defamation, wrongful arrest and seduction, not to mention all such examples. The cause of action exists as a mere peg on which to hang the element of damages. See Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 510.

Perhaps the most fruitful field for recovering damages for mental injury lies in the telegraph cases. Recovery in this type of case dates from the 1881 case of *So Belle v. Teleg. Co.*, 55 Tex. 308, 40 Am. Rep. 805. Eleven states now follow this holding. Arkansas, South Carolina, Tennessee, and Wisconsin rely on statutes; Texas, Alabama, and Kentucky allow recovery only in actions ex contractu; while Iowa, North Carolina, Nevada, and Louisiana allow recovery in either tort or contract. 4 Texas L. Rev. 270. Here again the breach of contract or the negligence for the non-delivery of the message furnishes the peg on which the element of damages is hung. Despite the decision of these states, the great weight of authority is against them. 1 Cooley on Torts, ed. 3, p. 92; 23 Mich. L. Rev. 312.


the cause of action is present to furnish the basis for the damages resulting from the mental injury. This is a good illustration of reaching a result by a circuitous route.

The principal case has the merit of being in accord with well settled law. There was no right at common law to be free from mental suffering. However, the growing tendency of courts to give relief in the indirect manner indicated above, lends hope that freedom from mental injury may come to be recognized as a substantive right.

J. C. B.

License Law—Progressive Tax on Chain Stores.—This action was brought by the plaintiff by and in behalf of himself and some five hundred persons, firms, and corporations engaged in operating one or more stores in the state of Indiana, for the purpose of testing the constitutionality of an act of the Indiana Legislature imposing a license tax running from three dollars for the first store up to twenty-five dollars for each store operated in excess of twenty in the said state. Held: That all persons engaged in the operation of one or more stores or mercantile establishments within the state of Indiana belong to the same class for occupational tax purposes and should pay the same license fee, regardless of the number of stores owned and operated by them. Any other classification is arbitrary and is in violation of the constitutional rights of the plaintiff. Jackson v. State Board of Tax Commissioners. 38 Fed. (2nd) 652.

The legislature has a broad power in the classification of property for the purposes of taxation. Ohio Oil Co. v. Conway, 231 U. S. 146; 50 S. Ct. 310, 313; 74 L. Ed. 775. “The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods.

The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.” Kentucky Railroad Tax Cases. 115 U. S. 321, 337; 6 S. Ct. 57; 29 L. Ed. 414, 419. In determining whether the classification of property for taxation purposes violates the equal protection clause of the constitution, such classification must be found upon some ground of difference having a fair and substantial relation to the object of the legislation, as that all persons similarly circumstanced shall be treated alike. Royster Guano Co. v. Virginia, 253 U. S. 412, 415; 64 L. Ed. 989, 990; 40 Sup. Ct. Rep. 560; Schlesinger v. Wisconsin, 270 U. S. 230, 240; 70 L. Ed. 557, 564; 43 A. L. R. 1224; 46 Sup. Ct. Rep. 260.

In the instant case the manifest intent of the legislature of Indiana was to impose a heavier occupational tax upon the owners and operators of “chain stores” than upon the owners and operators of “home owned” stores.
The State Tax Commission attempted to sustain the legislature's classification on the ground that the owners and operators of more than one store do not have the same general interest in the community as the owners and operators of single stores, and therefore do not contribute as much to the welfare of the state.

This decision, adverse to the Indiana Legislature's classification, had a direct influence in the framing of the present "Sales Tax" Law in Kentucky enacted at the 1930 session of the Kentucky Legislature. (See Chapter 149, 1930 Acts). The Kentucky lawmakers sought to obviate the unconstitutional classification of a progressive tax on the number of stores operated, by substituting therefor a progressive tax on the volume of gross sales, running in the first instance from 1/20 of 1% on $400,000 to 1% on $1,000,000 or over, of sales per annum.

As this is written, actions have been instituted in both the State and Federal courts to test the constitutionality of the Kentucky Law. This writer feels that the Kentucky law is not unjustly discriminatory and that the classification is sound.

J. K. L.

NEGLIGENCE—EFFECT OF SPECIFIC ALLEGATIONS OF NEGLIGENCE ON APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.—The plaintiff was an operator of an elevator in the defendant's building, and sued to recover for the injuries she received through the falling of an elevator which she was operating. The plaintiff averred negligence generally, and then in her deposition, showed that the elevator had been out of order before the fall, that she had advised the proper person as to its condition, and he had promised to remedy it but did not. The defendant claims that these specific allegations of negligence deprive the plaintiff of the right to rely on the doctrine of res ipsa loquitur. The court decided that "It is settled law that the plaintiff is not precluded, by showing specific acts of negligence, from relying on the presumption of negligence arising under the doctrine of res ipsa loquitur." Bartlett v. Pontiac Realty Co. (Mo.) 31 S. W. (2nd) 279.

This case arose in Missouri where its type is far from novel. More cases have arisen in this jurisdiction on this point than in any other, and, generally, at least until recently, most of these cases have been consistent in holding that specific allegations of negligence prohibit the plaintiff from basing his claim on the doctrine of res ipsa loquitur, Byers v. Essex Investment Co., 231 Mo. 375; Boeckman v. Milling Co., 199 S. W. 457; Reid v. Schaff, 210 S. W. 85; Casenowitz v. American Packing Co. 213 S. W. 799; Meredith v. Claycomb, 216 S. W. 794; McCullough v. Lumber Co., 205 Mo. App. 15; Hennekse v. Beetz, 203 Mo. App. 63; Kean v. Piano Co. 206 Mo. App. 170; Rice v. White, 239 S. W. 141; Heckfuss v. American Packing Co., 224 S. W. 99; Carpenter v. Burmister, 273 S. W. 418; Kuhlman v. Water, Light & Transit Co., 271 S. W. 788; Waldheir v. Railroad Co., 71 Mo. 516; Bogress v. Wabash R. Co. 266 S. W. 333; Roscoe v. Metropolitan St. R. Co. 203 Mo. 576, 101 S. W. 32; Hite v. Metropolitan St. R. Co. 130 Mo. 132, 31
S. W. 262; McManamee v. Mo. P. R. Co., 135 Mo. 440, 37 S. W. 119; Feary v. Metropolitan St. R. Co., 167 Mo. 75, 62 S. W. 452; Malloy v. St. Louis Suburban R. Co., 173 Mo. 75, 73 S. W. 159; McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872; Politowitz v. Citizen's Telephone Co., 115 Mo. App. 57, 90 S. W. 1031; Thompson v. Livery Co., 214 Mo. 487, 113 S. W. 1128; Grisamore v. Railroad Co., 118 Mo. App. 387, 94 S. W. 366; Kaw Feed and Coal Co. v. Railroad Co., 120 Mo. App. 498, 107 S. W. 1034; Joseph v. Metropolitan St. R. Co., 129 Mo. App. 603, 107 S. W. 1055; Heiberger v. Mo. & Kan. Telephone Co., 133 Mo. App. 452, 113 S. W. 730. Besides being indicated by the astonishing array of cases, of which the above is but a very small portion, the abundance of authority on the question in Missouri is thus declared in the language of one Judge: "The rule is too well settled in this state to cite authority to show that where a plaintiff, in his petition and instruction, relies upon certain specific allegations of negligence, he will not be entitled to recover for other or different causes of negligence, or upon the theory of res ipsa loquitur." Todd v. Mo. P. R. Co., 126 Mo. App. 126, 105 S. W. 671. The theory of res ipsa loquitur is that if the facts of negligence are peculiarly and exclusively in the knowledge of the defendant because of the very nature of the occurrence and the attendant circumstances, the plaintiff can dispense with particularity of proof and he will be allowed to rely on a legal presumption of negligence. The reason then for the so-called Missouri rule is thus outlined by Judge Graves: "If the plaintiff in his petition alleges special acts of negligence, it is evident that he also knows the facts, and so knowing them, there is no reason to invoke the rule of presumptive negligence." Orcutt v. Century Building Company (Mo.) 99 S. W. 1062.

However, in spite of the great weight of authority and extravagant language of the courts as to the impossibility of any other than the majority rule, there seems to be a straggling line of cases to the contrary. This phenomenon of two opposing lines of cases is strange, though not unique. Several early cases in Missouri suggest a certain liberality as to the application of res ipsa loquitur. One of these earlier cases Gallagher v. Edison Illuminating Co., 72 Mo. App. 576, contains language which is quite definitely in support of the present case. "The legal presumption (res ipsa loquitur) stated in the instruction under review, when applicable, is conditioned on the absence of other evidence of negligence, not on the absence of averments of negligence in the petition or statement, and a party may rely on it, even though his pleadings set out the facts of the negligence complained of, provided such facts are the ones which the legal inference of negligence tends to establish." Another case, somewhat later, is plainly and unequivocally opposed to the majority doctrine and clearly supports the case under consideration. "The unnecessary and additional allegations made on the part of the plaintiff cannot have the effect of changing the presumption that the law raises from the given
state of facts; and when that presumption attaches from proof made of facts alleged, the after allegations will not stay the course of procedure resulting from them." Gannon v. Le Clede Gaslight Co., 145 Mo. 502, 46 S. W. 968. A rather recent case also departs from the established rule and declares itself in exact words to be unable to reconcile its decision with the many cases above cited. "We do not believe that the ruling in (these cases) can be harmonized with Gannon v. Le Clede Gaslight Co., and Gallagher v. Edison Illuminating Co., and possibly the same may be true (i. e. cannot be harmonized) of Grady v. La. Light, Power, and Traction Co., and Kidd v. Kansas City Light and Power Co. (Mo. App. 239 S. W. 584)." The case then holds that where the plaintiff in his petition alleged general negligence and then further specific allegations of negligence the doctrine of res ipsa loquitur would apply. Sanders v. City of Carthage (Mo.) 9 S. W. (2nd) 813.

The doctrine as expressed by the present case and those supporting it are in accord with what seems to be the general weight of authority in most jurisdictions. On principle this seems a more just and reasonable rule. There is no reason why the mere allegation of specific incidents of negligence should deprive the plaintiff of his right to rely on the doctrine of res ipsa loquitur. Such allegations do not necessarily or even occasionally indicate that the plaintiff knows or can prove specific negligence, and the merits of his case as based on the rule of presumptive negligence should not be prejudiced because he has done more than he was legally bound to do. Many jurisdictions adhere to this doctrine. Kleinman v. Banner Laundry Co., 150 Minn. 515; Chicago City R. Co. v Carroll, 206 Ill. 316; Walters v. Seattle R. and S. R. Co., 48 Wash. 233; Biddle v. Riley 118 Ark. 206; First v. Capital Park Realty Co., 98 Conn. 627; Rapp v. Butler-Newark Bus Line, 138 Atl. 377; McNell v. Durham and C. R. Co., 130 N. C., 256, 41 S. E. 383; North Chicago St. R. Co. v. Cotton, 140 Ill., 486, 29 N. E. 899; Palmer Brick Co. v. Chenault, 119 Ga. 342, 47 S. E. 329; Louisville and S. I. Traction Co. v. Worrell (Ind.) 86 N. E. 78.

The cases in Kentucky do not seem to be concerned with this prohibition on the application of res ipsa loquitur. We investigated the cases of negligence in this jurisdiction in which the doctrine was invoked and found that the allegations of specific negligence did not prejudice the plaintiff's right, although no case was found in which this particular point was discussed. Even though specific allegations of negligence are made in addition to allegations of general negligence the plaintiff is allowed to base his recovery on the doctrine of res ipsa loquitur.

H. T. W.

PERJURY—FALSE SWEARING—NECESSITY FOR CORROBORATION.—Dr. Wheeler was indicted for false swearing under Kentucky Statutes Sec. 1174—"If any person, in any matter which is or may be pending—or on any subject in which he can be legally sworn—by a person
authorized to administer an oath shall wilfully or knowingly swear, depose, or give in evidence that which is false, he shall be confined in the penitentiary not less than one nor more than five years.” Dr. Wheeler's evidence before a Workman's Compensation Board was alleged to be false. In his trial the State introduced only the evidence of one Pearl Bobitt, the trial judge gave a peremptory instruction for the defendant, and under section 337 of the Kentucky Criminal Code of Procedure, the State brings the record up for a certification of the law. Hence:—The evidence of the single witness of the State was not sufficient to convict of the offense of false swearing. Commonwealth v. Wheeler, 235 Ky. 327, 31 S. W. (2nd) 377.

This is in accord with the general rule of law on this question since perjury was first tried in the common law courts. Fanshaw's case, Skinner 327, 90 Eng. Rep. 146 (1693) is the earliest case on this point, and there it was said, “And there being but the oath of the prosecutor, and so oath against oath, the defendant was acquitted.” It was formerly held that a conviction for perjury could only be had on the testimony of two witnesses. This has been relaxed, however, and it is now held everywhere that one witness, whose testimony is corroborated by strong circumstantial evidence will sustain a conviction. Wigmore, Sections 2040-2042. This requirement of two witnesses or one and circumstantial corroboration, applies only to the proof of the falsity of the statement sworn to, for a single witness may establish the other necessary elements, the taking of the oath and the matter sworn to. 30 Cyc. p. 1453 and cases cited.

In Metcalf v. State, 129 Pac. 675, 44 L. R. A. (N. S.) 513, an Oklahoma case, a conviction for perjury was sustained on evidence purely circumstantial, sworn to by one credible witness, and supported by corroborative evidence of the same character. But taken as a whole, the evidence was of such a conclusive character that it excluded every reasonable hypothesis save that of the defendant's guilt. But this situation and state of the evidence would sustain the conviction in all but one or two states, so broadened has the rule become. 21 R. C. L. p. 273 and cases cited. The case of U. S. v. Wood, 14 Peters 440, 10 Law, Ed. 527, gives three situations where a conviction may be had without the testimony of a single living witness:

1.—Cases where the falsehood is directly proven by documentary evidence springing from the prisoner, accompanied by circumstances proving the corrupt intent. 2. Cases where the matter sworn to is contradicted by a public record, proved to have been within the knowledge of the prisoner when he took the oath. 3. Cases where the party is charged with taking an oath contrary to what he must necessarily have known to be true—the falsehood being shown by his own letters relating to the fact sworn to, or any other written testimony found in his possession.

In cases where one witness is used and circumstantial evidence to corroborate him is relied on, a question arises as to the amount of
corroboration necessary. No rule has been laid down, nor should there be, says Wigmore, sec. 2042. "The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt."

J. H. C.

**Torts — Contributory Negligence — Last Clear Chance**—
The plaintiff while driving on the highway saw the defendant’s truck approaching in the middle of the road, at a speed of thirty miles an hour, and with its front wheels "wobbling." The plaintiff realizing the danger ran off the road on his side, but did not sound his horn. The defendant instead of rounding the curve, on which he and the plaintiff were, ran off the road on his left side, struck, and injured the plaintiff. The defendant requested an instruction on the last clear chance rule, arguing the defendant might have been momentarily asleep, or otherwise unaware of the danger, and that plaintiff, therefore, had the last clear chance to avoid the injury by sounding his horn, warning the defendant, and thereby causing him to drive off the other side of the road. The lower court refused the instruction, and was sustained on the ground that no evidence had been introduced to substantiate the defendant's contention. *Kjellander v. Piedmont Baking Co.*, 197 N. C. 206, 148 S. E. 40.

Without attempting to distinguish its exact nature, as distinguished from the rule enforced in other jurisdictions under the same name, the following cases are cited to show that the courts of North Carolina do enforce a last clear chance rule where it is applicable; *Johnson v. R. R.*, 79 S. E. 690; *Henderson v. R. R.*, 75 S. E. 1092; *Edge v. R. R.*, 69 S. E. 74; *Snipes v. Manufacturing Co.*, 67 S. E. 27; *Farrie v. R. R.*, 66 S. E. 457.

The court thus implied that if the defendant had introduced evidence to substantiate its contention there might have been an opportunity to apply to the last clear chance rule. It would seem that counsel for the defendant made an error which has confused several courts, in applying the last clear chance rule. He says the defendant might have been asleep and that, if he were, plaintiff had the last clear chance to avoid the injury by sounding his horn and attracting his, the defendant’s, attention. He tried to make the doctrine of proximate cause the sole test of legal liability. It would seem, however, that even if the defendant had been asleep and the plaintiff’s blowing of his horn might have prevented the injury there would still have been an obstacle to be overcome by the defendant, and it would seem that the latter would have been insurmountable.

A man, presumably, is not to be held legally liable for another’s injury, nor is he to be prevented from recovering from his own injury, unless he was, himself, negligent. As to whether or not his taking this or that course of action would have prevented the injury is not the question, but rather the question is, was his conduct reasonable,
under the circumstances, in the eyes of the law? It would seem that requiring a plaintiff in the present one’s position to anticipate that the defendant’s driver might be asleep, and so be bound to blow his horn, and so be held negligent, to such an extent to bar his recovery, even though he ran completely off the road on his own side would be requiring that degree of omniscient foresight the requirement of which was repudiated by the principal court in Gant v. Gant, 197 N. C. 164, 148 S. E. 34. It would seem therefore that there was no place in this case for the application of the so-called last clear chance rule.

W. H. D.

TORTS—CONTRIBUTORY NEGLIGENCE—MOTORIST FALLING FROM ELEVATED RACK.—Plaintiff’s husband drove his automobile upon a hydraulic rack at a filling station and requested an oil change. He either got out of the car before it was lifted or afterwards to wipe off his windshield. When this was done he stepped backward, fell to the ground and was killed. In an action by his widow under a Florida statute to recover for the decedent’s death, it was held, that his having voluntarily left a place of safety in the car or upon the ground for a somewhat more dangerous position when the car was elevated, was to heedlessly place himself in a danger which he should have anticipated, and constituted contributory negligence as to bar the plaintiff’s recovery, even if negligence existed on the part of the defendant. O’Brien v. Standard Oil Co., of Ky., — C. C. A. —, 38 F. (2d) 808.

The court enunciated the general rule when it declared, “The widow can recover only if the deceased could have recovered, had he not died.” Kalho v. Worcester C. St. Ry., 222 Mass. 121, 109 N. E. 814; Danforth v. Emmons, 146 Md. 390, 126 A. 105.

Therefore if the deceased was guilty of contributory negligence which would have barred his recovery, his personal representative is barred thereby. Frese v. C. B. & Q. R. Co., 263 U. S. 1, 44 S. Ct. 1; Stock v. East St. L. & S. Ry. Co., 245 Ill. 308, 92 N. E. 241. Where the negligence of the plaintiff contributed proximately to the injury complained of so that it would not have occurred without this negligence, it is contributory negligence which bars recovery. German American Lbr. Co. v. Hannah, 60 Fla. 70, 53 So. 515.

Knowledge of the danger does not alone establish contributory negligence even though one momentarily forgets the fact, if there are extenuating circumstances; as where, while going for a doctor on a dark night to attend her husband who had taken suddenly and dangerously ill, plaintiff was injured by a known defect, which she had forgotten in her excitement. City of Lancaster v. Walter, 25 Ky. L. R. 189, 80 S. W. 189; City of Maysville v. Gutifogic, 110 Ky. 670, 62 S 493. Such knowledge is but one of the facts to be considered by the jury in determining whether plaintiff was negligent. Lowell v. Watertown, 58 Mich. 568, 25 N. W. 519. There is drawn a distinction between forgetfulness, as above, and “recklessness” or heedlessness.
See 4 Col. L. Rev. 695. In the absence of such extenuating circumstances, knowledge of the danger will preclude recovery; as where the deceased, a miner, sat down in a tunnel under a portion of the roof which he knew to be dangerous. This recklessness was contributory negligence and barred recovery by his personal representative. Bunt v. Sierra Butte Gold Mining Co., 138 U. S. 483, 11 S. Ct. 464. The instant case agrees with C. N. O. & T. P. Ry. Co. v. Yocum's Adm'v, 137 Ky. 117, 123 S. W. 247, which said: "If the injury or loss complained of by a person seeking recovery in cases like this was caused by his own negligence." In all of these cases the plaintiff is held up to that standard of care which the ordinarily prudent man would have exercised under the same or similar circumstances. Stock v. East St. L. & S. Ry. Co., supra.

The instant case represents, as we have seen above, the general rule, the Federal rule and the Kentucky rule and is based upon well established principles of negligence.

L. B. R.

**WILLS—CONSTRUCTION OF INCONSISTENT CLAUSES.**—Testator executed the third clause of his will in a manner that passed a fee simple title to the residue of his estate to his young grandchildren, one five years old and the second one eight years old. The fourth clause directed his executor to sell the property as soon as practicable after death of the testator. The fifth clause directed the executor to collect all real and personal property, sell all real estate, and keep the estate "intact" until the youngest (5 years old) became twenty-one, etc. etc.

The executor claims that control of the estate remains in him. Held, that the fifth clause, when read in connection with the fourth clause, is ambiguous, and the inseparable connection between the two clauses accomplishes the defeat of both; and that the estate will pass in fee simple to the two grandchildren by the third clause. Lehmann v. Griffin, 31 S. W. (2d) 271 (Mo).

The rule in this case may be stated generally as follows: "Where an estate is devised in one clause of a will it will not be cut down in a subsequent clause unless the language used in the subsequent clause clearly states that to be the intention of the testator."

It was clear to the court that the fifth clause placed control in the hands of the executor; the children were young and incapable of managing their affairs, their mother was not relied upon to manage real estate but the management was left to the executor who was to convert it into cash. The court could find nothing in the will to indicate that any power was given to the executor to invest the funds realized, and use the income for the benefit of the beneficiaries; it seemed improbable on the other hand, that the executor should hurry to sell the real estate with no object in view other than to retain the proceeds "intact" for fifteen years, when the young grandchildren needed help more than at any other time. Keeping it "intact"
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amounted to keeping it entire, untouched, etc., and the court declined to hold that the testator meant just that.

Kentucky decisions are in line with this case, it is noted in Mayo v. Cooksey, 148 Ky. 43, 145 S. W. 1135; that if an "irreconcilable" conflict exists between clauses of a will, the latest clause must prevail as expressing the intention of the testator; a similar holding is apparent in Lewis v. Reed, 163 Ky. 559, 182 S. W. 638. Holdings in widely separated states are to the same effect, notably Turnbull v. Whitmore, 218 Mass. 210; 105 N. E. 861; Taylor v. Brown 165 N. C. 157, 81 S. E. 137; Randall's Will, 137 N. Y. Supp. 319, 105 N. E. 1097. In Haywood v. Wachovia Loan & Trust Co., 149 N. C. 208, 62 S. E. 915, it is held that where two clauses are "repugnant" to each other the latest one will prevail; and in Hamilton v. Stone, 33 Ohio Cir. Ct. Rep. 471, the holding was that where one provision of a will devised a life estate and a subsequent clause empowered the executor to sell a part thereof, the latter clause was "repugnant to and inconsistent with" the former and the former must prevail. A case in Virginia, Waters v. Trefouret, 117 Va. 186, 83 S. E. 1078, holds that if a clause expresses an intent to dispose of estate, it will not have the effect of enlarging an actual distribution in a subsequent clause by supplying words thereto—the latter clause being perfectly clear.

The cases examined reveal the fact that the words "repugnant," "inconsistent" and "irreconcilable" are used interchangeably, and the decisions are rather uniform to the effect that the latest clause will prevail. It should be noted in the principal case that the word "ambiguous" is used and the latest clause does not prevail. The usual decision throws out prior clauses if they are repugnant to, irreconcilable or inconsistent with later clauses, and no doubt all clauses might meet the same fate unless this action caused the entire will to fail. It is the endeavor of courts to give effect to all the provisions in a will and even in the case of inconsistent clauses former clauses will prevail to a point that does not prevent a later clause having full effect.

Where ambiguity exists however, courts do not make a practice of inserting words to make a very desirable intention appear in a will, when no such intention is apparent from the words used by the testator.

Since estates granted in one clause cannot be cut down by a subsequent clause, unless the language of the subsequent clause shows clearly that such was intended, it is submitted that no estate can be enlarged by a subsequent clause unless the language used is perfectly clear to accomplish that effect.

H. H. B.