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status by Louisiana law. The court's view was that the maker's liability to the endorsee was to be governed by the law of the place where the obligation was to be performed. Although the court clearly applied the law of the obligor's contract, the opinion stands alone and is not from a court of last resort. The question remains an open one in Louisiana.

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CONTRIBUTORY NEGLIGENCE IN THE CONFLICT OF LAWS: SUBSTANCE OR PROCEDURE?

The rule is settled in the conflict of laws that problems of the law of torts are to be determined according to the law of the place of wrong.[1] This and other choice of law rules are designed to create substantial uniformity of result in legal controversies irrespective of where the parties may desire to litigate their grievances.[2] The Utopian goal in the conflict of laws is that every controversy, regardless of where it arises, be decided by all courts in exactly the same manner. Unfortunately, this goal could not be completely attained even if the choice of law rules were the same everywhere. The organization of courts, rules regulating process, pleading, evidence and other similar matters vary from state to state and from country to country. The necessity for effective and expeditious administration of justice makes it impossible for a court to duplicate such foreign details.[3] Thus, for their own convenience and protection, courts, as early as the Thirteenth Century, adopted the rule, which today is axiomatic, that, while problems of substantive law may be determined by foreign law, for example, in torts cases, the law of the place of wrong, procedural matters will always be determined by the forum's own rules.[4] Hence there arises the problem of demarcating problems of substantive law from problems of procedure. In this respect, it has been suggested that procedural problems "are those which concern methods of presenting to a court the operative facts upon which legal relations depend" and that problems of substantive law are "those which concern the legal effect of those facts after they have been established."[5] When one of the

* Graduate of February 1950; presently Member, Opelousas Bar.
1. Restatement, Conflict of Laws (1934) §§ 378, 384.
2. Id. at introductory note to c. 12.
3. Ibid.
4. Id. at § 585.
5. Stumberg, Conflict of Laws (1937) 128.

parties to a litigation, which by the applicable choice of law rule is to be decided by the law of a place other than the forum, pleads for the application of a foreign rule which is different from a corresponding rule of the forum, it becomes necessary for the court to determine which is applicable. If the court classifies or characterizes its own rule as procedural, the law of the forum will be applied; if not, the foreign rule will be applied, unless the court should find that the foreign rule, being "procedural," is not intended to be applied by foreign courts. Whether, and, if so, to what extent a foreign characterization of the foreign rule as procedural should be considered, is one of the most controversial problems of the conflict of laws, which need not be considered here.[6]

In the early part of the Nineteenth Century, Anglo-American courts manifested a marked tendency toward classifying problems as procedural.[7] Courts viewed foreign law with suspicious eyes and resented encroachment upon the "true law" of the forum. This tendency, though considerably weaker, is still observable today. The device of classifying a matter as procedural is especially utilized by the courts as a backhanded method of protecting the public policy of the forum.[8]

In the average case, the court, without discussing choice of law policy, simply classifies a matter as one of substance or procedure according to preconceived notions. The result is that the basic choice of law policies and the raison d'être of the distinction between substance and procedure are ignored. In recent years, many notable writers have taken the position that courts should re-evaluate the underlying policies of choice of law rules and delimit the concept of procedure in the conflict of laws.[9] All admit that a balance must be struck. The basic choice of law policy is to achieve a uniform solution to a given problem regard-

6. For detailed studies of the characterization problem see 1 Rabel, The Conflict of Laws: A Comparative Study (1945) 47-60; Robertson, Characterization in the Conflict of Laws (1940); Beckett, The Question of Classification ("Qualification") in Private International Law (1934) 15 Brit. Y. B. Int. L. 46; Falconbridge, Characterization in the Conflict of Laws (1937) 53 L.Q. Rev. 235; Lorenzen, The Theory of Qualifications and the Conflict of Laws (1920) 20 Col. L. Rev. 247.

7. Hancock, Torts in the Conflict of Laws (1942) 64; Stumberg, op. cit. supra note 5, at 147; Lorenzen, The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L.J. 311, 327.

8. Ibid.

9. Hancock, op. cit. supra note 7, at 76. See Stumberg, op. cit. supra note 5, at 128, n. 1; Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L.J. 333; Lorenzen, supra note 7; McClintock, Distinguishing Substance and Procedure in the Conflict of Laws (1930) 78 U. of Pa. L. Rev. 933; Morgan, Choice of Law Governing Proof (1944) 58 Harv. L. Rev. 153.

less of the forum. A distinction is drawn between substantive and procedural matters to enable a court to discard those foreign rules which would seriously inconvenience the court and hamper the effective administration of justice at the forum. It would seem, therefore, that the court of the forum should apply all properly applicable foreign laws as are likely to have a material bearing upon the result of the controversy unless such application would seriously inconvenience or hamper the court.[10]

Turning now to the doctrine of contributory negligence and some of its more important aspects, it will be seen for the most part that the choice of law rules are unsettled.

Contributory Negligence as a Defense

In general, the problem of what defenses are open against a cause of action is as much one of substantive law as that of determining the operative facts upon which the existence of a cause of action depends. Thus, if a plaintiff is entitled to have his rights determined according to the law of the place of wrong, the defendant is likewise entitled to invoke any defense there recognized.[11] The cases in this country are uniform in holding that the effect of contributory negligence as a defense is a question of substantive law.[12] When, therefore, by the law of the place of wrong, contributory negligence operates as an absolute bar to an action, it will have the same effect at the forum, a contrary rule of the forum notwithstanding.[13] The court of the forum will also apply the well-known exceptions to the doctrine of contributory negligence, the "last clear chance"[14] and "humanitarian"[15] rules, when it is proved that they form a part of the law of the place of wrong.

Civil law countries, as well as some American states, in

10. See Hancock, op. cit. supra note 7, at 76; Cook, supra note 9; Morgan, supra note 9.

11. Restatement, Conflict of Laws (1934) § 388.

12. Representative cases: Caine v. St. Louis-San Francisco R. Co., 209 Ala. 181, 95 So. 876, 32 A.L.R. 793 (1923); Missouri Pacific Ry. v. Coca Cola Bottling Co., 154 Ark. 413, 242 S.W. 813 (1922); Kingery v. Donnel, 222 Iowa 241, 268 N.W. 617 (1936); Louisville & N. Ry. v. Whitlow, 105 Ky. 1, 43 S.W. 711, 41 L.R.A. 614 (1897); Louisville & N. Ry. v. Keiffer, 132 Ky. 419, 113 S.W. 433 (1908); Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929); Jones v. Louisiana Western Ry., 243 S.W. 976 (Tex. 1922); Morisette v. Canadian P. R.R., 76 Vt. 267, 56 Atl. 1102 (1904).

13. East Tennessee V. & G. R.R. v. Lewis, 89 Tenn. 235, 14 S.W. 603 (1890). Accord: In re Pennsylvania R.R., 48 F.(2d) 559, 565 (C.C.A. 2nd, 1931).

14. Missouri Pacific Ry. v. Coca Cola Bottling Co., 154 Ark. 413, 242 S.W. 813 (1922); Gregory v. Maine Central Railroad Co., 317 Mass. 636, 59 N.E. (2d) 471, 159 A.L.R. 714 (1945); Cox v. Terminal R. Ass'n, 331 Mo. 910, 55 S.W.(2d) 685 (1932).

15. Kingery v. Donnel, 222 Iowa 241, 268 N.W. 617 (1936).

which the doctrine of contributory negligence has been abolished, follow the different doctrine of comparative negligence. A problem arises when the place of wrong follows one and the forum the other of these two doctrines.[16] In the main, two arguments have been advanced against the application of the "civil law" rule when suit is brought in a jurisdiction which adheres to the common law rule: First, it is contended that it is contrary to the public policy of the forum to apply such a rule. The courts have consistently rejected the argument.[17] Second, it is argued that comparative negligence is a procedural matter, unconnected with substantive rights, and, hence, not applicable at the forum. Only one case,[18] now overruled, has squarely held that the doctrine of comparative negligence is a procedural matter. The now universal rule is that the doctrine is a matter of substance giving a right to recover not recognized by the common law.[19] Any other rule would ignore choice of law policy because, if contributory negligence is allowed to defeat a recovery, clearly the plaintiff cannot recover in the same manner and to the same extent as if the action had been brought at the place of wrong. It is important to add that the court of the forum, in applying the doctrine, suffers little, if any, inconvenience.

The courts, whether aware of choice of law policy or not, are on sound ground when they classify the determination of the respective effects of contributory and comparative negligence as a matter of substance. The quest for uniformity of result is furthered with a minimum of inconvenience to the court of the forum.

Contributory Negligence and the Function of Court and Jury

In some states the question of whether the plaintiff is guilty of contributory negligence is, in all cases, for the jury; while in other states the question may be decided by either the court or

16. This problem would seem to be of importance in Louisiana since the neighboring state of Mississippi follows the doctrine of comparative negligence. Despite the proximity of the two states and the ever-increasing number of automobile accident cases, no Louisiana cases have been found wherein this problem was discussed.

17. Caine v. St. Louis-San Francisco R.R., 209 Ala. 181, 95 So. 876, 32 A.L.R. 793 (1923); Morrisette v. Canadian P. Ry., 76 Vt. 267, 56 Atl. 1102 (1904).

18. Johnson v. Chicago & N.W. R.R., 91 Iowa 248, 59 N.W. 66 (1894), overruled by name in Kingery v. Donnel, 222 Iowa 241, 268 N.W. 617 (1936).

19. Leading cases: Caine v. St. Louis-San Francisco R.R., 209 Ala. 181, 95 So. 876, 32 A.L.R. 793 (1923); Louisville & N. R.R. v. Whitlow, 105 Ky. 1, 43 S.W. 711, 41 L.R.A. 614 (1897); Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929); Morrisette v. Canadian P. R.R., 76 Vt. 267, 56 Atl. 1102 (1904).

the jury, depending upon whether reasonable men might differ on the issue. If the place of wrong has a constitutional provision or statute providing that contributory negligence is a question for the jury and the law of the forum provides that the court may, in the absence of a doubt, decide the question without submitting the case to the jury, the court must make a choice of law.[20] According to the traditional concept of procedure, it would seem clear that a rule regulating the function of court and jury is a matter of procedure.[21] A majority of the cases do hold that such a foreign rule is procedural and hence not applicable at the forum.[22] There is, however, a contrary view.[23] It cannot be doubted that in negligence cases such a constitutional or statutory provision greatly increases the plaintiff's chance of success and often proves to be the decisive factor in the case. It is a matter of common knowledge that in a negligence case the average jury has a great deal of sympathy for plaintiffs, especially where the defendant is a corporation. In view of the effect of such a provision on the outcome of litigation, if the quest for uniformity of result is to be pursued, the court of the forum should apply the law of the place of wrong. Is the administrative inconvenience of applying such a provision so great as to justify the court of the forum to forsake the basic choice of law policy? It is an everyday occurrence for courts to ascertain and apply foreign constitutional and statutory law. Thus, ruling out the public policy of the forum, the failure of courts to apply foreign provisions requiring the jury to pass upon the issue of contributory negligence does not seem justified.

In *Hopkins v. Kurn*,[24] an action in Missouri upon a cause of action arising in Oklahoma, the Missouri court refused to apply at the forum, on the ground that it was procedural, a provision of the Oklahoma constitution providing that, in all cases, the de-

20. The same holds true in the obverse case unless it is taken for granted at the outset that such a constitutional provision or statute of the forum expresses such a strong public policy that any different foreign rule will be disregarded.

21. See Restatement, Conflict of Laws (1934) § 594.

22. Hopkins v. Kurn, 351 Mo. 41, 171 S.W. (2d) 625, 149 A.L.R. 762 (1943); Colucci v. Lehigh Valley R.R., 121 Misc. 758, 202 N.Y. Supp. 717 (S.Ct. 1923); Singer v. Messina, 312 Pa. 129, 167 Atl. 583, 89 A.L.R. 1271 (1933); Boureston v. Boureston, 231 Wis. 666, 285 N.W. 426 (1939).

23. Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931); Atchison, T. & S.F. Ry. v. Spencer, 20 F.(2d) 714 (C.C.A. 9th, 1927); Missouri Pacific R.R. v. Mills, 184 Ark. 61, 41 S.W.(2d) 971 (1931); Jackson v. St. Louis-San Francisco R.R., 224 Mo. App. 601, 31 S.W.(2d) 250 (1930), overruled in Hopkins v. Kurn, 351 Mo. 41, 171 S.W.(2d) 625, 149 A.L.R. 762 (1943).

24. 351 Mo. 41, 171 S.W.(2d) 625, 149 A.L.R. 762 (1943).

fense of contributory negligence is a question of fact for the jury. The court's classification was based primarily on Oklahoma cases[25] holding, in purely domestic situations, the provision to be procedural. It is obvious that the classification made by the court of the forum was not influenced by choice of law policy. What are the motivating forces behind such a classification? Perhaps purely local policy considerations prompt the result. It may well be that the court of the forum is of the opinion that its own rule is based upon sound principles and that to enforce another rule would be contrary to its public policy. Certainly a court is not to be condemned for refusing to follow a rule which is contrary to the public policy of the forum, but in so doing the court should not cloud the issue, in order to justify its decision, by improperly classifying a foreign rule as a matter or procedure. Such a classification can only serve to mislead other courts in similar cases. If the refusal to apply the foreign rule is based upon public policy the court should plainly say so. If the court of the forum finds no compelling policy reasons why the foreign rule should not be applied, it is submitted that, in the interest of uniformity of result, the rule should be adopted.

Usually the place of wrong has no constitutional or statutory provision providing that the issue of contributory negligence must go to the jury, but does have rules, found in the case law, regulating the functions of the court and jury on the issue. If the decisional rule of the place of wrong would require the trial judge, on the facts shown, to hold the plaintiff guilty of contributory negligence as a matter of law, should the court of the forum seek out this rule and apply it or should the court apply its own pertinent rule, if different? Or conversely, if the rule of the forum requires the court, on a given set of facts, to find contributory negligence as a matter of law, should the court do so notwithstanding a contrary rule of the place of wrong? Again the cases are in conflict. Some take the view that the rules are substantive and must be applied at the forum;[26] others view such rules as procedural and refuse to apply them.[27] Because such rules often

25. Independent Cotton Oil Co. v. Beacham, 31 Okla. 384, 120 Pac. 969 (1911); Muskogee Vitrified Brick Co. v. Napier, 34 Okla. 618, 126 Pac. 792 (1912).

26. Smith v. Brown, 302 Mass. 432, 19 N.E.(2d) 732 (1939); Pilgrim v. MacGibbon, 313 Mass. 290, 47 N.E. (2d) 299 (1943); Wieden v. Minneapolis, St. P. & S. Ste. M. R.R., 181 Minn. 235, 232 N.W. 109 (1930); Kuba v. New York Central R.R., 143 S.W.(2d) 332 (Mo. App. 1940); Busker v. New York Central R.R., 149 S.W.(2d) 449 (Mo. App. 1941).

27. Savannah, F. & W. R.R. v. Evans, 115 Ga. 315, 41 S.E. 631, 90 Am. St. Rep. 116 (1902); Gregory v. Maine Central R.R., 317 Mass. 636, 59 N.E.(2d)

have an important bearing upon the outcome of the case, it is desirable to classify them as matters of substance. The court, however, may find that it will be unduly inconvenienced and delayed by expending the time and energy necessary to ascertain and apply the rule correctly. Sometimes the rule is not clearly defined and the court is faced with the problem of analyzing numerous foreign cases, ironing out apparent conflicts, and discarding irrelevant material. If such be the case, the court of the forum may justifiably classify the rule as procedural and refuse to give it application.

Problems relative to the functions of the court and jury on the issue of contributory negligence are of little practical importance in Louisiana. Jury trials, expensive and time consuming, are rare in this state due to the peculiar provisions[28] of the Louisiana Constitution allowing appellate courts to review, independently, both the law and facts of a case. No litigant could seriously contend that he is entitled to have a jury verdict on the issue of contributory negligence which would preclude the reviewing court from making an independent decision.

The foregoing discussion has assumed, of course, that the laws of both the forum and the place of wrong provide for trial by jury. Situations may occur, however, where the place of wrong provides for jury trials and the forum makes no such provision at all, especially if the forum is in a foreign country. It is obvious that a litigant, in such a case, is not entitled to a jury. Conversely, if the forum provides for trial by jury and the place of wrong does not, the machinery of the forum will prevail. A litigant, suing on a cause of action arising, for instance, in Mexico, where civil juries are unknown, must, of course, accept the peculiar structure of the judiciary existing at the forum. Choice of law notwithstanding, it is too much to ask the forum to furnish the exact machinery existing at the place of wrong.

Contributory Negligence and the Burden of Proof

If we are to accept as correct the suggestion that procedural rules are those which concern methods of presenting to a court the operative facts upon which legal relations depend and that substantive rules are those which concern the legal effect of those facts after they have been established, the rules relating

471, 159 A.L.R. 714 (1945); Franklin v. Minneapolis, St. P. & S. Ste. M. R.R., 179 Minn. 480, 229 N.W. 797 (1930); Jones v. Louisiana Western R.R., 243 S.W. 976 (Tex. 1922).

28. La. Const. of 1921, Art. VII, §§ 10, 29.

to burden of proof must necessarily be classified as procedural. The weight of authority is in favor of such a classification.[29] The cases, particularly the older ones, usually state the general rule relating to substance and procedure and hold, as a matter of course, that rules regulating the burden of proving contributory negligence are procedural. Documentation, when given in support of the holding, frequently consists of non-conflict of laws cases[30] holding particular burden of proof rules to be procedural in nature. The courts following the majority view seemingly are indifferent to arguments that choice of law policies are ignored without adequate justification.

A few older cases,[31] principally in the federal courts, held that matters relating to burden of proof are of a substantive nature. The case of *Precourt v. Driscoll*[32] gave the minority view a much needed shot in the arm. The case involved a conflict between local and foreign burden of proof rules. By the law of the forum, contributory negligence was an affirmative defense to be pleaded and proved by the defendant. By the law of the place of wrong, the plaintiff had the burden of proving himself free from fault. The plaintiff argued that burden of proof is a procedural matter to be governed by the law of the forum. The court, holding the foreign rule applicable, said:

> "If the local remedy results in destroying or altering the foreign cause of action, the ends of comity are not only defeated, but rights are given or liabilities imposed in respect to a foreign transaction affecting its legal character. One way to avoid such a result is to take no jurisdiction. . . . The other way is to make an exception to the rule applying the local law when the foreign remedy is so inseparable from the cause of action that it must be enforced to preserve the integrity and character of the cause and when such remedy is prac-

29. Representative cases: Kingery v. Donnel, 222 Iowa 241, 268 N.W. 617 (1936); Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919); Gregory v. Maine Central R.R., 317 Mass. 636, 59 N.E.(2d) 471, 159 A.L.R. 714 (1945); Jenkins v. Minneapolis & St. L. R.R., 124 Minn. 368, 145 N.W. 40 (1914); Menard v. Goltna, 328 Mo. 368, 40 S.W.(2d) 1053 (1931); Midland Trail Bus Lines, Inc. v. Martin, 100 Ind. 206, 194 N.E. 862; Wright v. Palmison, 237 App. Div. 22, 260 N.Y. Supp. 812 (S.Ct. 1932).

30. Typical of the cases cited are those involving retroactive application of statutes changing the burden of proof. Duggan v. Bay State Ry., 230 Mass. 370, 119 N.E. 757 (1918) and Southern Indiana Ry. v. Peyton, 157 Ind. 690, 61 N.E. 722 (1901) are illustrative.

31. Central Vermont Railway Co. v. White, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915); New Orleans & Northwestern R.R. v. Harris, 247 U.S. 354, 38 S.Ct. 504, 62 L.Ed. 1156 (1917); Southern Ry. v. Robertson, 7 Ga. App. 154, 66 S.E. 535 (1909).

32. 85 N.H. 280, 157 Atl. 525, 78 A.L.R. 874 (1931).

tically available. The vindication of substantive rights should not mean their loss or alteration, and, when no local policy is adversely affected, strict adherence to a rule which becomes arbitrary and works injustice in a given case may well be dispensed with."[33]

It was found that the foreign burden of proof rule was indispensable to the enforcement of the plaintiff's substantive rights. The foreign requirement that the plaintiff prove himself free from fault was interpreted as being a condition of the cause of action itself, and the court held that the rule was applicable at the forum. The decision served the laudable purpose of bringing out into the open important choice of law policies. The court manifested an unusual sensitivity to the plea for a uniform solution to a foreign cause of action. The drafters of the Restatement of the Conflict of Laws, recognizing the force of the decision, adopted the rule.[34] The direction having been pointed out, other courts are following.[35]

In *Sampson v. Channel*,[36] the court, in a somewhat unorthodox analysis, held that rules relating to the burden of proof of contributory negligence are matters of substance and must be followed by federal courts under the doctrine of *Erie v. Tompkins*.[37] Approaching the analysis suggested by some of the modern writers,[38] the court pointed out that substance and procedure are not clear cut categories with a definite line dividing one from the other. The confusion prevalent in the cases substantiates this observation. It was said that a matter may properly be classified as procedural for one purpose and as substantive for another. Classification, observed the court, should be made only when the purpose of classifying is clearly understood. It was found that if the policy considerations of the *Erie* case are to be given full effect, it is necessary for a federal court to classify rules governing the burden of proof as substantive matters. This is so because the burden of proof in negligence cases often determines the outcome of the case, and the rationale of the *Erie* case is that the federal court, in diversity of citizenship cases, should reach

33. 85 N.H. 280, 283, 157 Atl. 525, 527.

34. Restatement, Conflict of Laws (1934) § 595, Comment *a*.

35. Olsen v. Omaha & C. B. St. Ry., 131 Neb. 94, 267 N.W. 246 (1936); Buhler v. Maddison, 109 Utah 267, 176 Pa. (2d) 118, 168 A.L.R. 177 (1947).

36. 110 F.(2d) 754 (C.C.A. 1st, 1940), 128 A.L.R. 394 (1940), cert. denied, 310 U.S. 650, 60 S. Ct. 1099, 84 L.Ed. 1415 (1940).

37. 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938).

38. Hancock, op. cit. supra note 7, at 76; Cook, supra note 9; Morgan, supra note 9.

the same result as the court of the state in which it is sitting. It was also pointed out that there is no important counter-consideration because the state burden of proof rule can be easily ascertained and applied by the federal court.

That the burden of proof is often the decisive factor in tort cases cannot be disputed. It follows, therefore, that when a court refuses to apply the foreign burden of proof rule, the plaintiff's chances of recovering in the same manner and to the same extent as if the action had been brought at the place of wrong are either enlarged or diminished. Uniformity of result is certainly not accomplished. If we admit the validity of the basic choice of law policy, it must be agreed that the court of the forum should classify as procedural only those foreign laws which would seriously inconvenience the court and hamper the effective administration of justice. The court should not be influenced by a classification made in a purely domestic case; its classification should be controlled by choice of law policy. Is there any strong countervailing argument to justify the court of the forum to classify a burden of proof rule as procedural? Such cases as *Sampson v. Channel* and *Precourt v. Driscoll* furnish the answer. Certainly it cannot be said that ascertaining and applying a foreign burden of proof rule is so onerous a duty as to justify a court to place the ideal of uniformity in jeopardy. The proper rule, then, is that the court of the forum should apply the foreign rule regulating the burden of proving contributory negligence.

The Louisiana cases[39] recognize the general distinction between substantive and procedural matters, but no cases have been found which discuss the precise problems treated herein. Unbound by precedents, the way is open for the courts of Louisiana to give full effect to the basic choice of law policies.

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LIMITATION OF ACTIONS IN THE CONFLICT OF LAWS

When there is a conflict between the statute of limitations of the forum and that of a foreign jurisdiction, the law of which applies generally to the legal relation in question *(lex causae)*, which statute should be applied? The general rule in Anglo-American common law, contrary to that prevailing on the conti-

39. Wasson v. Gatling, 184 So. 596 (La. App. 1938); Matney v. Blue Ribbon, Inc., 12 So.(2d) 249 (1942), affirmed 202 La. 505, 12 So.(2d) 253 (1942).

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