

California Law Review

VOL. 38

AUGUST, 1950

NO. 3

Proximate Cause in California

William L. Prosser*

SO MUCH has been written¹ about proximate cause that any professor who feels an article coming on would do well to coil it and sit on it and hold his peace. Everything worth saying on the subject has been said many times, as well as a great deal more that was not worth saying. Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze, and the very bewildering abundance of the literature defeats its own purpose and adds its smoke to the fog. Only

* Dean, University of California School of Law at Berkeley.

¹ Articles, notes and comments, signed and unsigned, are legion. The following partial list includes most of the landmarks:

Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870); Beale, *Recovery for Consequences of an Act*, 9 HARV. L. REV. 80 (1895); Bohlen, *The Probable or the Natural Consequences as a Test of Liability in Negligence*, 40 U. OF PA. L. REV. 79, 148 (1901); Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COL. L. REV. 16, 136 (1909); Larremore, *Negligence and the Act of God*, 18 YALE L. J. 338 (1909); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1911); Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10 (1914); Bauer, *A Rational Rule of Proximate Causation in Torts*, 83 CENT. L. J. 148 (1916); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Levitt, *A Passive Situation as a Proximate Cause*, 92 CENT. L. J. 390 (1921); Reese, *Negligence and Proximate Cause*, 7 CORNELL L. Q. 95 (1922); Levitt, *Cause, Legal Cause and Proximate Cause*, 21 MICH. L. REV. 34, 160 (1922); Leon Green, *Are Negligence and Proximate Cause Determinable by the Same Test?*, 1 TEXAS L. REV. 243 (1923); Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211, 343 (1924); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); Burke, *Rules of Legal Cause in Negligence Cases*, 15 CALIF. L. REV. 1 (1926); Leon Green, *Contributory Negligence and Proximate Cause*, 6 N. C. L. REV. 3 (1927); Leon Green, *Are There Dependable Rules of Causation*, 77 U. OF PA. L. REV. 601 (1929); Leon Green, *Mahoney v. Beaman: A Study in Proximate Cause*, 39 YALE L. J. 532 (1930); Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L. J. 449 (1930); Leon Green, *The Palsgraf Case*, 30 COL. L. REV. 789 (1930); Gardner, *Theories of Proximate Causation*, 4 U. OF CIN. L. REV. 118 (1930); Heyting, *Proximate Causation in Civil Actions*, 44 JURID. REV. 239 (1932); Patterson, *Cause in Law and Metaphysics*, 10 CAN. B. REV. 645 (1932); Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932); Lewis, *Proximate Cause in Law*, 7 FLA. B. J. 109, 138, 158 (1933);

rarely,² however, has anyone attempted to deal with the decisions of a single jurisdiction, to trace the path the courts have trodden, and to consider whether the parts make a consistent whole. Since apology is due for writing once again where so much ink has been shed, a newcomer to the state can only plead an interest that may perhaps be pardoned, in the law of California.

Let us begin with three California cases, which will at least open the door to some difficulties.

The first is *Roos v. Loeser*,³ in 1919. The plaintiff was the owner of a dog, a Pomeranian, of the value inseparable from injured animals in torts cases: "The plaintiff's dog was the proud possessor of the kennel name Encliffe-Masterpiece; his pedigree and reputation entitled him to be regarded in dog circles as possessing the bluest of blood; in short, in canine society he belonged to the inner circle of the four hundred." This aristocrat, attended by no less than two maids, was "pursuing the even tenor of his way upon the street, 'tarrying' now and then and occupied by matters entirely his own," when he was suddenly set upon by the defendant's Airedale, "an arrogant bully, dom-

Edgar, *Foreseeability and Recovery in Tort*, 9 ST. JOHN'S L. REV. 84 (1934); Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934); Tilley, *The English Rule as to Liability for Unintended Consequences*, 33 MICH. L. REV. 829 (1935); Bauer, *Confusion of the Terms "Proximate" and "Direct,"* 11 NOTRE DAME LAW. 395 (1936); Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. OF PA. L. REV. 121 (1937); Campbell, *Duty, Fault and Legal Cause*, [1938] WIS. L. REV. 402; Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV. 46 (1938); Gregory, *Proximate Cause in Negligence—A Retreat from "Rationalization,"* 6 U. OF CHI. L. REV. 36 (1938); Morris, *On the Teaching of Legal Cause*, 39 COL. L. REV. 1087 (1939); Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940); Leon Green, *Merlo v. Public Service Company: A Study in Proximate Cause*, 37 ILL. L. REV. 429 (1943); Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185 (1950).

In addition, there are two which deserve special mention. One is the book by Leon Green, *THE RATIONALE OF PROXIMATE CAUSE* (1927). The other is the long series by the late Professor Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 471 (1932); *Proximate Cause*, 14 SO. CALIF. L. REV. 1, 115, 416 (1940); 15 SO. CALIF. L. REV. 187, 304, 427 (1941); 16 SO. CALIF. L. REV. 1, 61, 275 (1943).

² The few that come to mind are Keeton, *Negligence, Duty and Causation in Texas*, 16 TEXAS L. REV. 1 (1937); Herriott, *Proximate Cause and Negligence in Wisconsin*, 4 WIS. L. REV. 193 (1927); Boardman and Lundgren, *Proximate Cause in Wisconsin*, 5 WIS. L. REV. 142 (1929); Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936); Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185 (1950); Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEXAS L. REV. 621 (1950).

³ 41 Cal. App. 782, 183 Pac. 204 (1919).

ineering and dogmatic.”⁴ This villain of the piece “dashed upon the scene, and with destruction in his heart and mayhem in his teeth pounced upon the Pomeranian with the result already regretfully recorded; the plaintiff’s dog had had its day. It crossed to that shore from which none, not even a good dog, ever returns.”

When sued for this outrage the defendant claimed that there was contributory negligence as a matter of law, in that the plaintiff’s dog was “upon the public streets without being licensed—unlike the defendant’s Airedale, whose master had ornamented his favorite with a tag entitling him to roam the city’s streets secure from interference by the poundkeeper or his myrmidons.” To this the court replied that the violation had no causal connection with the injury. “The appellant’s contention in this respect would be well grounded if the plaintiff’s omission to comply with the ordinance requiring dogs to be licensed had contributed to the incident resulting in the Pomeranian’s untimely end. But for aught that appears the absence of a tag from the collar of plaintiff’s dog was unnoticed by the Airedale, and was not the matter that aroused his ire or induced him to make the attack. His was the canine point of view and not that of the license collector.” Judgment for the plaintiff was affirmed.

Surely no one will quarrel with the result, or dispute the learned court’s profound and intimate knowledge of canine psychology. But granted that the Airedale’s fury was provoked by the sight of the pampered, patrician, pedigreed Pomeranian pup with the retinue of attendants, which was more than any honest animal could be asked to endure, still the fact remains that the conduct prohibited by the ordinance was keeping the dog, or at least allowing him upon the streets, until he had been licensed. It was the presence of the dog which was made illegal by express provision, and for the violation it was the dog which could be impounded, not the tag. And however uninterested the Airedale may have been in the matter of tags, it would be idle to pretend that he was indifferent to the dog. There is a very obvious and real causal connection between the forbidden act of the plaintiff and the tragedy which followed. If the plaintiff had kept no dog, or had kept his dog at home, there would have been no such result. It seems clear that the right conclusion has been reached for the wrong reason, and that something else is masquerading here under the guise of “cause.”

The second case is *Hale v. Pacific Telephone and Telegraph Com-*

⁴ The writer wishes to make it clear that he deplors this.

pany,⁵ again in 1919. The defendant kept upon its premises a wooden box, with the cover nailed down, which contained dynamite caps. A trespassing boy of eight found the box, pried off the cover, took some of the caps and gave one to the plaintiff, a boy of seven, who fired it off in a toy pistol and was injured. It was held that the defendant was not liable, because "its negligence was not the proximate cause of the plaintiff's injury." In the opinion the court made use of a horse-and-buggy illustration, as follows:

Thus, if A negligently leaves his horse attached to a buggy unhitched in the street, and, due to the wrongful act of B in frightening the horse, it runs away, causing injury to another by a collision, A is liable to the person so injured, for the reason that he, as a reasonably prudent man, should have foreseen that the horse might be frightened as a result of which it, in accordance with the instinctive nature of such animals would run away and cause damage. But, on the other hand, if B steals the unhitched horse, and in escaping with it collides with another to the latter's damage, no recovery therefor can be had against A, for the reason that the wrongful theft of the horse was not a consequence of which A, as a reasonably prudent man, should be deemed to have anticipated as a result of leaving his horse in the street unhitched.

Taking the illustration first, how can this be? When a horse is left unattended in the street, the possibility that he may be stolen is certainly one that would occur to the ordinary mind;⁶ and while it may be less likely than the chance of a runaway, it is still at least a definite part of the foreseeable risk. But apart from that, what has causation to do with it? In each suggested situation the plaintiff is run down by the defendant's unattended horse; and if the horse had not been left, the plaintiff would be safe and well. How can it be said that the defendant's conduct was not a cause of the injury, and a very important one? Likewise in the case itself, any negligence in leaving

⁵ 42 Cal. App. 55, 183 Pac. 280 (1919).

⁶ The defendant has been held liable in the analogous case where keys are left in an automobile and the plaintiff is run down by a thief in flight. *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N. E. 2d 537 (1948); *Ross v. Hartman*, 139 F. 2d 14 (1943), overruling *Squires v. Brooks*, 44 App. D. C. 320 (1916). The majority of the cases are to the contrary, but most of them find no duty to the plaintiff rather than no casual connection. *Slater v. T. C. Baker Co.*, 261 Mass. 424, 158 N. E. 778 (1927); *Castray v. Katz & Besthoff*, 148 So. 76 (La. App. 1933); *Wilson v. Harrington*, 269 App. Div. 891, 56 N. Y. S. 2d 157 (1945), *aff'd*, 295 N. Y. 667, 65 N. E. 2d 101 (1946); *Curtis v. Jacobson*, 54 A. 2d 520 (Maine 1947); *Galbraith v. Levin*, 323 Mass. 255, 81 N. E. 2d 560 (1948). Where the plaintiff is run down after the thief has made his escape, the car owner has been held not liable. *Howard v. Swagart*, 161 F. 2d 651 (D. C. Cir. 1947); *Wannebo v. Gates*, 227 Minn. 195, 34 N. W. 2d 695 (1948).

dynamite caps accessible and unguarded certainly arises from the possibility that they will fall into the wrong hands and explode in someone's face, which is precisely what has occurred. If the caps had been properly locked up the plaintiff would not have been hurt. What sense does it make to say that there is no sufficient causal connection? Again it seems clear that some other reason, distinct from the fact of "cause" and having nothing whatever to do with it, must be involved in both decision and illustration.

The third case is *Girdner v. Union Oil Company*,⁷ in 1932. There was a collision at an intersection, and it was found that both parties were negligent. It was also found that the plaintiff did not see the defendant's truck in time to avoid the collision, while the defendant saw the plaintiff's car in time. The defendant was held liable under the doctrine of the last clear chance. The court stated the doctrine, limiting it to situations where the plaintiff's negligence has left him helpless or unaware of his danger, while the defendant has discovered it. The opinion then continued:

If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof. . . . Stated in another way, contributory negligence of the party injured is not the proximate cause of the injury, as the negligence of the defendant being later it constitutes the sole proximate cause.

Once more it must be asked, how can this be? When the negligently driven vehicles of *A* and *B* collide and injure *C*, who is standing on the sidewalk, no one has any doubt that both *A* and *B* are liable to *C*. It has been held in California,⁸ as elsewhere,⁹ that the negligence

⁷ 216 Cal. 197, 13 P. 2d 915 (1932).

⁸ *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436 (1907); *Spear v. United Railroads of San Francisco*, 16 Cal. App. 637, 117 Pac. 956 (1911); *Keiper v. Pacific Gas & Electric Co.*, 36 Cal. App. 362, 172 Pac. 180 (1918). *Contra*, without mentioning the earlier cases, *Unger v. San Francisco-Oakland Terminal Railways*, 61 Cal. App. 125, 214 Pac. 510 (1923).

⁹ *Tetrault v. Gould*, 83 N. H. 99, 138 Atl. 544 (1927); *Austin Electric Ry. v. Faust*, 63 Tex. Civ. App. 91, 133 S. W. 449 (1910). It has been held, however, that the defendant who has the last clear chance may be required to indemnify the other defendant. *Nashua Iron & Steel Co. v. Worcester & N. R. R.*, 62 N. H. 159 (1882); *Colorado & Southern R. R. v. Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30 (1923); see *Knippenberg v. Lord & Taylor*, 193 App. Div. 753, 184 N. Y. Supp. 785 (1920);

of both *A* and *B* is a proximate cause of the injury to *C*, even though *A* may have had the last clear chance to avoid the collision. What possible difference can there be, in any terms of causal sequence, when it is *B* who is hurt? Are the negligence and the crash any less a cause when the flying glass cuts the driver instead of the passenger? Is *A*'s failure to step on the brake any less a cause of the collision where he is watching a girl on the sidewalk than where he discovers *B*'s danger? Is *B*'s negligence in proceeding into the intersection any more a cause of the collision where he sees *A* coming than where he does not even look? There is not, and never has been, any satisfactory reply to these questions. Again it is apparent that some other reason, entirely unconnected with causation, enters into the case, and that the language of the court only obscures and conceals it.

Such cases could be multiplied more or less indefinitely, in California as in every other state. They indicate that "proximate cause" covers a multitude of sins, that it is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried, and that at least in many cases there is no real question of causation at all. They indicate also that no one will get anywhere in dealing with "proximate cause" unless he is prepared to attempt to break the thing down into its component parts, to classify the cases according to the issues which appear in reality to be involved, and to recognize that what is said on one issue does not necessarily have any bearing on another.

It is possible to approach proximate cause on this basis. One may distinguish the following issues, all of which have been called by the one name, and any one or more of which may be involved in a single case:

1. The issue of causation in fact.
2. The issue of apportionment of damages among causes.
3. The issue of liability for unforeseeable consequences.
4. The issue of superseding causes.
5. The issues of shifted responsibility.
6. The issue of duty to the plaintiff.
7. The issue of the plaintiff's fault.

This list is by no means an exclusive one. There are other issues

Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. OF PA. L. REV. 130, 152 (1932). There are dicta to the contrary in *Shield v. F. Johnson & Son Co.*, 132 La. 773, 61 So. 787 (1913); *Pacific Tel. & Tel. Co. v. Parmenter*, 170 Fed. 140 (9th Cir. 1909); *Bradley v. Becker*, 321 Mo. 405, 11 S. W. 2d 8 (1928).

which may arise¹⁰ and pass under the name of "proximate cause," but those listed will account for all but a very small number of the cases in which that mysterious phrase has been uttered.

1. CAUSATION IN FACT

Of all the questions which arise under the name of "proximate cause" it is easiest to give an answer to that which traditionally is regarded as the most difficult: has the conduct of the defendant caused the plaintiff's loss? It is a question of fact, and one on which any layman is quite as competent to pass judgment as the most learned court. For that reason it is normally for the jury.

Causation is a fact. A cause is something regarded as a necessary antecedent; something without which the event would not have occurred. The term includes all things which have so far contributed to the result as to be essential to it.¹¹ In a philosophical sense the causes of any accident or event go back to the birth of the parties and the discovery of America; but any attempt to impose responsibility upon such a basis would result in infinite liability, and would "set society on edge and fill the courts with endless litigation."¹² As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay. But this limitation is not in any sense one of causation; it is one of rules and policies which deny liability for what has clearly been caused. The failure to distinguish between causation and responsibility is a fundamental one, and the attempt to state one in terms of the other has led and can lead only to the most hopeless confusion.

When the defendant digs a hole in the street and the plaintiff accidentally tumbles into it, no one doubts that the hole is a cause of the injury, and an important one.¹³ It is no less a cause, and an important

¹⁰ Thus in *Hyer v. Inter-Insurance Exchange*, 77 Cal. App. 343, 246 Pac. 1055 (1928), where the plaintiff's collision with another car broke his steering gear and brought about a second collision, the action was on an insurance policy, and the only issue would appear to be the meaning of the words "arising from one accident" in the policy.

¹¹ "In a comprehensive sense, all the circumstances (powers, occasions, actions and conditions) necessary to an event and necessarily followed by it; the entire antecedent of an event; the fundamental and philosophical conception of cause; in general, whatever in reality stands in relations analogous to those between a necessitated conclusion and its antecedent grounds." FUNK & WAGNALLS, NEW STANDARD DICTIONARY (1923).

¹² Mitchell, J., in *North v. Johnson*, 58 Minn. 242, 59 N. W. 1012 (1894).

¹³ *Evarts v. Santa Barbara Consolidated R. R.*, 3 Cal. App. 712, 86 Pac. 830 (1906);

one, when a third person deliberately kicks a child into the hole.¹⁴ The defendant escapes liability, not because his excavation has not injured the child, but because the duty imposed upon him by the law does not extend to protection against such an attack. On exactly the same basis, if the defendant drives through town at sixty miles an hour and arrives at a particular point in time to be hit by a falling tree,¹⁵ his speed is in a very real sense a cause of the accident, since without it he would not have been there when the tree fell; and if he is not liable to his passenger, it is because his negligence did not extend to such a risk. All those considerations which determine liability after causation has been established are included within the uncertain word "proximate;" but they do not mean that *cause* is not there.

One will-of-the-wisp which the courts of California have industriously pursued is found in the following language:¹⁶

Care must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not; that is to say, in order to make a defendant liable his wrongful act must be the *causa causans*, and not merely the *causa sine qua non*.

It is suggested, with deference, that this is moonshine and vapor; that the distinction stated does not exist. There are many cases in which it is clear as a matter of law that the defendant's conduct has not caused the injury; but they are, without exception, cases in which the identical event would have occurred without the conduct. The defendant's bridge is not a cause of the inundation of the plaintiff's land by a deluge which would have flooded it even if the bridge had not been there.¹⁷ The prohibited employment of a child to work after ten o'clock is not the cause of an injury which occurs at half-past

Fernald v. Eaton & Smith, 40 Cal. App. 498, 180 Pac. 944 (1919). "For if the fill had been maintained on a level with the surrounding surface there would have been no hole for Mrs. Donahoo to fall into." Donahoo v. Kress House Moving Corp., 25 Cal. 2d 237, 153 P. 2d 349 (1944).

¹⁴ Cf. Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Alexander v. Town of New Castle, 115 Ind. 51, 17 N. E. 200 (1888); Milostan v. Chicago, 148 Ill. App. 540 (1909); Miller v. Bahmmuller, 124 App. Div. 558, 108 N. Y. Supp. 924 (1908).

¹⁵ Cf. Berry v. Sugar Notch Borough, 191 Pa. St. 345, 43 Atl. 240 (1899).

¹⁶ Johnson v. Union Furniture Co., 31 Cal. App. 2d 234, 237, 87 P. 2d 917 (1939); Klarquist v. Chamberlain & Proctor, 124 Cal. App. 398, 12 P. 2d 664 (1932); Weck v. Los Angeles County Flood Control District, 80 Cal. App. 2d 182, 181 P. 2d 935 (1947); see Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 Pac. 534 (1910).

¹⁷ Asher v. Pacific Electric Ry., 42 Cal. App. 712, 187 Pac. 976 (1919).

nine.¹⁸ Failure to blow a whistle more than 950 feet from a railway crossing is not a cause where the whistle is blown continuously after 750 feet and the plaintiff does not hear it.¹⁹ Failure to stop an automobile and give name and address after an accident has nothing to do with the original injury.²⁰ There are of course many more such cases;²¹ and in all of them the injury would have occurred regardless of the defendant's act or omission.

In cases of this kind the courts of other states have arrived at a rule, commonly known as the "but for" or "sine qua non" rule, which may be stated as follows: The defendant's conduct is not the cause of the event, if the same event would have occurred without it.²² This has been said, in substance, in California.²³ At most it is a rule of ex-

¹⁸ *Williams v. Southern Pacific R. R.*, 173 Cal. 525, 160 Pac. 660 (1916).

¹⁹ *Davis v. Lane*, 24 Cal. App. 2d 400, 75 P. 2d 565 (1938).

²⁰ *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044 (1917).

²¹ *Greeneich v. Knoll*, 73 Cal. App. 1, 238 Pac. 163 (1925) (absence of reflector on rear of bicycle not cause where defendant's lights were so dim he could not have seen it in time); *Blodgett v. B. H. Dyas Co.*, 4 Cal. 2d 511, 50 P. 2d 801 (1935) (absence of handrail in center of basement stair not a cause of plaintiff's misstep and fall); *Blodgett v. Preston*, 118 Cal. App. 297, 5 P. 2d 25 (1931) (pedestrian crossing street diagonally rather than at right angle not shown to have contributed to his being run down); *Cary v. Los Angeles Ry.*, 157 Cal. 599, 108 Pac. 682 (1910) (crowded condition of street car not cause of plaintiff's fall when alighting, where other passenger gave signal to motorman to start car); *Burt v. Bank of California*, 211 Cal. 548, 296 Pac. 68 (1931) (defects in building not cause of collapse where overloading would have caused collapse even if building had satisfied all requirements); *Provin v. Continental Oil Co.*, 49 Cal. App. 2d 417, 121 P. 2d 740 (1942) (negligent maintenance of loading rack had nothing to do with customer's U-turn); *Kauffman v. Machine Shirt Co.*, 167 Cal. 506, 140 Pac. 15 (1914) (violation of ordinance requiring elevator doors to open only from inside not cause of fall down shaft where door left open); *Feldesman v. McGovern*, 44 Cal. App. 2d 566, 112 P. 2d 645 (1941) (failure to file petition in bankruptcy; no allegation plaintiff would have been entitled to discharge).

Compare the following cases of the negligence of notaries in taking acknowledgments: *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775 (1888) (property valueless anyway); *Ross v. New Amsterdam Casualty Co.*, 56 Cal. App. 254, 205 Pac. 43 (1922) (property in another); *Riverside Portland Cement Co. v. Maryland Casualty Co.*, 46 Cal. App. 87, 189 Pac. 808 (1920) (if sureties good they were liable anyway; if not, their failure to swear immaterial).

See also the cases cited *infra*, note 38, where it was held that the burden of proof was not sustained.

²² See *Smith, Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106, 109 (1911); *McLaughlin, Proximate Cause*, 39 HARV. L. REV. 149, 155 (1925); *Carpenter, Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396 (1932); *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N. W. 1091 (1893); *Ford v. Trident Fisheries Co.*, 232 Mass. 409, 122 N. E. 389 (1919); *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679 (1899); *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809 (1898).

²³ "The whole doctrine of responsibility for negligence is based on the postulate that without such negligence the injury would not have occurred, or, in other words,

clusion; if the injury would not have happened but for the defendant's negligence, it still does not follow that he must be liable. Other considerations, which remain to be discussed, may prevent the recovery.

In the ordinary case the "but for" rule works well enough as a test of causation alone. It fails, however, in one type of situation, which has arisen twice²⁴ in California. If two causes combine to bring about an injury, and either one of them alone would have been sufficient to cause the identical result, obviously some other test is required. The typical case is that of two fires from separate sources which merge and burn over the plaintiff's property.²⁵ In the absence of either fire the result would be the same, yet obviously responsibility must attach to both.

It was in such a case²⁶ that the Minnesota court evolved a substitute formula which has found more or less general acceptance:²⁷ The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it is such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable men cannot differ.

that the negligence is the proximate cause of the injury." *McVay v. Central California Investment Co.*, 6 Cal. App. 184, 188-9, 91 Pac. 745 (1907).

²⁴ In the criminal case of *People v. Liera*, 27 Cal. App. 346, 149 Pac. 1004 (1915), one Lopez fractured the decedent's skull with a beer bottle and the defendant immediately shot the decedent. There was evidence that he died from the effect of both wounds, and that either alone would have been fatal. A conviction of murder was affirmed. A similar case is *People v. Lewis*, 124 Cal. 551, 57 Pac. 470 (1899), where the defendant shot the decedent, who was left in great agony and cut his own throat. *Accord*, *Wilson v. State*, 24 S. W. 409 (Texas Cr. App. 1893); *Thompson v. Louisville & Nashville R. R.*, 91 Ala. 496, 8 So. 406 (1890).

²⁵ *Anderson v. Minneapolis, St. P. & S. S. M. R. R.*, 146 Minn. 430, 179 N. W. 45 (1920); *Borsheim v. Great Northern R. R.*, 149 Minn. 210, 183 N. W. 519 (1921); *Seckerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239 (1913). *Accord*, *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69 (1902) (horse frightened by two motorcycles passing at same time).

²⁶ *Anderson v. Minneapolis, St. P. & S. S. M. R. R.*, 146 Minn. 430, 179 N. W. 45 (1920). The court doubtless was influenced by the well-known article by Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1912), in which the term "substantial factor" was first suggested.

²⁷ *Cf.* RESTATEMENT, TORTS § 431: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."

Unhappily the *Restatement* has introduced confusion in § 433, which lists considerations which are important in determining whether negligent conduct is a substantial factor in bringing about harm to another. The effect is to apply the words to something more than mere causal connection, which leaves them as unsatisfactory as "proximate cause."

So far as can be discovered, "substantial factor" has not yet appeared in any California decision. The formula has rather obvious advantages. The phrase is sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms.²⁸ It covers the case of the merging fires, and also the occasional case²⁹ where the defendant has played a clear but insignificant part in the result, as well as the difficulties that have been suggested where a similar but not identical event would have followed without the defendant's act.³⁰ In ordinary cases, however, it comes out at the same door as the "but for" rule. Except as stated, no cases have been found where the defendant's conduct could be called a substantial factor where the event would have happened without it; nor is it easy to imagine any case where it would not be such a factor if it was so indispensable a cause that without it the result would not have ensued.³¹

It follows that there are always many such substantial factors contributing to an injury. Nothing occurs in a vacuum, and the event without multiple causes is inconceivable. Existing conditions, the forces of nature, the prior acts and omissions of others, and all other surrounding circumstances invariably play their important part. From time to time³² the California courts have gone seeking "the sole proximate cause" of an accident. There is, as the same courts have been forced to recognize often enough,³³ no such thing. Neither is there any such thing as "the proximate cause" of an event, distin-

²⁸ GREEN, RATIONALE OF PROXIMATE CAUSE, 132-141 (1927).

²⁹ Such as *Golden v. Lerch*, 203 Minn. 211, 281 N. W. 249 (1938); *Connellan v. Coffey*, 122 Conn. 136, 187 Atl. 901 (1936).

³⁰ Thus the case put by Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396 (1932) where A and B each sell a rope to C, who is bent on hanging himself, and C hangs himself with A's rope.

³¹ Apology is due for repeating in these paragraphs much that is said in PROSSER, TORTS 321-325 (1941).

³² As in *Peters v. United Studios*, 98 Cal. App. 373, 277 Pac. 156 (1929); *Donahoo v. Kress House Moving Corp.*, 25 Cal. 2d 237, 153 P. 2d 349 (1944).

³³ *Homan v. Wayer*, 9 Cal. App. 123, 98 Pac. 80 (1908); *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 Pac. 913 (1923); *Condon v. Ansaldi*, 203 Cal. 180, 263 Pac. 198 (1928); *Corvello v. Baumsteiger*, 115 Cal. App. 194, 1 P. 2d 484 (1931); *Herrin v. Smith Bros.*, 116 Cal. App. 518, 2 P. 2d 1012 (1931); *Bickford v. Pacific Electric Ry.*, 120 Cal. App. 542, 8 P. 2d 186 (1932); *Craig v. Boyes*, 123 Cal. App. 592, 11 P. 2d 673 (1932); *Mahoney v. Murray*, 140 Cal. App. 206, 35 P. 2d 612 (1934); *Hemet Home Builders Ass'n. v. Wells*, 3 Cal. App. 2d 65, 39 P. 2d 233 (1934); *Polk v. Weinstein*, 12 Cal. App. 2d 360, 55 P. 2d 588 (1936); *Canvin v. General Brewing Co.*, 20 Cal. App. 2d 49, 66 P. 2d 691 (1937); *Miller v. Cranston*, 41 Cal. App. 2d 470, 106 P. 2d 963 (1940); *Ross v. Baldwin*, 44 Cal. App. 2d 433, 112 P. 2d 666 (1941); *Scott v. Renz*, 67 Cal. App. 2d 428, 154 P. 2d 738 (1945).

guished as a cause from all other causes.³⁴ In particular, the defendant never can be absolved from liability for the mere reason that the negligence of another has contributed to the result. The obvious illustration is that of the two negligently driven automobiles which collide and injure a passenger or a bystander.³⁵ There are a host of similar situations in which the negligence of *A* combines with that of *B* to do harm, and both are liable.³⁶ A considerable part of the law of

³⁴*Squier v. Davis Standard Bread Co.*, 181 Cal. 533, 185 Pac. 391 (1919); *Frelburg v. Israel*, 45 Cal. App. 138, 187 Pac. 130 (1919); *Briggs v. Jess Mead, Inc.*, 93 Cal. App. 666, 270 Pac. 263 (1928); *Morris v. Purity Sausage Co.*, 2 Cal. App. 2d 536, 38 P. 2d 193 (1934); *Hartford v. Pacific Motor Trucking Co.*, 16 Cal. App. 2d 378, 60 P. 2d 476 (1936); *Bramble v. McEwan*, 40 Cal. App. 2d 400, 104 P. 2d 1054 (1940); *Dieterle v. Yellow Cab Co.*, 53 Cal. App. 2d 691, 128 P. 2d 132 (1942).

³⁵*Tompkins v. Clay Street R.R.*, 66 Cal. 163, 4 Pac. 1165 (1884); *Cordiner v. Los Angeles Gas & Electric Corp.*, 5 Cal. App. 400, 91 Pac. 436 (1907); *Spear v. United Railroads of San Francisco*, 16 Cal. App. 637, 117 Pac. 956 (1911); *Lininger v. San Francisco, V. & N. V. R.R.*, 18 Cal. App. 411, 123 Pac. 235 (1912); *Blackwell v. American Film Co.*, 48 Cal. App. 681, 192 Pac. 189 (1920); *Bibby v. Pacific Electric Ry.*, 58 Cal. App. 658, 209 Pac. 387 (1922); *Simmons v. Pacific Electric Ry.*, 60 Cal. App. 140, 212 Pac. 641 (1922); *Springer v. Pacific Fruit Exchange*, 92 Cal. App. 732, 268 Pac. 951 (1928); *Dougherty v. Ellingson*, 97 Cal. App. 87, 275 Pac. 456 (1929); *Sawdey v. Producers' Milk Co.*, 107 Cal. App. 467, 290 Pac. 684 (1930); *Edgar v. Cittaro*, 112 Cal. App. 178, 297 Pac. 654 (1931); *Bennett v. Central California Traction Co.*, 115 Cal. App. 1, 1 P. 2d 47 (1931); *Aungst v. Central California Traction Co.*, 115 Cal. App. 113, 1 P. 2d 56 (1931); *Fishman v. Silva*, 116 Cal. App. 1, 2 P. 2d 473 (1931); *Sullivan v. Richardson*, 119 Cal. App. 357, 6 P. 2d 567 (1931); *Kroijer v. Jenkins*, 119 Cal. App. 175, 6 P. 2d 96 (1931); *De Martini v. Wheatley*, 126 Cal. App. 230, 14 P. 2d 869 (1932); *Smith v. Schwartz*, 14 Cal. App. 2d 160, 57 P. 2d 1386 (1936); *Cummings v. Kendall*, 34 Cal. App. 2d 379, 93 P. 2d 633 (1939); *Fagan v. Union Pacific R.R.*, 85 Cal. App. 2d 583, 193 P. 2d 776 (1948).

³⁶*Pastene v. Adams*, 49 Cal. 87 (1874); *Merrill v. Los Angeles Gas & Electric Corp.*, 158 Cal. 499, 111 Pac. 534 (1910); *King v. San Diego Electric Ry.*, 176 Cal. 266, 168 Pac. 131 (1917); *Keiper v. Pacific Gas & Electric Co.*, 36 Cal. App. 362, 172 Pac. 180 (1918); *Marr v. Rowell*, 44 Cal. App. 147, 185 Pac. 1000 (1919); *Schilling v. Hayes*, 55 Cal. App. 1, 202 Pac. 680 (1921); *Morris v. Sierra & San Francisco Power Co.*, 57 Cal. App. 281, 207 Pac. 262 (1922); *Hansen v. Market Street Ry.*, 64 Cal. App. 426, 221 Pac. 955 (1923); *Deweese v. Kuntz*, 130 Cal. App. 620, 20 P. 2d 733 (1933); *Wright v. Southern Counties Gas. Co.*, 102 Cal. App. 656, 283 Pac. 823 (1929); *Olden v. Bahicora Development Co.*, 107 Cal. App. 399, 290 Pac. 1062 (1930); *Holohan v. McGrew*, 111 Cal. App. 443, 295 Pac. 1059 (1931); *Herron v. Smith Bros., Inc.*, 116 Cal. App. 518, 2 P. 2d 1012 (1931); *Lacy v. Pacific Gas & Electric Co.*, 229 Cal. 97, 29 P. 2d 781 (1934); *Gerberich v. Southern California Edison Co.*, 5 Cal. 2d 46, 53 P. 2d 948 (1936); *Canvin v. General Brewing Co.*, 20 Cal. App. 2d 49, 66 P. 2d 691 (1937); *Harmon v. H. M. Sherman Co.*, 29 Cal. App. 2d 580, 85 P. 2d 205 (1938); *John v. B. B. McGinnis Co.*, 37 Cal. App. 2d 176, 99 P. 2d 323 (1940); *Mecchi v. Lyon Van & Storage Co.*, 38 Cal. App. 2d 674, 102 P. 2d 422, 104 P. 2d 26 (1940); *Monroe v. San Joaquin Light & Power Corp.*, 42 Cal. App. 2d 641, 109 P. 2d 720 (1941); *Taylor v. Oakland Scavenger Co.*, 17 Cal. 2d 594, 110 P. 2d 1044 (1941); *Westover v. City of Los Angeles*, 20 Cal. 2d 635, 128 P. 2d 350 (1942); *Callison v. Dondero*, 51 Cal. App. 2d 403, 124 P. 2d 852 (1942); *Green v. County of Merced*, 62 Cal. App. 2d 570, 144 P.

joint tortfeasors has been built upon the principle that responsibility may be attached to each of two or more such "concurring" causes.³⁷

Apart from this illusory quest of a cause which is more causal than other causes, most of the California cases dealing with causation in fact have turned on the sufficiency of the evidence to establish the fact. The plaintiff has the burden of proof, and he must sustain it by more than mere speculation and conjecture.³⁸ He must provide a reasonable basis for the conclusion that it was more likely than not that the conduct of the defendant was a substantial factor in the result. Circumstantial evidence³⁹ or expert testimony⁴⁰ may be enough to establish causal connection, as in the case of any other fact; but there must be room to find that the balance of probabilities is in favor of the plaintiff, and if they are at best evenly divided, he must lose.⁴¹

2d 874 (1944); *Rodriguez v. Savage Transportation Co.*, 77 Cal. App. 2d 162, 175 P. 2d 37 (1946); *Monterrosa v. Grace Lines*, 90 Cal. App. 2d 826, 204 P. 2d 377 (1949); *Finnegan v. Royal Realty Co.*, 90 A. C. A. 975, 204 P. 2d 661 (1949), *hearing granted*; *De Corsey v. Purex Corp.*, 92 Cal. App. 2d 669, 207 P. 2d 616 (1949); *Gibson v. Garcia*, 96 A. C. A. 758, 216 P. 2d 119 (1950); *Wirkman v. Howard Zink Corp.*, 97 A. C. A. 477 (1950).

In the face of such a list, one can only marvel at the temerity of counsel who continue to raise on appeal the contention that the fact that another was also negligent relieves the defendant of liability, and at the patience of courts that continue to suffer it.

³⁷ See Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

³⁸ *Brown v. Northern California Power Co.*, 14 Cal. App. 651, 114 Pac. 54, 74 (1910); *Union Investment Co. v. San Francisco Gas & Electric Co.*, 168 Cal. 58, 141 Pac. 807 (1914); *Snow v. Harris*, 41 Cal. App. 34, 181 Pac. 676 (1919); *Webber v. Bank of Tracy*, 66 Cal. App. 29, 225 Pac. 41 (1924); *Peterson v. Lewis*, 2 Cal. 2d 569, 42 P. 2d 311 (1935); *Adrian v. Guyette*, 21 Cal. App. 2d 306, 69 P. 2d 197 (1937); *Dull v. Atchison, T. & S. F. Ry.*, 27 Cal. App. 2d 473, 81 P. 2d 158 (1938).

³⁹ *Viera v. Atchison, T. & S. F. Ry.*, 10 Cal. App. 267, 101 Pac. 690 (1909); *St. Paul Fire & Marine Ins. Co. v. Southern Pacific R. R.*, 30 Cal. App. 140, 157 Pac. 247 (1916); *Hallawell v. Union Oil Co.*, 36 Cal. App. 672, 173 Pac. 177 (1918); *Reuter v. San Pedro, L. A. & S. L. R. R.*, 37 Cal. App. 277, 174 Pac. 927 (1918); *County of Alameda v. Tieslau*, 44 Cal. App. 332, 186 Pac. 398, (1919); *Ross v. San Francisco-Oakland Terminal Ry.*, 47 Cal. App. 753, 191 Pac. 703 (1920); *Paiva v. California Door Co.*, 75 Cal. App. 323, 242 Pac. 887 (1925); *Keena v. United Railroads of San Francisco*, 197 Cal. 148, 239 Pac. 1061 (1925); *Gorman v. County of Sacramento*, 92 Cal. App. 563, 266 Pac. 1083 (1928); *Kennedy v. Minarets & Western R. R.*, 90 Cal. App. 563, 266 Pac. 563 (1928); *Redmond v. City of Burbank*, 43 Cal. App. 2d 711, 111 P. 2d 375 (1941).

⁴⁰ *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436 (1907); *Averdieck v. Burris*, 87 Cal. App. 626, 262 Pac. 423 (1927); *Shaw v. Owl Drug Co.*, 4 Cal. App. 2d 191, 40 P. 2d 588 (1935); *Burford v. Baker*, 53 Cal. App. 2d 301, 127 P. 2d 941 (1942); see *Kerby v. Elk Grove Union High School District*, 1 Cal. App. 2d 246, 34 P. 2d 431 (1934).

⁴¹ *Snow v. Harris*, 41 Cal. App. 34, 181 Pac. 676 (1919); *Hopkins v. Heller*, 59 Cal. App. 447, 210 Pac. 975 (1922); *Christensen v. Los Angeles Electric Supply Co.*, 112

In the ordinary case the question becomes one of what would have happened if the defendant had acted otherwise. This is of course incapable of mathematical proof, and a certain element of guesswork is always involved. Proof of the relation of cause and effect can never be more than "the projection of our habit of expecting certain consequents to follow certain antecedents merely because we have observed those sequences on previous occasions."⁴² When a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved him; but the experience of the community is that with guards present people are commonly saved, and this affords a sufficient basis for the conclusion that it is more likely than not that the absence of the guard played a significant part in the drowning.⁴³ Such questions are peculiarly for the jury.⁴⁴ Whether proper construction of a building would have withstood an earthquake,⁴⁵ whether reasonable police precautions would have prevented a boy from shooting the plaintiff in the eye with an airgun,⁴⁶ whether a broken flange would have made an electric car leave the rails in the absence of excessive speed,⁴⁷ whether a collision would have occurred

Cal. App. 629, 297 Pac. 614 (1931); *Mounts v. Tzugares*, 9 Cal. App. 2d 327, 49 P. 2d 883 (1935); *Neuber v. Royal Realty Co.*, 86 Cal. App. 2d 596, 195 P. 2d 501 (1948).

⁴² See Wolf, *Causality*, 5 *ENCYCLOPEDIA BRITANNICA* 61, 62 (14th Ed. 1929); PEARSON, *THE GRAMMAR OF SCIENCE* 113 ff. (1911).

⁴³ *Lindsey v. De Vaux*, 50 Cal. App. 2d 445, 123 P. 2d 144 (1942); *Rovegno v. San Jose Knights of Columbus Hall*, 108 Cal. App. 591, 291 Pac. 848 (1930).

⁴⁴ Cases are infrequent in which causation in fact is held to be established as a matter of law. Three such are *Bissett v. South San Francisco Belt R. R.*, 67 Cal. App. 325, 227 Pac. 671 (1924); *Traylen v. Citraro*, 112 Cal. App. 172, 297 Pac. 649 (1931); *Gallichotte v. California Mutual Building & Loan Ass'n.*, 4 Cal. App. 2d 503, 41 P. 2d 349 (1935). It is much more often held that as a matter of law there is no sufficient proof of causation. Thus *Cary v. Los Angeles Ry.*, 157 Cal. 599, 108 Pac. 682 (1910); *Kauffman v. Machine Shirt Co.*, 167 Cal. 506, 140 Pac. 15 (1914); *Williams v. Southern Pacific R. R.*, 173 Cal. 525, 160 Pac. 660 (1916); *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044 (1917); *Snow v. Harris*, 41 Cal. App. 34, 181 Pac. 676 (1919); *Hopkins v. Heller*, 59 Cal. App. 447, 210 Pac. 975, (1922); *Reclamation District No. 883 v. American Farms Co.*, 209 Cal. 74, 285 Pac. 688 (1930); *Blodget v. Preston*, 118 Cal. App. 297, 5 P. 2d 25 (1931); *McMillan v. Thompson*, 140 Cal. App. 437, 35 P. 2d 419 (1934); *Mounts v. Tzugares*, 9 Cal. App. 2d 327, 49 P. 2d 883 (1935); *Davis v. Lane*, 24 Cal. App. 2d 400, 75 P. 2d 565 (1938); *Provin v. Continental Oil Co.*, 49 Cal. App. 2d 417, 121 P. 2d 740 (1942); *Neuber v. Royal Realty Co.*, 86 Cal. App. 2d 596, 195 P. 2d 501 (1948).

⁴⁵ *Finch v. McKee*, 18 Cal. App. 2d 90, 62 P. 2d 1380 (1936).

⁴⁶ *Stockwell v. Board of Trustees*, 64 Cal. App. 2d 197, 148 P. 2d 405 (1944).

⁴⁷ *Johnson v. Oakland, S. L. & H. E. Ry.*, 127 Cal. 608, 60 Pac. 170 (1900).

if the defendant had not partially obstructed the highway,⁴⁸ and many similar questions,⁴⁹ cannot be decided as a matter of law.

2. APPORTIONMENT OF DAMAGES

The next issue which passes under the name of "proximate cause" is that of the apportionment of damages among two or more causes. It arises after it has been determined that the defendant's conduct has in fact been a cause of some damage suffered by the plaintiff, and it becomes a question of the portion of the total damage which may properly be assigned to the defendant rather than to other causes. It is not so much a question of causation as of the feasibility and practical convenience of splitting the total harm into separate parts which may reasonably be attributed to each cause.⁵⁰

The ordinary injury is indivisible. There can be no possible basis in reason for saying that any man has caused half of a broken leg, a third of the loss of a building by fire, or thirty-eight per cent of death. Any apportionment in such cases must be a purely arbitrary one, made for its own sake and for no other reason. Such division the courts always have refused to make. It is the general rule that if the defendant has contributed to the plaintiff's injury and is liable at all, he is liable for all the damages sustained. This is true where some of the causes are innocent, as where a fire set by the defendant is carried by a wind,⁵¹ and where two or more causes are culpable. It is true where either cause would have been sufficient in itself to bring about

⁴⁸ *Whelan v. Bigelow*, 33 Cal. App. 2d 717, 92 P. 2d 952 (1939); *Mecchi v. Lyon Van & Storage Co.*, 38 Cal. App. 2d 674, 102 P. 2d 422, 104 P. 2d 26 (1940); *Fennessey v. Pacific Gas & Electric Co.*, 20 Cal. 2d 141, 124 P. 2d 51 (1942).

⁴⁹ For example, *Harrison v. Gamatero*, 52 Cal. App. 2d 178, 125 P. 2d 904 (1942) (defendant violated a statute by double-parking and sent a child across the street to mail a letter; the child was struck by an automobile while returning); *Redmond v. City of Burbank*, 43 Cal. App. 2d 711, 111 P. 2d 375 (1941) (plaintiff in the dark fell over a wall fifteen inches high on land dedicated to sidewalk use); *Skaggs v. Wiley*, 108 Cal. App. 429, 292 Pac. 132 (1930) (whether speed three miles in excess of limit contributed to collision); *Burford v. Baker*, 53 Cal. App. 2d 301, 127 P. 2d 941 (1942) (improper medical treatment as cause of ankylosis); *Groat v. Walker Drayage & Warehouse Co.*, 14 Cal. App. 2d 350, 58 P. 2d 200 (1936) (heart attack after shock in collision); *Clark v. New Amsterdam Casualty Co.*, 180 Cal. 76, 179 Pac. 195 (1919) (weakened condition due to concussion as cause of death from myocarditis).

⁵⁰ Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

⁵¹ *Alechoff v. Los Angeles G. & E. Corp.*, 84 Cal. App. 33, 257 Pac. 569 (1927); *Young v. San Joaquin Light & Power Corp.*, 83 Cal. App. 585, 257 Pac. 152 (1927); *Haverstick v. Southern Pacific R. R.*, 1 Cal. App. 2d 605, 37 P. 2d 146 (1934).

the result, as in the case of merging fires which burn over land,⁵² and where both were essential to the result, as in the ordinary automobile collision.⁵³

There are other injuries, however, which are capable of some rough and ready division. If two defendants, acting independently, shoot the plaintiff, and one wounds him in the arm and the other in the leg, it is reasonable as a practical matter to say that two different injuries have been inflicted, and that each defendant is liable only for one.⁵⁴ There are obvious difficulties in the way of the division, and the fever which results from the two wounds, the medical expenses and all the pain and suffering will still have to be apportioned quite arbitrarily; but these objections have not prevented the courts from holding that there are separate torts, and that neither defendant is liable for the damage caused by the other.

Much the same apportionment can be made on the basis of a difference in time, as where two defendants independently operating the same factory pollute a stream over successive periods.⁵⁵ It is even possible that the earlier wrongdoer may be liable for the total damage and the later one only for a part. There is, for example, the type of case in which the plaintiff is hit by *A*'s automobile and left lying helpless in the highway, where he is subsequently run over by *B*. In three California decisions⁵⁶ it has been held that *A* is liable for both

⁵² See cases cited *supra*, notes 24 and 25.

⁵³ See cases cited *supra*, notes 35 and 36.

⁵⁴ *Le Laurin v. Murray*, 75 Ark. 232, 87 S. W. 131 (1905); *Schafer v. Ostmann*, 148 Mo. App. 644, 129 S. W. 63 (1910); *Albrecht v. St. Hedwig's Roman Catholic Benevolent Society*, 205 Mich. 395, 171 N. W. 461 (1919); *McAllister v. Pennsylvania R. R.*, 324 Pa. 65, 187 Atl. 415 (1936).

⁵⁵ *Freshwater v. Bulmer Rayon Co.*, [1933] 1 Ch. 162; *Southern Iron & Steel Co. v. Acton*, 8 Ala. App. 502, 62 So. 402 (1913); *Mexican Nat. Construction Co. v. Meddlege*, 75 Tex. 634, 13 S. W. 257 (1890).

In *Oakland v. Pacific Gas & Electric Co.*, 47 Cal. App. 2d 444, 118 P. 2d 328 (1941), a steam pipe broke without the fault of the defendant, but the defendant negligently delayed in shutting off the steam. It was held that, although the defendant was liable only for the damage to the plaintiff's library books caused by the delay, the plaintiff could recover full damages because the defendant could not sustain the burden of proof as to the extent of each injury. See *infra*, text at notes 79-80.

In *McGannon v. Chicago & N.W. R. R.*, 160 Minn. 143, 199 N.W. 894 (1924), the court apportioned damages where a workman's health was impaired through the negligence of successive employers. Under the California Workmen's Compensation Act, it has been held that the policy of the statute requires that the employee recover his entire damages from any one insurance carrier, leaving the carriers to apportion among themselves. *Colonial Insurance Co. v. Industrial Accident Comm.*, 29 Cal. 2d 79, 172 P. 2d 884 (1946).

⁵⁶ *Sawdy v. Producers' Milk Co.*, 107 Cal. App. 467, 290 Pac. 684 (1930); *Hill v. Peres*, 136 Cal. App. 132, 28 P. 2d 946 (1934); *Cummings v. Kendall*, 41 Cal. App. 2d 549, 107 P. 2d 282 (1940).

injuries, since danger from a second car was reasonably to be anticipated; but it has been recognized⁵⁷ that *B* is liable only for the aggravation due to his own wrong, and not for the original damage inflicted by *A*. On the same basis, an original tortfeasor may be liable for the total damage where a personal injury is aggravated by the negligent treatment of a physician,⁵⁸ but the doctor himself is liable only for the damage he has caused himself, and not for the initial injury.⁵⁹

The same sort of division has been made among the owners of trespassing cattle⁶⁰ or dogs which kill sheep,⁶¹ despite the obvious impossibility of proving the exact amount of the damage done by each animal. The most extreme examples of apportionment have been in cases of nuisance. Defendants who independently pollute the same water,⁶² flood the plaintiff's land from separate sources,⁶³ or deposit

⁵⁷ In *Cummings v. Kendall*, 41 Cal. App. 2d 549, 107 P. 2d 282 (1940). The defendant was held liable for all the damages because he was unable to sustain the burden of proving the extent of the damage caused by each accident. See *infra*, text at note 80.

Accord, *Young v. Dille*, 127 Wash. 398, 280 Pac. 782 (1923); *Frye v. Detroit*, 256 Mich. 466, 239 N. W. 886 (1932); *Le Bella v. Brown*, 103 N. J. L. 491, 133 Atl. 82 (1926), *aff'd*, 135 Atl. 918 (1927); *Leishman v. Brady*, 3 A. 2d 118 (Del. Super. 1938).

⁵⁸ *Boa v. San Francisco-Oakland Terminal Ry.*, 182 Cal. 93, 187 Pac. 2 (1920); *Dewhirst v. Leopold*, 194 Cal. 424, 229 Pac. 30 (1924); *Sauter v. New York Central & H. R. R. R.*, 66 N. Y. 50, 23 Am. Rep. 18 (1876); *Selleck v. City of Janesville*, 100 Wis. 157, 75 N. W. 975 (1898).

⁵⁹ *Pederson v. Eppard*, 181 Minn. 47, 231 N. W. 393 (1930); *Staehlin v. Hochdoerfer*, 235 S. W. 1060 (Mo. 1921); *Pedigo & Pedigo v. Croom*, 37 S. W. 2d 1074 (Tex. Civ. App. 1931).

⁶⁰ *Dooley v. Seventeen Thousand Five Hundred Head of Sheep*, 4 Cal. Unrep. 479, 107 Cal. xvii, 35 Pac. 1011 (1894); *Pacific Live Stock Co. v. Murray*, 45 Ore. 103, 76 Pac. 1079 (1904); *Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858 (1907); *Hill v. Chappel Bros.*, 93 Mont. 92, 18 P. 2d 1106 (1933).

In *Ushirohira v. Stuckey*, 52 Cal. App. 526, 199 Pac. 339 (1921) the defendants kept their cattle in a common herd, and it was found that there was concerted action, so that each was liable for the entire damages.

⁶¹ *Anderson v. Halverson*, 126 Iowa 125, 101 N. W. 781 (1904); *Nohre v. Wright*, 98 Minn. 477, 108 N. W. 865 (1906); *Stine v. McShane*, 55 N. D. 745, 214 N. W. 906 (1927); *Miller v. Prough*, 203 Mo. App. 413, 221 S. W. 159 (1920).

⁶² *Farley v. Crystal Coal & Coke Co.*, 85 W. Va. 595, 102 S. E. 265 (1920); *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970 (1891); *Symmes v. Prairie Pebble Phosphate Co.*, 66 Fla. 27, 63 So. 1 (1913); *Johnson v. City of Fairmont*, 188 Minn. 451, 247 N. W. 572 (1933); *Masonite Corp. v. Burnham*, 164 Miss. 840, 146 So. 292 (1933).

⁶³ *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550 (1891); *Switzer v. Yunt*, 5 Cal. App. 2d 71, 41 P. 2d 974 (1935); *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (1889); *William Tackaberry Co. v. Sioux City Service Co.*, 154 Iowa 358, 132 N. W. 945 (1911); *Verheyen v. Dewey*, 27 Idaho 1, 146 Pac. 1116 (1915); *Boulger v. Northern Pacific R. R.*, 41 N. D. 316, 171 N. W. 632 (1918); *Ryan Gulch Reservoir Co. v. Swartz*, 77 Colo. 60, 234 Pac. 1059 (1922).

cement dust on his orange trees,⁶⁴ have been held liable severally for the proportion of the total damage that each has caused; and the same conclusion has been reached as to noise⁶⁵ and smoke.⁶⁶ Although it must be conceded that the division has an artificial look, it is possible in such cases to say that one defendant has contributed half of the situation which has caused the trouble, where it is not possible to say that he has contributed half of a fractured skull. The *Restatement of Torts* to the contrary⁶⁷ notwithstanding, the same kind of apportionment is possible, and is commonly made,⁶⁸ where one of the contributing causes is an innocent one, such as an unprecedented rainfall or other force of nature. It has even been made in a California case⁶⁹ where it appeared that a collision and some damage would have occurred if the defendant had been driving at a lawful speed, but his excessive speed resulted in greater damage. In short, whenever any reasonable basis for the apportionment can be worked out, it has been made.

There are three California cases in which it has been held that a defendant is liable for contributing to a nuisance even though his

⁶⁴ *California Orange Co. v. Riverside Portland Cement Co.*, 50 Cal. App. 522, 195 Pac. 694 (1920).

⁶⁵ *Sherman Gas & Electric Co. v. Belden*, 103 Tex. 59, 123 S.W. 119 (1909).

⁶⁶ *Swain v. Tennessee Copper Co.*, 111 Tenn. 450, 78 S.W. 93 (1903); *Key v. Armour Fertilizer Works*, 18 Ga. App. 472, 89 S.E. 593 (1916).

⁶⁷ Section 450. The illustration there given is based on *Elder v. Lykens Valley Coal Co.*, 157 Pa. 490, 27 Atl. 545 (1893) which is definitely a minority case.

⁶⁸ *Rix v. Town of Alamogordo*, 42 N.M. 325, 77 P.2d 765 (1938); *Priest v. Nichols*, 116 Mass. 401 (1874); *Chicago & N.W. R.R. v. Hoag*, 90 Ill. 339 (1878); *Radburn v. Fir Tree Lumber Co.*, 83 Wash. 643, 145 Pac. 632 (1915); *McAdams v. Chicago, R.I. & P. R.R.*, 200 Iowa 732, 205 N.W. 310 (1925); *Chicago, R.I. & G. R.R. v. Martin*, 37 S.W.2d 207 (Tex. Civ. App. 1931).

Compare the cases where the defendant is held liable only for the aggravation of a pre-existing disease or similar physical condition. *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 70 Pac. 624 (1902); *Deibler v. Wright*, 119 Cal. App. 277, 6 P.2d 344 (1931); *Matthews v. Atchison, T. & S.F. Ry. Co.*, 54 Cal. App.2d 549, 129 P.2d 435 (1942); *Gates v. Fleischer*, 67 Wis. 504, 30 N.W. 674 (1886); *St. Louis S.W. R.R. v. Johnson*, 100 Tex. 237, 97 S.W. 1039 (1906); *Dallas Ry. & Terminal Co. v. Ector*, 131 Tex. 505, 116 S.W.2d 683 (Tex. Comm. App. 1938); *Pittsburgh S.S. Co. v. Palo*, 89 F.2d 353 (6th Cir. 1937).

⁶⁹ *Bressee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152 (1906). *Cf. Jenkins v. Pennsylvania R.R.*, 67 N.J.L. 331, 51 Atl. 704 (1902); *O'Keefe v. Kansas City Western R.R.*, 87 Kan. 322, 124 Pac. 416 (1912); *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705 (1878).

own pollution of a stream⁷⁰ or diversion of water⁷¹ was not enough in itself to do any harm. The difficulty in such cases is that the conduct of the defendant, standing alone, would not be any tort, and can become one only because of what others are doing. The explanation must be that pollution to even a slight extent becomes unreasonable when pollution on the part of others approaches the danger point;⁷² and it is significant that in similar decisions elsewhere⁷³ considerable stress has been laid on the fact that the defendant had knowledge of the other conduct. Here too the apportionment has been made, and the defendant held liable only to the extent of his own contribution.⁷⁴

In all these cases the difficulty of proof has been recognized, but not regarded as reason enough for refusing to apportion. It seems fair to say that the difficulty has been overstated. Almost any evidence which affords some basis for an estimate has been found sufficient;⁷⁵

⁷⁰ *Hill v. Smith*, 32 Cal. 166 (1867); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 Pac. 1152 (1884) (injunction against public nuisance).

⁷¹ *Hillman v. Newington*, 57 Cal. 56 (1880). *Accord*, as to flooding land, *Sloggy v. Dilworth*, 38 Minn. 179, 36 N.W. 451 (1888); *Town of Sharon v. Anahama Realty Corp.*, 97 Vt. 336, 123 Atl. 192 (1924); *Woodland v. Portneuf Marsh Valley Irrigation Co.*, 26 Idaho 789, 146 Pac. 1106 (1915). *Cf.* *Thorpe v. Brumfitt*, L. R. 8 Ch. 650 (1873) (obstruction of a way; *Sadler v. Great Western Ry.*, [1895] 2 Q.B. 688 (same); *Lambton v. Mellish*, [1894] 3 Ch. 163 (noise nuisance)).

⁷² *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419 (1881); *Sadler v. Great Western Ry.*, [1895] 2 Q.B. 688. *Cf.* *Parker v. American Woolen Co.*, 195 Mass. 591, 81 N.E. 468 (1907); *Weidman Silk Dyeing Co. v. East Jersey Water Co.*, 91 Atl. 338 (N.J. Sup. Ct. 1914).

⁷³ *Warren v. Parkhurst*, 45 Misc. 466, 92 N.Y. Supp. 725 (1904); *Lambton v. Mellish*, [1894] 3 Ch. 163. *Cf.* *Folsom v. Apple River Log-Driving Co.*, 41 Wis. 602 (1877); *McKay v. Southern Bell Tel. & Tel. Co.*, 111 Ala. 337, 19 So. 695 (1896).

⁷⁴ *Hill v. Smith*, 32 Cal. 166 (1887); *Sloggy v. Dilworth*, 38 Minn. 179, 36 N.W. 451 (1888); *Woodland v. Portneuf Marsh Valley Irrigation Co.*, 26 Idaho 789, 146 Pac. 1106 (1915).

⁷⁵ *California Orange Co. v. Riverside Portland Cement Co.*, 50 Cal. App. 522, 195 Pac. 694 (1920). The case is apparently good law even after the California decisions shifting the burden of proof to the defendant (*infra*, note 80). It was cited with approval in *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), where the court said: "Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tortfeasors, and say that where factually a correct decision cannot be made, the trier of fact may make it the best he can, which would be more or less a guess, stressing the fact that the wrongdoers are not in a position to complain of uncertainty."

Accord, *Eckman v. Lehigh & Wilkes-Barre Coal Co.*, 50 Pa. Super. 427 (1912); *William Tackaberry Co. v. Sioux City Service Co.*, 154 Iowa 358, 132 N.W. 945 (1911); *Miller v. Prough*, 203 Mo. App. 413, 221 S.W. 159 (1920); *Hill v. Chappel Bros.*, 93 Mont. 92, 18 P. 2d 1106 (1933); *Sellick v. Hall*, 47 Conn. 260 (1879).

and the California courts⁷⁶ and others⁷⁷ have said many times that the defendant cannot escape liability because his own wrong has made it impossible to measure the damages. Although this state has the only case⁷⁸ the writer has ever found in which the plaintiff was denied recovery for lack of evidence, it is almost certainly out of line and cannot be accepted as the present law. Beginning in 1940, the intermediate courts have taken the bull by the horns and adopted the suggestion of several writers,⁷⁹ that where it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and that if he cannot sustain it he should be liable

⁷⁶ "A wrongdoer who contributes to a damage cannot escape entirely because his proportional contribution to the result cannot be accurately measured. (In a case like the one at bar, it would be at least as near justice to hold him for all the damage as to hold him for none)." *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (1889). *Accord*, *Switzer v. Yunt*, 5 Cal. App. 2d 71, 41 P. 2d 974 (1935); *Cummings v. Kendall*, 41 Cal. App. 2d 549, 107 P. 2d 282 (1940); *Burford v. Baker*, 53 Cal. App. 2d 301, 127 P. 2d 941 (1942); *Finnegan v. Royal Realty Co.*, 35 A. C. 452 (1949); see *Reclamation District No. 833 v. American Farms Co.*, 209 Cal. 74, 285 Pac. 688 (1930); *Stephani v. Abbott*, 137 Cal. App. 510, 30 P. 2d 1033 (1934).

⁷⁷ *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209 (1868); *Columbus v. Rohr*, 30 Ohio C. C. 155 (1907). See *McCORMICK, DAMAGES*, 102 (1935).

⁷⁸ *Slater v. Pacific American Oil Co.*, 212 Cal. 648, 300 Pac. 31 (1931). An injunction was granted because the plaintiff had established that some portion of the damage came from the defendant, which makes the denial of damages appear all the more outrageous.

In *Matthews v. Atchison, T. & S. F. Ry.*, 54 Cal. App. 2d 549, 129 P. 2d 435 (1942), where the injury to plaintiff's elbow aggravated a pre-existing condition, it was held that the burden of proving the damages from the aggravation was on the plaintiff, but that the jury could find that he had sustained it. In the light of the decisions cited *infra*, notes 80 and 81, this decision is now of doubtful authority.

⁷⁹ *Wigmore, Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458 (1923); *Carpenter, Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 406 (1932); *Jackson, Joint Torts and Several Liability*, 17 TEXAS L. REV. 399 (1939).

As is pointed out in the Comment in 19 CALIF. L. REV. 630 (1931), there is some precedent for shifting the burden of proof on the issue of damages where it is established that the defendant is a wrongdoer. A defendant who wilfully confuses goods of another with his own must prove which goods are his, or the court will award all to the plaintiff. *Stone v. Marshall Oil Co.*, 208 Pa. 85, 57 Atl. 183 (1904). And it was held in *Armory v. Delamirie*, 1 Stra. 505, 93 Eng. Rep. 664 (1722), that the defendant would be liable for the most costly stone which would fit the plaintiff's ring unless he showed the value of the one taken. In *Yatter v. Mathies*, 139 Misc. 26, 246 N. Y. Supp. 548 (1930), where one or more of the defendants had lost goods in transit, the court shifted the burden of proof to the defendants.

for the entire loss.⁸⁰ These California decisions appear to be unique in this respect, but it is only surprising that other courts have not done the same.

The supreme court recently has carried this to its logical conclusion in the interesting case of *Summers v. Tice*.⁸¹ The defendants, who were members of a hunting party, both fired in the plaintiff's direction at the same time, and the plaintiff was hit in the face by a charge of shot from one gun. It was clear that both defendants were negligent, but that one had caused all of the damage and the other none. There was no other satisfactory evidence. In such cases it has been held in other jurisdictions that the plaintiff cannot recover from either defendant⁸² unless it can be found that they acted in concert.⁸³ Such concerted action, as a basis for a joint tort, might have been found here in the common hunting enterprise;⁸⁴ but the court rejected this way out as "straining that concept," and held instead that the burden of proof rested upon each defendant to show that he had not caused the injury. Since there was no proof, the result was that both became liable for the entire amount. Mention was made of the analogy of the burden of proof on the issue of apportionment,⁸⁵ but essentially the decision was one of policy to avoid a denial of all recov-

⁸⁰ *Cummings v. Kendall*, 41 Cal. App. 2d 549, 107 P. 2d 282 (1940); *Oakland v. Pacific Gas & Electric Co.*, 47 Cal. App. 2d 444, 118 P. 2d 328 (1941); *Finnegan v. Royal Realty Co.*, 35 A. C. 452 (1949); *De Corsey v. Purex Corp.*, 92 Cal. App. 2d 669, 207 P. 2d 616 (1949).

⁸¹ 33 Cal. 2d 80, 199 P. 2d 1 (1948).

⁸² *Oglesby's Sureties v. State*, 73 Tex. 658, 11 S. W. 873 (1889); *Casey Pure Milk Co. v. Booth Fisheries Co.*, 124 Minn. 117, 144 N. W. 450 (1913); *Hartzell v. Bank of Murray*, 211 Ky. 263, 277 S. W. 270 (1925); see *Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co.*, 117 App. Div. 215, 102 N. Y. Supp. 122 (1907), *aff'd* 191 N. Y. 533, 84 N. E. 1110 (1908).

⁸³ *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1927); *Benson v. Ross*, 143 Mich. 452, 106 N. W. 1120 (1906); *Reyher v. Mayne*, 90 Colo. 586, 10 P. 2d 1109 (1932); *Moore v. Foster*, 182 Miss. 15, 180 So. 73 (1938). See Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

⁸⁴ *Cf. Koskela v. Albion Lumber Co.*, 25 Cal. App. 12, 142 Pac. 851 (1914); *Reader v. Ottis*, 147 Minn. 385, 180 N. W. 117 (1920); and see Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

⁸⁵ "In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of the defendants to absolve himself if he can—relieving the wronged person of the duty of apportioning the injury to a particular defendant—apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment." 33 Cal. 2d 80, 88, 199 P. 2d 1 (1948).

ery where the plaintiff was innocent and both defendants clearly at fault.⁸⁶

The result seems an eminently desirable one, if it is limited to the situation where the fault of each defendant is established and it is only causation which is left in doubt. But where there is no evidence as to where culpability lies, and it appears that only one defendant can have been negligent, it is obvious that the application of the rule could impose upon an innocent defendant a hardship as great as any upon the plaintiff. In *Ybarra v. Spangard*,⁸⁷ where the plaintiff suffered a traumatic injury to his shoulder in the course of an operation, the court made an unprecedented use of *res ipsa loquitur* to put the burden of proof upon the diagnostician, the surgeon, the anaesthetist, the owner of the hospital and two nurses. The result was that all of them were held liable.⁸⁸ It seems quite unlikely that all of them were negligent, and very probable that judgment went against some entirely innocent person. The decision can be justified only on the ground that each defendant had undertaken a special responsibility for the plaintiff's safety, analogous to that of a carrier toward its passengers; that the injury was on its face a breach of the obligation, and that each defendant could therefore properly be required to explain or be liable.⁸⁹

There has been no consideration in California of one further kind of apportionment, which was involved in a well-known New Hampshire case.⁹⁰ A boy started to fall from the high beam of a bridge trestle, to almost certain death on rocks far below. He came in contact with defendant's uninsulated wires, and was electrocuted. The court allowed damages only for such a sum as his prospects for life and

⁸⁶ "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless." 33 Cal. 2d 80, 86, 199 P.2d 1 (1948).

See also Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458 (1923); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 406 (1932), both of which are cited and relied on by the decision.

⁸⁷ 25 Cal. 2d 486, 154 P. 2d 687 (1944).

⁸⁸ On a second trial none of the defendants offered any explanation of the accident, and the jury returned a verdict against all of them. This was affirmed by the District Court of Appeal in *Ybarra v. Spangard*, 93 A. C. A. 83, 208 P. 2d 445 (1949).

⁸⁹ See Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 223 (1949).

⁹⁰ *Dillon v. Twin State Gas & Electric Co.*, 85 N. H. 449, 163 Atl. 111 (1932).

health were worth when the defendants killed him. From this case the late Chief Justice Peaslee of New Hampshire, in a noted article,⁹¹ derived the general principle that an otherwise indivisible injury may be apportioned on the basis that potential damage from one cause has reduced the value of the loss inflicted by another. There are several decisions to this effect in other states,⁹² and there are cases in California⁹³ which are at least consistent with the theory.

3. UNFORESEEABLE CONSEQUENCES

The next issue is that of the defendant's liability for consequences which he could not reasonably have foreseen or anticipated. It has nothing whatever to do with causation, and it can arise only after it is established that the defendant's conduct has in fact caused the result. In other words, it is included within the indefinite meaning of

⁹¹ Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934). The idea is opposed by Carpenter, *Concurrent Causation*, 83 U. OF PA. L. REV. 941 (1935).

⁹² Thus the value of an injury has been reduced by an existing disease or prior accident. *Pieczonka v. Pullman Co.*, 89 F. 2d 353 (2d Cir. 1937); *Slaven v. Germain*, 64 Hun 506, 19 N. Y. Supp. 492 (1892); *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565 (1891); *Fortner v. Koch*, 272 Mich. 273, 261 N. W. 762 (1935); *Pittsburgh S. S. Co. v. Palo*, 64 F. 2d 198 (6th Cir. 1933).

In *Felter v. Delaware & Hudson R. Corp.*, 19 F. Supp. 852 (D. Pa. 1937) *aff'd*, 98 F. 2d 868 (3rd Cir. 1938), the defendant prevented efforts to save a burning building, and was held liable only for its value at the time. In *Douglas Burt & Buchanan Co. v. Texas & Pacific R. R.*, 150 La. 1038, 91 So. 503 (1922), the defendant prevented a barge from entering a canal already blocked by a landslide. In *Hawkins v. Front-St. Cable R. R.*, 3 Wash. 592, 28 Pac. 1021 (1892), it was held that the normal pain and suffering of childbirth must be taken into account where a miscarriage occurred three weeks before the child was due.

⁹³ The most obvious cases are those in which the plaintiff's life expectancy and state of health are taken into account in an action for wrongful death. *Harrison v. Sutter Street Ry.*, 116 Cal. 156, 47 Pac. 1019 (1897); *Valente v. Sierra R. R.*, 151 Cal. 534, 91 Pac. 481 (1907); *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 Pac. 808 (1919). Likewise where the injury has aggravated an existing disease or other physical condition. *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 70 Pac. 624 (1902); *White v. Red Mountain Fruit Co.*, 186 Cal. 335, 199 Pac. 318 (1921); *Deibler v. Wright*, 119 Cal. App. 277, 6 P. 2d 344 (1931); *Matthews v. Atchison, T. & S. F. Ry.*, 54 Cal. App. 2d 549, 123 P. 2d 586 (1942).

In *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 Pac. 152 (1906), it was assumed that the plaintiff had got himself into a situation where the defendant's legal speed of eight miles an hour would have caused a collision and some injury. It was said that the plaintiff could recover only for the "additional injury" caused by excessive speed. *Cf. DeCorsey v. Purex Corp.*, 92 Cal. App. 2d 669, 207 P. 2d 616 (1949).

In *Finnegan v. Royal Realty Co.*, 35 A. C. 452 (1949) plaintiff was trapped in a fire for which defendant was not responsible. Defendant's fire doors did not open outward as required by law. It was assumed that defendant was not liable for damages which would have been incurred anyway, but it was held that on this issue the defendant had the burden of proof. See cases cited *supra*, note 80.

"proximate." Essentially it is a question of whether the defendant's legal responsibility, obligation or duty extends to the protection of the plaintiff against such unforeseeable consequences of his negligent acts.

For "proximate" we are indebted to Lord Bacon,⁹⁴ who in his time committed other sins. The word means nothing more than near; and when it was first taken up by the courts it had connotations of proximity in time or space which long since have gone by the boards. Today it is well settled in nearly all jurisdictions⁹⁵ that mailing poisoned chocolates in California may be the proximate cause of death in Delaware,⁹⁶ and that negligence today may be the proximate cause of death ten years hence.⁹⁷ Instead "proximate" has developed in some courts a more or less vague meaning excluding remoteness in the sense merely of the improbable or unforeseeable.

Over this issue controversy has raged and continues to rage, both in the deluge of writing and in the decisions of other states. There are two diametrically opposed positions. One, which goes back to Baron Pollock⁹⁸ in 1850, is that the defendant's liability should be limited to the scope of the foreseeable risk created by his conduct, and that the test of his responsibility should be the same as for his negligence. The other, of later origin, is that a defendant who is negligent must

⁹⁴ "In jure non remota causa, sed proxima, spectatur. [In law the near cause is looked to, not the remote one.] It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." BACON, *MAXIMS OF THE LAW*, Reg. I.

⁹⁵ Almost the only vestige of the idea is the New York rule limiting recovery for the spread of fire to the next adjoining house. *Ryan v. New York Central R. R.*, 35 N. Y. 210, 91 Am. Dec. 49 (1866); *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 301 (1899). The idea was taken up in Pennsylvania in *Pennsylvania R. R. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431 (1870), but was repudiated in *Pennsylvania R. R. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100 (1876). It was rejected in *Butcher v. Vaca Valley & Clear Lake R. R.*, 67 Cal. 518, 8 Pac. 174 (1885), where stress was laid on the fact that California is a dry state.

⁹⁶ *People v. Botkin*, 132 Cal. 231, 64 Pac. 286 (1901). *Accord*, *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971 (1909) (nine or ten miles); *Ramsey v. Carolina-Tennessee Power Co.*, 195 N. C. 788, 143 S. E. 861 (1928) (several miles).

⁹⁷ *Western Union Telegraph Co. v. Preston*, 254 Fed. 229 (3d Cir. 1918). *Accord*, *Averdieck v. Burris*, 87 Cal. App. 626, 262 Pac. 423 (1927) (nineteen and one-half months); *Western Indemnity Co. v. Industrial Accident Comm'n*, 176 Cal. 776, 169 Pac. 663 (1917) (two years); *Bishop v. St. Paul City R. R.*, 48 Minn. 26, 50 N. W. 927 (1892) (seven months).

⁹⁸ In *Greenland v. Chapin*, 5 Ex. 243 (1850). *Accord*, *Milwaukee & St. Paul R. R. v. Kellogg*, 94 U. S. 469 (1878); *Wood v. Pennsylvania R. R.*, 177 Pa. 306, 35 Atl. 699 (1896); *Engle v. Director General of Railroads*, 78 Ind. App. 547, 133 N. E. 138 (1921); *Allison v. City of Fredericksburg*, 112 Va. 243, 71 S. E. 525 (1911).

take existing circumstances as he finds them, whether he knows of them or not, and is liable for the consequences which his acts produce upon them even though those consequences could not have been anticipated.⁹⁹ The second rule leaves any limitation to some other basis, such as that of duty to the plaintiff,¹⁰⁰ or any superseding causes.¹⁰¹ It is followed by the majority of the decisions¹⁰² in other states, and it has been adopted by the *Restatement of Torts*.¹⁰³

It is astonishing to find that this question, which has been the subject of so much literary tonnage, and has so extensively occupied the attention of other courts, appears to be quite undetermined in California, and that it has been virtually ignored. There is, to begin with, a provision of the Civil Code,¹⁰⁴ to the effect that

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, *whether it could have been anticipated or not*.

To the italicized words, so far as can be discovered, no reference has ever been made by any court.

It has been said that recovery in tort is limited to the foreseeable consequences,¹⁰⁵ or to the "natural and probable" consequences,¹⁰⁶ of the defendant's act. It has been said also that recovery is not so limited at all,¹⁰⁷ or that the particular injury, accident or event, or

⁹⁹ The position is well stated in *Christianson v. Chicago, St. P. M. & O. R. R.*, 67 Minn. 94, 69 N. W. 640 (1896); *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372 (1931). *Accord*, *Alabama Great Southern R. R. v. Chapman*, 80 Ala. 615, 2 So. 738 (1896); *Robinson v. Standard Oil Co.*, 89 Ind. App. 167, 166 N. E. 160 (1929); *Wolfe v. Checker Taxi Co.*, 299 Mass. 225, 12 N. E. 2d 849 (1938); *Kuhn v. Jewett*, 32 N. J. Eq. 647 (1880); *E. T. & H. K. Ide Co. v. Boston & Maine R. R.*, 83 Vt. 66, 74 Atl. 401 (1909); *Walmsley v. Rural Telephone Ass'n*, 102 Kan. 139, 169 Pac. 197 (1917).

¹⁰⁰ See *infra*, part 6.

¹⁰¹ See *infra*, part 4.

¹⁰² See PROSSER, TORTS, 344-348 (1941).

¹⁰³ Section 435.

¹⁰⁴ CAL. CIV. CODE § 3333 (italics added).

¹⁰⁵ *Johnson v. Union Furniture Co.*, 31 Cal. App. 2d 234, 87 P.2d 917 (1939); *Weck v. Los Angeles County Flood Control District*, 80 Cal. App. 2d 182, 181 P. 2d 935 (1947); *Harrison v. Ganatero*, 52 Cal. App. 2d 178, 125 P. 2d 904 (1942).

¹⁰⁶ *Conner v. East Bay Municipal Utility District*, 8 Cal. App. 2d 613, 47 P. 2d 774, 48 P. 2d 982 (1935); *Johnson v. Union Furniture Co.*, 31 Cal. App. 2d 234, 87 P. 2d 917 (1939); *Weck v. Los Angeles County Flood Control District*, 80 Cal. App. 2d 182, 181 P. 2d 935 (1947).

¹⁰⁷ *Jaques v. Southern Pacific R. R.*, 8 Cal. App. 2d 738, 48 P. 2d 63 (1935); *Workman v. Howard Zink Corp.*, 97 A. C. A. 477 (1950).

the manner of its occurrence, need not be one that could have been foreseen.¹⁰⁸ It has been said¹⁰⁹ finally that

A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind.

What this last is intended to mean is an especially intriguing problem, since by one gifted with omniscience all things would necessarily be foreseen, and even predicted with certainty. All of these statements have been made more or less casually, in the course of opinions in which the attention of the court was directed to a narrow issue.

When we turn to the actual results of the cases, they offer no better solution. There are instances in which personal injuries have developed unusual and unexpected complications for which the plaintiff has recovered: cancer from a contusion, followed by the collapse of a leg;¹¹⁰ gangrene and an amputation following a mere bruise on the ankle;¹¹¹ a heart attack from the shock of a collision;¹¹² the transfer of an infection from a toe to the face;¹¹³ the rupture of a cerebral artery when a boy was hit on the head by a basketball.¹¹⁴ There are also cases in which a fire has spread to a considerable distance;¹¹⁵ and freak accidents in which an initial collision has thrown

¹⁰⁸ *Carroll v. Central Counties Gas Co.*, 74 Cal. App. 303, 240 Pac. 53 (1925); *Royal Indemnity Co. v. Midland Counties Public Service Corp.*, 42 Cal. App. 628, 183 Pac. 960 (1919); *Rocca v. Tuolumne County Electric L. & P. Co.*, 76 Cal. App. 569, 245 Pac. 468 (1926); *Lim Ben v. Pacific Gas & Electric Co.*, 101 Cal. App. 174, 281 Pac. 634 (1929); *Haverstick v. Southern Pacific R. R.*, 1 Cal. App. 2d 605, 37 P. 2d 146 (1934); *Conner v. East Bay Municipal Utility District*, 8 Cal. App. 2d 613, 47 P. 2d 774, 48 P. 2d 982 (1935).

¹⁰⁹ *Williams v. San Francisco & Northwestern Ry.*, 6 Cal. App. 251, 91 Pac. 1011 (1907); *Inai v. Ede*, 42 Cal. App. 2d 521, 109 P. 2d 400 (1941).

¹¹⁰ *Shaw v. Owl Drug Co.*, 4 Cal. App. 2d 191, 40 P. 2d 588 (1935).

¹¹¹ *Smith v. Schumacker*, 30 Cal. App. 2d 251, 85 P. 2d 967 (1938).

¹¹² *Groat v. Walkup Drayage & Warehouse Co.*, 14 Cal. App. 2d 350, 58 P. 2d 200 (1936).

¹¹³ *Bethlehem Corp. v. Industrial Accident Comm'n*, 181 Cal. 500, 185 Pac. 179 (1919).

¹¹⁴ *Kerby v. Elk Grove Union High School District*, 1 Cal. App. 2d 246, 36 P. 2d 431 (1934). Recovery was denied because defendant was not negligent; but it was said that if there had been negligence the result would be proximate.

¹¹⁵ *Henry v. Southern Pacific R. R.*, 50 Cal. 176 (1875); *Butcher v. Vaca Valley & C. L. Ry.*, 67 Cal. 518, 8 Pac. 174 (1885); *Haverstick v. Southern Pacific R. R.*, 1 Cal. App. 2d 605, 37 P. 2d 146 (1934); *Alechoff v. Los Angeles Gas & Electric Corp.*, 84 Cal. App. 33, 257 Pac. 569 (1927).

a car out of control so that a second collision followed.¹¹⁶ It is not very easy to regard these events as foreseeable consequences which are a normal part of the risk created; yet in all the cases it has been held that the jury may find them so. There are other cases¹¹⁷ in which recovery has been denied because the event could not reasonably have been anticipated; but in all of them an intervening, superseding cause has operated, which has been regarded as sufficient to relieve the defendant of responsibility.¹¹⁸ The clear case of the unforeseeable result without such a superseding cause apparently has yet to arise in California.

What should the rule be? There is an appealing neatness and simplicity in the limitation which makes the same foreseeable risk that defines negligence define the boundaries of liability for it. It has been

¹¹⁶ In *Springer v. Pacific Fruit Exchange*, 92 Cal. App. 732, 268 Pac. 951 (1928), defendant negligently collided with a Buick car, which was thrown out of control, went across the highway thirty or forty feet, hit a stagecoach, veered back to the center of the road, traveled west forty or fifty feet, turned south and hit the rear end of the plaintiff's car. "Therefore, how far the Buick car might go after it collided with the Peerless before the driver would be chargeable as an independent actor, would also be a question of fact."

Other very similar cases, differing only in degree, are *Hill v. Jacquemart*, 55 Cal. App. 498, 203 Pac. 1021 (1921); *Terry v. Peterson*, 97 Cal. App. 160, 275 Pac. 484 (1929); *Coppock v. Pacific Gas & Electric Co.*, 137 Cal. App. 80, 30 P. 2d 549 (1934); *Hyer v. Inter-Insurance Exchange*, 77 Cal. App. 343, 246 Pac. 1055 (1926).

In *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 25 P. 2d 781 (1934), the defendant negligently left a pole lying in the roadway. A driver cranked his automobile, which started backward, hit the pole and threw it into the air. Plaintiff was thrown from the automobile to the ground, and the pole fell across his legs and injured him. The defendant was held liable for an accident which was at least highly improbable, if not fantastic.

In *Burke v. W. R. Chamberlain & Co.*, 51 Cal. App. 2d 419, 125 P. 2d 120 (1942), defendant's stevedores negligently left a block of wood lying on a dock. A lumber carrier driven by an employee ran over the block, which was pinched by the tire and catapulted from the dock into the hold of a ship in process of being loaded, where it struck and injured the plaintiff. The court had no difficulty in saying that the defendant should have anticipated that the block might be squeezed by the wheels and that it would "render probable the catapulting of the block into the air." Perhaps so; but the contrary could certainly be argued.

¹¹⁷ For example *Mann v. Chase*, 41 Cal. App. 2d 701, 107 P. 2d 498 (1940) (giving liquor to minor not proximate cause of his negligent driving); *Newman v. Steuernagel*, 132 Cal. App. 417, 22 P. 2d 780 (1933) (double-parking car not proximate cause of collision when guest tried to move it); *Angelis v. Foster*, 24 Cal. App. 2d 541, 75 P. 2d 650 (1938) (failure to provide transportation for child not proximate cause of injury when child ran into street); *Provin v. Continental Oil Co.*, 49 Cal. App. 2d 417, 121 P. 2d 740 (1942) (negligent maintenance of loading rack not proximate cause of injury where customer made a U-turn); *Figone v. Guisti*, 43 Cal. App. 606, 185 Pac. 694 (1919) (keeping loaded revolver under bar counter not proximate cause where boy seized it and shot plaintiff). See also *infra*, notes 175-183.

¹¹⁸ See *infra*, part 4.

defended as easier to administer, since it fixes the nearest thing to a definite rule that is possible, and as more just, since negligence may consist of only a slight deviation from the social standard and be free from moral blame, while the consequences may be out of all proportion to the fault.¹¹⁹ Yet this simplicity is deceptive. It is relatively easy to say that the total risk, made up of the aggregate of all the possibilities of harm, large or small, probable or fantastic, is so great that the reasonable man of ordinary prudence would not drive at an excessive speed. It is quite another matter to say that any one fragment of that risk, consisting of the particular consequences that have in fact occurred,¹²⁰ would have been sufficient in itself for the reasonable man to have it in mind and be deterred, or that it is so significant a part of the whole that liability should attach to it. Such piecemeal foresight is a rope of sand, and can be of no real aid to decision, as the floundering in the cases seems to demonstrate.¹²¹

¹¹⁹ Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 48 YALE L. J. 390, 39 COL. L. REV. 20 (1939).

¹²⁰ Which of the following possibilities could the automobile driver be expected to foresee, have in mind and guard against?

- (a) That he will collide with another car and kill a man?
- (b) That he will collide with another car and bruise a man's shin, and cancer will develop from the bruise?
- (c) That he will collide with another car, which will be thrown out of control and collide with a third car, or even a fourth?
- (d) That he will hit a pedestrian, whose body will be thrown several feet and injure a man on the sidewalk?
- (e) That he will narrowly miss a pregnant woman, who will be frightened into a miscarriage?
- (f) That he will endanger a child in the street, and that its rescuer will sustain a broken leg?
- (g) That in avoiding a collision he will run into a building and loosen a brick at the top of it, which a week later will fall on someone's head?
- (h) That he will injure someone who will be left helpless in the street and be run over by another car?
- (i) That he will hit a power line pole, mix up electric wires and start a fire, or electrocute a workman operating a laundry machine two miles away?
- (j) That he will hit a man carrying a shotgun, the gun will be discharged, and a bystander will be shot in the leg?

There is a mathematical chance of all these possibilities. All of them have in fact occurred, and can occur again; and all of them have been held "proximate" by some court. Which are "foreseeable" in the sense of being a significant part of the risk recognizable in advance?

See Gregory, *Proximate Cause in Negligence—A Retreat from "Rationalization,"* 6 U. OF CHI. L. REV. 36, 50 (1938).

¹²¹ Compare the conflicting views as to what consequences are "foreseeable" in the same case in *Pure Distributing Corp. v. Carey*, 97 S. W. 2d 768 (Tex. Civ. App. 1936), reversed in 133 Tex. 31, 124 S. W. 2d 847 (1939).

Essentially the choice is one between a loss which must fall upon a negligent defendant or upon an innocent plaintiff. If the loss is out of proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's innocence. If it is unjust to the defendant to make him bear the loss which he could not have foreseen, it is no less unjust to the plaintiff to make him bear a loss which he too could not have foreseen, and which is not even due to his own negligence, but to that of another. In these cases there is no justice to be achieved. Where the loss should lie is purely a question of policy. The defendants in proximate cause cases are in a large measure railroads, automobile owners, municipal corporations, public utilities and others who by rates, taxes or liability insurance can distribute the inevitable damage of a complex civilization among a larger group.¹²² Whatever the fear may have been in the beginning that industry and enterprise might be overburdened with catastrophic losses,¹²³ insurance has long since removed most of its sting; and where the idea of liability with-

The basic difficulty is well started in Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 198 (1950):

"This is the dilemma: Foresight is not psychologically irrelevant to the solution of problems of remoteness and often affects the judgment of those who try them. Yet foresight cannot function as a test until the facts of the case are described, and since the facts are nearly always susceptible of differing descriptions which will vary the result, a foresight criterion is a true testing process.

"A realization of this dilemma is of little value to judges—except insofar as knowledge that no definite answer lies this way may send them elsewhere for decisions, jury charges, and rules. But the advocate who must argue such issues in the tradition set by the courts may find the analysis useful in plumbing the inescapable psychology of decision and countering an opponent who makes a noise which purports to be eternal verity."

Morris, at p. 193, gives as an illustration the famous Texas "peg leg" case, where the defendant failed in its duty to maintain a highway. The plaintiff, engaged in attempting to tow a stalled car, slipped into a mudhole and was unable to extricate his peg leg. He seized the tail gate of the tow truck to pull himself loose, and a loop in the tow rope lassoed his good leg and broke it. All this was found to be within the realm of foresight on the basis of the following statement of the facts, quoted from plaintiff's brief: "The case stated in briefest form, is simply this: Appellee was on the highway, using it in a lawful manner, and slipped into this hole, created by appellant's negligence, and was injured in attempting to extricate himself."

¹²² Thus a count of 672 California cases bearing on "proximate cause," read for purposes of this article, discloses the following list of defendants: railways, street railways and other carriers 137; other public utilities 68; automobile drivers 127; manufacturers, industrial concerns and sellers of goods 78; owners and occupiers of land 75; employers 31; municipal and other government corporations 24; contractors 39; physicians and surgeons 22; notaries and other bonded officers 13; steamship companies 8; other defendants, including several who might well have carried liability insurance, 48. (The total exceeds 672 because in a number of cases there were two or more defendants).

¹²³ See *Ryan v. New York Central R. R.*, 35 N. Y. 210, 91 Am. Dec. 49 (1866); *Pennsylvania R. R. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431 (1870).

out fault is accepted, it is not surprising that liability in excess of fault has been gaining ground. In other states the drift has been slowly but surely toward the view that the unforeseeability of consequences is not in itself a sufficient reason for denying liability. That may well be the ultimate decision in California, in the light of the provision of the Code,¹²⁴ if counsel should ever have the happy inspiration to bring it to the attention of the courts.

If that is to be the rule, we are left with the search for some other end to liability. It is still inconceivable that any defendant should be liable to infinity for all the consequences which flow from his act; and something more than common sense and a rough sense of justice is called for if the law is to be anything but an unpredictable gamble. The possibility of other available limitations remains to be considered.

4. SUPERSEDING CAUSES

There follows the issue of superseding causes. This too has nothing to do with causation, and arises only after it has been established that the defendant's conduct has been in fact a cause of the injury. Essentially it is a question of whether the defendant shall be relieved of responsibility for the result of his fault for the reason that another cause which has contributed to that result is regarded as playing a more important, significant and responsible part. Again the issue is merely one of the policy which imposes liability, and any attempt to deal with it in the language of the fact of causation can lead only to perplexity and bewilderment. Reverting again to the case¹²⁵ of the child kicked into the hole, it is worse than futile to deny that the plaintiff has been injured by falling into the defendant's unguarded excavation; and the defendant is not liable only because the law concludes that a superseding responsibility lies elsewhere.

It is here that the greatest difficulties are met in "proximate cause." In several other courts a distinction, almost never encountered in California,¹²⁶ has been drawn between "direct" causation and

¹²⁴ *Supra*, text at note 104.

¹²⁵ *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379 (1901), *supra*, text at note 14.

¹²⁶ The idea of "direct" causation undoubtedly is descended from the old distinction between trespass and case. The California courts have occasionally used "direct" as a vague equivalent of "proximate." *Olson v. Standard Oil Co.*, 188 Cal. 20, 204 Pac. 393 (1922); *Weaver v. Landis*, 66 Cal. App. 2d 34, 151 P. 2d 884 (1944). The distinction has been recognized, however, in *Ramos v. Service Bros.*, 118 Cal. App. 432, 5 P. 2d 623 (1931); *Ward v. Read*, 219 Cal. 65, 25 P. 2d 821 (1933); *Dowd v. Atlas Taxicab & Auto Service Co.*, 69 Cal. App. 9, 230 Pac. 958 (1924).

See Bauer, *Confusion of the Terms "Proximate" and "Direct,"* 11 NOTRE DAME LAW. 395 (1936).

intervening causes. "Direct" refers to the kind of sequence in which the defendant's conduct operates upon the existing circumstances, known or unknown, the set stage to produce the result without the intervention of any active force of external origin.¹²⁷ There is an analogy, sometimes mentioned, to knocking over the first of a row of blocks, after which all the rest fall down. "Intervening" is used in a time sense; it has reference to external forces which come into play *after* the defendant's conduct, to change the situation which he has created.¹²⁸ Such intervening causes may or may not supersede the defendant's responsibility; but for all direct consequences of his fault he is held liable by these courts even though he could not have foreseen them.

This distinction has been damned, and rightly so, as artificial, illogical and calling for unreal and refined hair-splitting;¹²⁹ and as laying an undue emphasis upon the physics and mechanics of causal sequence, when what we are seeking is not that but a basis of legal responsibility. It does have this to be said for it, that it focuses attention upon the one point at which, if not before, liability must of necessity stop. The direct consequences of any act are limited, not by foreseeability but by the circumstances as they exist at the time, the way the stage is set; and they are therefore few. The possibilities of unexpected intervening causes which may enlarge the consequences at some later time are infinite, and if liability is not to be infinite, it is here at least that the line must be drawn.

Obviously it cannot be every intervening cause that will relieve the defendant of responsibility. There are first of all many cases where the only negligence lies in the risk that the very cause will

¹²⁷ A typical example of direct causation is *Coppock v. Pacific Gas & Electric Co.*, 137 Cal. App. 80, 30 P. 2d 549 (1934), where an automobile driver was waiting for a bridge to close, with his engine running and his foot on the clutch. The defendant drove into him from the rear; his foot was knocked off of the clutch, and his car jumped forward and ran into the plaintiff. Another is *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 Pac. 544 (1929), where defendant turned on the gas in pipes leading to an open meter and an uncapped vent, with a flame burning in the house. The gas exploded and injured the plaintiff.

¹²⁸ Thus if a fire is set with a wind blowing at the time, as in *Butcher v. Vaca Valley & C. L. Ry.*, 67 Cal. 518, 8 Pac. 174 (1885); *Alechoff v. Los Angeles Gas & Electric Corp.*, 84 Cal. App. 33, 257 Pac. 569 (1927), the spread of the fire by the wind is direct. If the wind springs up afterward, as in *McVay v. Central California Investment Co.*, 6 Cal. App. 184, 91 Pac. 745 (1907), it is an intervening cause.

¹²⁹ Suppose a wind is blowing from the east when a fire is set, and it subsequently veers to the north. Is it a new cause or a continuation of existing circumstances? Compare *Stevens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (1918), with *E. T. & H. K. Ide v. Boston & Maine R. R.*, 83 Vt. 66, 74 Atl. 401 (1909).

intervene. Failure to refrigerate a car of bananas involves only the risk that heat will spoil them.¹³⁰ It is negligence to furnish the plaintiff with a skittish mule only because the mule may take fright at a bundle of hay or something else.¹³¹ It is negligence to stand a drunken man up and leave him only because he may fall down and be hurt.¹³² The absence of a safety catch on an elevator means that someone may accidentally start it;¹³³ unguarded excavations¹³⁴ or machinery¹³⁵ mean that people may fall into them; electric wires which are too low offer the obvious risk that some person or thing may come in contact with them.¹³⁶ In all such cases¹³⁷ the defendant is clearly not to be absolved from liability because the danger he has created has materialized.

¹³⁰ *Ferraris v. Southern Pacific R. R.*, 47 Cal. App. 560, 191 Pac. 45 (1920).

¹³¹ *Fererira v. Silvey*, 38 Cal. App. 346, 176 Pac. 371 (1918). Compare, as to frightening horses, *Peterson v. General Geophysical Co.*, 185 P. 2d 56 (Cal. App. 1947), *hearing granted*; *Fallon v. United Railroads of San Francisco*, 28 Cal. App. 60, 151 Pac. 290 (1915); *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044 (1917).

¹³² *Doherty v. California Navigation & Improvement Co.*, 6 Cal. App. 131, 91 Pac. 419 (1907).

¹³³ *Barbieri v. Law*, 209 Cal. 429, 287 Pac. 464 (1930).

¹³⁴ *Fernald v. Eaton & Smith*, 40 Cal. App. 498, 180 Pac. 944 (1919); *Evarts v. Santa Barbara Consolidated R. R.*, 3 Cal. App. 712, 86 Pac. 830 (1906); *Donahoo v. Kress House Moving Corp.*, 25 Cal. 2d 237, 153 P. 2d 349 (1944). *Cf.* *Marton v. Jones*, 44 Cal. App. 299, 186 Pac. 410 (1919) (plaintiff slipped on a pebble and fell against defendant's barbed wire fence adjoining the sidewalk).

¹³⁵ *Elder v. Rose*, 63 Cal. App. 545, 219 Pac. 74 (1923).

¹³⁶ *Howell v. San Joaquin Light & Power Corp.*, 87 Cal. App. 44, 261 Pac. 1107 (1927); *Royal Insurance Co. v. Mazzei*, 50 Cal. App. 2d 549, 123 P. 2d 586 (1942).

¹³⁷ Compare also *Lindsey v. De Vaux*, 50 Cal. App. 2d 445, 123 P. 2d 144 (1942) (plaintiff drowned in swimming pool without lifeguard); *Rovegno v. San Jose Knights of Columbus Hall*, 108 Cal. App. 591, 291 Pac. 848 (1930) (*sanie*); *Redmond v. City of Burbank*, 43 Cal. App. 2d 711, 111 P. 2d 375 (1941) (fall over sidewalk obstruction in the dark); *Skoglund v. Moore Dry-Dock Co.*, 11 Cal. App. 2d 287, 53 P. 2d 1001 (1936) (fall over obstruction in unlighted shipyard); *Stapp v. Madera Canal & Irrigation Co.*, 34 Cal. App. 41, 166 Pac. 823 (1917) (failure to take precautions against occasional freshets in constructing dam); *Johnstone v. Panama Pacific International Exposition Co.*, 187 Cal. 323, 202 Pac. 34 (1921) (renting electric carriage to person unskilled in operation); *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 Pac. 1083 (1928) (bridge without a guardrail, boy on bicycle went over the edge); *Gill v. Johnson*, 125 Cal. App. 296, 13 P. 2d 857, 14 P. 2d 1017 (1932) (defendant filed a false return of service of summons in an action to cancel a deed of trust, which was followed by default judgment, Torrens registration of the land, and issuance of a certificate of title); *Finnegan v. Royal Realty Co.*, 35 A. C. 452 (1949) (fire doors opening inward, plaintiff caught in a fire).

In *Mitsuda v. Isbell*, 71 Cal. App. 221, 234 Pac. 928 (1925), defendant left a wagon partially obstructing a gravel road at night. A passing car raised a cloud of dust, and plaintiff, with his vision obscured, drove into the wagon. It was held that the other car and the dust were not superseding causes, but "only a natural incident of the passing of automobiles or other vehicles over the highway."

The fact that the intervening cause is the negligent act of a third person will not necessarily relieve the defendant, since his own fault may lie in exposing the plaintiff to the risk that such negligence will intervene. An automobile parked on a street car track creates the risk that the motorman will negligently run into it,¹³⁸ and a cable across the road¹³⁹ or any other obstruction of the highway¹⁴⁰ creates the danger that a driver may negligently fail to see it. A blocked sidewalk which forces pedestrians to walk in a busy street subjects them to the obvious hazards of negligent traffic,¹⁴¹ and a partially blocked roadway with obstructed vision or inadequate room to pass means that some negligently driven automobile may hit a man or another car.¹⁴² Negligently piled lumber means that someone may negligently knock it over,¹⁴³ and a car driven without a proper look-out calls to mind at once the old warning, "Drive carefully; you may meet another fool."¹⁴⁴

The issue here is not one of causation, which is beyond all dispute; but of whether the defendant was under any duty to protect the plaintiff against the intervening cause. Once that question is answered in the affirmative, nothing whatever remains to be said. Particularly when children are known to be in the vicinity, the defendant's duty may extend to the anticipation and prevention of a great deal of very foolish conduct which may injure the child himself¹⁴⁵ or an-

¹³⁸ Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 Pac. 180 (1918).

¹³⁹ Been v. The Lummus Co., 76 Cal. App. 2d 288, 173 P. 2d 34 (1946).

¹⁴⁰ Mason v. Crawford, 17 Cal. App. 2d 529, 62 P. 2d 420 (1936) (rear-end collision with double-parked car); Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 Pac. 887 (1928) (loading rails on truck extending into street); Holahan v. McGrew, 111 Cal. App. 430, 295 Pac. 1054 (1931) (timbers projecting beyond curbing hit by bus); cf Westover v. Los Angeles, 20 Cal. 2d 635, 128 P. 2d 350 (1948) (dip in highway).

¹⁴¹ Hansen v. Market Street R.R., 64 Cal. App. 426, 221 Pac. 955 (1923). Cf. Winsky v. De Mandel, 204 Cal. 107, 266 Pac. 534 (1928) (blocked pedestrian crossing, child hit by car); Jones v. South San Francisco, 96 A.C.A. 457 (1950). The case of Klarquist v. Chamberlain & Proctor, 124 Cal. App. 398, 12 P. 2d 664 (1932), holding that a contractor who blocks a sidewalk and provides no temporary walk is not responsible when a pedestrian is hit by a negligently driven truck, appears definitely wrong.

¹⁴² Whelan v. Bigelow, 33 Cal. App. 2d 717, 92 P. 2d 952 (1939); Fennessey v. Pacific Gas & Electric Co., 20 Cal. 2d 141, 124 P. 2d 51 (1942); Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 102 P. 2d 422, 104 P. 2d 26 (1940); McKay v. Hedger, 139 Cal. App. 266, 34 P. 2d 221 (1934).

¹⁴³ Pastene v. Adams, 49 Cal. 87 (1874).

¹⁴⁴ See the collision cases cited *supra*, note 35.

¹⁴⁵ Barrett v. Southern Pacific R. R., 91 Cal. 296, 27 Pac. 666 (1891) (turntable); Callahan v. Eel River & Eureka R. R., 92 Cal. 89, 28 Pac. 104 (1891) (same); Weik v. Southern Pacific R. R., 21 Cal. App. 711, 132 Pac. 775 (1913) (same); Skinner v. Knickrehn, 10 Cal. App. 596, 102 Pac. 947 (1909) (riding in wagon attached to house being moved along street); Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700 (1911) (swinging on guy wire hanging from power line pole); Faylor v. Great

other;¹⁴⁶ and the line is drawn only when the intervening act becomes so unpredictable¹⁴⁷ or it is so clear that any normal child should be able to look out for himself,¹⁴⁸ that the defendant's responsibility does not include looking out for him. The entire doctrine of attractive nuisance¹⁴⁹ has nothing to do with "proximate cause," although like everything else it has been swept into the bag.¹⁵⁰

Eastern Quicksilver Mining Co., 45 Cal. App. 194, 187 Pac. 101 (1919) (falling into stope of mine tunnel); Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 Pac. 487 (1928) (climbing apple tree and coming in contact with uninsulated wire); Morse v. Douglas, 107 Cal. App. 196, 290 Pac. 465 (1930) (meddling with hot tar vat on street); McKay v. Hedger, 139 Cal. App. 266, 34 P. 2d 221 (1934) (children gathering around double-parked ice truck in traffic).

¹⁴⁶ Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 Pac. 712 (1914) (one child ran unguarded push car loaded with steel rails over another's foot); Salas v. Whittington, 77 Cal. App. 2d 90, 174 P. 2d 886 (1946) (one child ignited a can containing shellac residue and burned another); Stockwell v. Board of Trustees, 64 Cal. App. 2d 197, 148 P. 2d 405 (1944) (inadequate policing of campus; boy with airgun shot plaintiff in the eye).

Where the defendant has notice that such conduct has occurred in the past, his duty may be considerably extended. Thus in Katz v. Helbing, 205 Cal. 629, 271 Pac. 1062 (1928), *aff'd* 215 Cal. 449, 10 P. 2d 1001 (1932), the defendant left a box full of lime on the sidewalk after notice that boys were throwing the lime at street cars, and was held liable when a passenger was hit in the eye. In Camp v. Peel, 33 Cal. App. 2d 612, 92 P. 2d 428 (1939), the defendant was held not liable on very similar facts except for the notice.

¹⁴⁷ Reithardt v. Board of Education, 43 Cal. App. 2d 629, 111 P. 2d 440 (1941) (one student pulled another off of window ledge); Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901) (one child kicked another into excavation); Solomon v. Red River Lumber Co., 56 Cal. App. 742, 206 Pac. 498 (1922) (children placed planks in swing ropes); Minter v. San Diego Consolidated Gas & Electric Co., 180 Cal. 723, 182 Pac. 749 (1919) (boy climbing tree to apparently inaccessible wire). Frace v. Long Beach City High School District, 58 Cal. App. 2d 566, 137 P. 2d 60 (1943) (theft of chemicals by schoolboy).

¹⁴⁸ Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896) (pond of water); Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 Pac. 414 (1918) (same); George v. Los Angeles R. R., 126 Cal. 357, 58 Pac. 819 (1899) (street car on side track with brakes set); Giannini v. Campodonico, 176 Cal. 548, 169 Pac. 80 (1917) (stable); Melendez v. Los Angeles, 8 Cal. 2d 741, 68 P. 2d 971 (1937) (pool of water); Angelis v. Foster, 24 Cal. App. 2d 541, 75 P. 2d 650 (1938) (boy dashing into street run down after defendant had failed to provide him with transportation).

The writer disagrees with Nicolosi v. Clerk, 169 Cal. 746, 147 Pac. 971 (1915), where defendant left a small box full of dynamite caps in an open tool box in the street, and a child removed one of the caps and injured himself. It was held that a boy of ten was "chargeable with knowledge that he has no right to make free with the contents of a box placed such as this." In Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 Pac. 280 (1919) (*supra*, text at notes 5 and 6), the case is much clearer for the defendant, where the boy was a trespasser and had to pry the box open.

¹⁴⁹ See Comments, 8 CALIF. L. REV. 266 (1920); 19 CALIF. L. REV. 86 (1930); 26 CALIF. L. REV. 159 (1938). The best statement of the rule to be found is in the RESTATEMENT, TORTS § 339.

¹⁵⁰ As in Hale v. Pacific Telephone & Telegraph Co. 42 Cal. App. 55, 183 Pac. 280 (1919).

An intentional, or even a criminal intervening act will not relieve the defendant if he was under a duty to protect the plaintiff against it. The California cases appear to be limited to the failure of a carrier to prevent a fight on a street car¹⁵¹ and the unauthorized filling of blank checks;¹⁵² but the decisions in other jurisdictions¹⁵³ leave no doubt of the rule.

There are other cases in which the intervening cause is not the only danger which makes the defendant negligent, but it is so clearly to be anticipated as a material part of the risk created that it cannot relieve the defendant. The man responsible for a fire, a dam or a ditch or a power line pole, must take precautions against ordinary wind and rain, and even against those unusual storms which do occasionally occur;¹⁵⁴ and the earthquake is not so unknown here that the contractor who builds a building can ignore it.¹⁵⁵ If gas¹⁵⁶ or gasoline¹⁵⁷ is allowed to escape, it is only to be expected that someone will strike a match; if gasoline is sold as kerosene it is obvious that someone is likely to light it in a lamp and fail to get it out of the house;¹⁵⁸ and when magnesium castings are delivered instead of aluminum there is a clear danger that they may be subjected to too high a tempera-

¹⁵¹ Terrell v. Key System, 69 Cal. App. 2d 682, 159 P. 2d 704 (1945).

¹⁵² Rancho San Carlos v. Bank of Italy, 123 Cal. App. 291, 11 P. 2d 424 (1932); Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 Pac. 704 (1912). *Accord*, as to failure to discover and report a series of forgeries, California Vegetable Union v. Crocker National Bank, 37 Cal. App. 743, 174 Pac. 920 (1918).

¹⁵³ Brauer v. New York Central & H. R. R., 91 N. J. L. 190, 103 Atl. 106 (1918); Whitehead v. Stringer, 106 Wash. 501, 180 Pac. 486 (1919); Filson v. Pacific Express Co., 84 Kan. 614, 114 Pac. 863 (1911); Morse v. Homer's Inc., 295 Mass. 606, 4 N. E. 2d 625 (1936); Garceau v. Engel, 169 Minn. 62, 210 N. W. 608 (1926); Jesse French Piano Co. v. Phelps, 47 Tex. Civ. App. 385, 105 S. W. 225 (1907); Southwestern Bell Telephone Co. v. Adams, 199 Ark. 254, 133 S. W. 2d 867 (1939); Peck v. Gerber, 154 Ore. 126, 59 P. 2d 675 (1936); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 913 (1901); David v. Missouri Pacific R. R., 328 Mo. 437, 41 S. W. 2d 179 (1931); Sinn v. Farmers' Deposit Savings Bank, 300 Pa. 85, 150 Atl. 163 (1930); Hines v. Garrett, 131 Va. 125, 108 S. E. 690 (1921). See Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. OF PA. L. REV. 121 (1937); Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940).

¹⁵⁴ Asher v. Pacific Electric Ry., 42 Cal. App. 712, 187 Pac. 976 (1919); Newman v. Alhambra, 179 Cal. 42, 175 Pac. 414 (1918); Wallner v. Barry, 207 Cal. 465, 279 Pac. 148 (1929); Southern Pacific R. R. v. Los Angeles, 5 Cal. 2d 545, 55 P. 2d 847 (1936); Conlin v. Coyne, 19 Cal. App. 2d 78, 64 P. 2d 1123 (1937); Smith v. San Joaquin Light & Power Corp., 59 Cal. App. 647, 211 Pac. 843 (1922); Rocca v. Tuolumne County Electric L. & P. Corp., 76 Cal. App. 569, 245 Pac. 468 (1926).

¹⁵⁵ Finch v. McKee, 18 Cal. App. 2d 90, 62 P. 2d 1380 (1936).

¹⁵⁶ Hilson v. Pacific Gas & Electric Co., 131 Cal. App. 427, 21 P. 2d 662 (1933).

¹⁵⁷ Feeney v. Standard Oil Co., 58 Cal. App. 587, 209 Pac. 85 (1922).

¹⁵⁸ Titlow v. Florence Trading Co., 35 Cal. App. 457, 170 Pac. 172 (1917).

ture.¹⁵⁹ Gas pipes too close to the surface of the street suggest at once that they may be broken by excavation;¹⁶⁰ crates left on the sidewalk mean that someone may move them;¹⁶¹ and when wires are left uninsulated in a factory yard it is not at all unusual that the man who comes in contact with them should be a workman sent into the yard to do his job.¹⁶² It is to be expected that cattle imprisoned in a field of alfalfa will founder;¹⁶³ and with traffic conditions what they are, when dangerous chemicals are left loose in an automobile it is not beyond contemplation that a collision will upset them.¹⁶⁴

As we approach the borderline, there are other cases in which it is not so easy to explain or justify the defendant's liability. Any negligent driver of a vehicle should certainly expect that he may endanger others; but should the reasonable man of ordinary prudence contemplate that the person so endangered will try to escape and be injured in leaping to safety,¹⁶⁵ even foolishly and in a state of panic?¹⁶⁶ Is it to be anticipated that his escape will injure another?¹⁶⁷ Should the defendant really contemplate a rescuer of person or property, who

¹⁵⁹ *Northwestern National Insurance Co. v. Rogers Patterns & Aluminum Foundry*, 73 Cal. App. 2d 442, 166 P.2d 401 (1946).

¹⁶⁰ *Rauch v. Southern California Gas Co.*, 96 Cal. App. 250, 273 Pac. 1111 (1929).

¹⁶¹ *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P. 2d 372 (1945).

¹⁶² *Monroe v. San Joaquin Light & Power Corp.* 42 Cal. App. 2d 641, 109 P. 2d 720 (1941).

¹⁶³ *Matoza v. Southern Pacific R. R.*, 59 Cal. App. 636, 211 Pac. 252 (1922).

¹⁶⁴ *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 195 P. 2d 783 (1948).

Compare also *Sawyer v. Hooper*, 79 Cal. App. 395, 249 Pac. 530 (1926) (some third person opened a valve permitting gas to flow into defendant's uncapped pipe); *Harmon v. H. M. Sherman Co.*, 29 Cal. App. 2d 580, 85 P. 2d 205 (1938) (defendant installed toilet which flushed directly from building water supply; third person installed heater which backed up hot water and steam).

¹⁶⁵ *Lawrence v. Green*, 70 Cal. 417, 11 Pac. 750 (1886); *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747 (1900); *Dinnigan v. Peterson*, 3 Cal. App. 764, 87 Pac. 218 (1906); *Schilling v. Hayes*, 55 Cal. App. 1, 202 Pac. 680 (1921) (dodging one automobile and stepping into path of another); *Churchman v. County of Sonoma*, 59 Cal. App. 2d 801, 140 P. 2d 81 (1943). *Cf.* *Miller v. Pacific Electric Ry.*, 169 Cal. 107, 145 Pac. 1023 (1915) (passenger walking back over trestle after he was carried past his station).

¹⁶⁶ *Waniorek v. United Railroads of San Francisco*, 17 Cal. App. 121, 118 Pac. 947 (1911); *cf.* *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 Pac. 954 (1915).

¹⁶⁷ *King v. San Diego Electric Ry.*, 176 Cal. 266, 168 Pac. 131 (1917) (fire automobile forced to swerve onto sidewalk to avoid collision); *Olden v. Babicora Development Co.*, 107 Cal. App. 399, 290 Pac. 1062 (1930) (driver turning into embankment to avoid cattle on highway at night); *Champagne v. A. Hamburger & Sons*, 169 Cal. 683, 147 Pac. 954 (1915) (plaintiff trampled in rush to escape from crowded elevator which fell); *Green v. County of Merced*, 62 Cal. App. 2d 570, 144 P. 2d 874 (1944) (driver avoiding collision hit bridge abutment); *Merrill v. Finnegan*, 133 Cal. App. 101, 24 P. 2d 188 (1933) (swinging car to avoid collision with bus which drove into intersection "careening and twisting as a giant monster. Immediate confusion results and all is chaos.")

will be injured in the attempt?¹⁶⁸ Is it to be anticipated that the person injured will need an operation and die from the shock of it,¹⁶⁹ or that he will be further injured through the negligence of a carefully selected physician?¹⁷⁰ Should the driver actually contemplate that wounds will be infected and the infection will spread,¹⁷¹ or that the injured man will fall and hurt himself again when he is walking on crutches three months later?¹⁷² Finally, should the driver really have in mind, while he is driving, the possibility that the man he hits will be left lying helpless in the street and be run over by a second car?¹⁷³ In all these cases the California courts, in common with the rest, have held that the defendant's liability extends to such events.

As an explanation of these decisions foreseeability, in any sense of what the defendant should anticipate, contemplate, have in mind and guard against at the time of his act, is a broken reed. It seems quite evident that liability is extended beyond the immediate risk

¹⁶⁸ Some courts have said yes. It has been held that one who endangers no one but himself owes a duty to his rescuer and is liable when the rescuer is injured. *Carney v. Buyea*, 271 App. Div. 338, 65 N. Y. S. 2d 902 (1946); *Longacre v. Reddick*, 215 S. W. 2d 404 (Tex. Civ. App. 1948); *Brugh v. Bigelow*, 310 Mich. 74, 16 N. W. 2d 668 (1944); *Butler v. Jersey Coast News Co.*, 109 N. J. L. 255, 160 Atl. 659 (1932) (the court says it is not a case of rescue, but no one can take that seriously). *Contra*, *Saylor v. Parsons*, 122 Iowa 679, 98 N. W. 500 (1904); see *Alabama Power Co. v. Conine*, 212 Ala. 228, 229, 104 So. 535 (1925); *Linz Realty Co. v. McDonald*, 133 S. W. 535 (Tex. 1911).

Rescue cases in California apparently are limited to *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700 (1911) (one boy trying to rescue another from electric shock); *Haverstick v. Southern Pacific R. R.*, 1 Cal. App. 2d 605, 37 P. 2d 146 (1934) (plaintiff trying to save his property from fire). It is well settled in other states that the rescuer may recover for his injuries unless his conduct has been foolhardy or entirely unusual. See PROSSER, TORTS, 361 (1941); RESTATEMENT, TORTS, § 320.

¹⁶⁹ *Blackwell v. American Film Co.*, 189 Cal. 689, 209 Pac. 999 (1922); *Western Indemnity Co. v. Industrial Accident Comm'n*, 176 Cal. 776, 169 Pac. 663 (1917).

¹⁷⁰ *Boa v. San Francisco-Oakland Terminal Railways*, 182 Cal. 93, 187 Pac. 2 (1920); *Dewhirst v. Leopold*, 194 Cal. 424, 229 Pac. 30 (1924).

¹⁷¹ *Bethlehem Corp. v. Industrial Accident Comm'n*, 181 Cal. 500, 185 Pac. 179 (1919); *Great Western Power Co. v. Pillsbury*, 171 Cal. 69, 151 Pac. 1136 (1915).

¹⁷² *Head Drilling Co. v. Industrial Accident Comm'n*, 177 Cal. 194, 170 Pac. 157 (1918); *Brown v. Beck*, 63 Cal. App. 686, 220 Pac. 14 (1923). In *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24 (1915), recovery was denied where the second injury was considered to be caused "either by carelessly using the arm or by a new accident."

¹⁷³ *Sawdey v. Producers' Milk Co.*, 107 Cal. App. 467, 290 Pac. 684 (1930); *Hill v. Peres*, 136 Cal. App. 132, 28 P. 2d 946 (1934); *Cummings v. Kendall*, 41 Cal. App. 2d 549, 107 P. 2d 282 (1940). *Accord*, *Adams v. Parrish*, 189 Ky. 628, 225 S. W. 407 (1920); *Morrison v. Medaglia*, 287 Mass. 46, 191 N. E. 133 (1934); *Thornton v. Eneroth*, 177 Wash. 1, 30 P. 2d 951 (1934). *Cf.* *Holmberg v. Villaume*, 158 Minn. 442, 197 N. W. 849 (1924); *Reed v. Ogden & Moffett*, 252 Mich. 362, 233 N. W. 345 (1930); *Caylor v. B. C. Motor Transportation*, 191 Wash. 365, 71 P. 2d 162 (1937); *Wedel v. Johnson*, 196 Minn. 170, 264 N. W. 689 (1936).

which makes him negligent in the first instance. Yet these intervening causes are certainly not abnormal incidents of the situation he has in fact created; and given that situation, they are easy enough to predict. The Restatement¹⁷⁴ calls them "normal," which is as good a word as any. If attention is directed, not at the original risk but at the intervening cause itself and whether it should supersede the defendant's responsibility—if, in other words, the question is asked, why should he *not* be liable for what he has clearly caused—the answer is much easier to give. The question becomes one of whether the intervening cause is, in retrospect, so abnormal and irregular, so external, foreign and unrelated to the defendant's original conduct, that it should relieve him of liability.

When we cross the line and come to those intervening causes which do relieve the defendant, they are found to answer this description. The unpredictable force of nature or "act of God,"¹⁷⁵ the guest who moves a double-parked car and does it so negligently as to cause a collision,¹⁷⁶ the stranger who foolishly¹⁷⁷ or maliciously¹⁷⁸ tampers with a power line, the automobile driver who quite unexpectedly cuts in ahead of a crowded bus,¹⁷⁹ the passenger who gives a signal to start

Christensen v. Los Angeles Electrical Supply Co., 112 Cal. App. 629, 297 Pac. 614 (1931), holding that there is no liability for the second accident, "must be deemed disapproved." Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

¹⁷⁴ RESTATEMENT, TORTS, § 294. See Bohlen, *Review of Harper, Law of Torts*, 47 HARV. L. REV. 556, 557 (1934).

¹⁷⁵ *McVay v. Central California Investment Co.*, 6 Cal. App. 184, 91 Pac. 745 (1907) (sudden whirlwind); *Asher v. Pacific Electric Ry.*, 42 Cal. App. 712, 187 Pac. 976 (1919) (unprecedented flood); *Suthiff v. Sweetwater Water Co.*, 182 Cal. 34, 186 Pac. 766 (1920) (same).

"Act of God" means the same thing as the "irresistible and superhuman cause" which under CAL. CIV. CODE § 1511 will excuse performance of a contract. *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244 (1892). It does not include any human conduct, or an accidental fire not caused by lightning or other superhuman agency. *Polack v. Pioche*, 35 Cal. 416 (1868); *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 28 Pac. 943 (1892). It does not include storms of unusual intensity which are not unprecedented, and against which the defendant is required to take precautions. *Mitchell v. Santa Barbara*, 48 Cal. App. 2d 568, 120 P.2d 131 (1941); *Conlin v. Coyne*, 19 Cal. App. 2d 78, 64 P.2d 1123 (1937); *Southern Pacific R.R. v. Los Angeles*, 5 Cal. 2d 545, 55 P.2d 847 (1936); *Wallner v. Barry*, 207 Cal. 465, 279 Pac. 148 (1929); *Asher v. Pacific Electric Ry.*, 42 Cal. App. 712, 187 Pac. 976 (1919); *Newman v. City of Alhambra*, 179 Cal. 42, 175 Pac. 414 (1918); *cf. Stapp v. Madera Canal & Irrigation Co.*, 34 Cal. App. 41, 166 Pac. 823 (1917). Even an earthquake will not relieve the defendant of liability if he was under a duty to guard against damage from it. *Finch v. McKee*, 18 Cal. App. 2d 90, 62 P.2d 1380 (1936).

¹⁷⁶ *Newman v. Steuernagel*, 132 Cal. App. 417, 22 P.2d 780 (1933).

¹⁷⁷ *Polloni v. Ryland*, 28 Cal. App. 51, 151 Pac. 296 (1915).

¹⁷⁸ *Stasulat v. Pacific Gas & Electric Co.*, 8 Cal. 2d 631, 67 P.2d 678 (1937).

¹⁷⁹ *Sweet v. Los Angeles Ry.*, 79 Cal. App. 2d 195, 179 P.2d 824 (1947).

a street car while the plaintiff is alighting,¹⁸⁰ the child who dashes into the street after the defendant has failed to provide him with transportation,¹⁸¹ the sick man who sleeps on the floor in a draft and catches pneumonia when the defendant fails to deliver his bed,¹⁸² all have been regarded as abnormal, unpredictable, and as bearing no real relation to the defendant's conduct.¹⁸³

A more troublesome question arises when the intervening cause, abnormal in itself, leads only to the consequences which were to be anticipated as a result of the original negligence. The defendant obstructs the highway, and a runaway horse collides with the obstruc-

¹⁸⁰ *Cary v. Los Angeles Ry.*, 157 Cal. 599, 108 Pac. 682 (1910).

¹⁸¹ *Angelis v. Foster*, 24 Cal. App. 2d 541, 75 P. 2d 650 (1938).

¹⁸² *Johnson v. Union Furniture Co.*, 31 Cal. App. 2d 234, 87 P. 2d 917 (1939).

The writer disagrees with *McMillan v. Thompson*, 140 Cal. App. 437, 35 P. 2d 419 (1934), where the defendant partly obstructed the highway at night with his truck and trailer, and an automobile swinging left to pass was struck from the rear by another car. It was held that while a head-on collision would have been proximately caused, a rear-end collision was strictly the "intervening act of a third party." The risk of one would appear to be as much a part of the situation created as the other.

¹⁸³ There are in addition many cases in which no harm at all was reasonably to be anticipated, either from the intervening cause or as the direct result of the defendant's conduct. The proper holding in such cases is certainly that the defendant is not negligent, rather than that there is no "proximate cause." *Stearns v. Hooper*, 78 Cal. 341, 20 Pac. 734 (1889) (vessel driven against wharf by violent storm); *Palmer v. Atchison, T. & S. F. R. R.*, 101 Cal. 187, 35 Pac. 630 (1894) (carrier not liable for delay occasioned by act of God); *Los Angeles Cemetery Ass'n v. Los Angeles*, 103 Cal. 461, 37 Pac. 375 (1894) (normally adequate sewer flooded by extraordinary storm); *Falls v. San Francisco & N. P. R. R.*, 97 Cal. 114, 31 Pac. 901 (1893) (passenger fell over freight on station platform in daylight); *Kleebauer v. Western Fuse & Explosives Co.*, 138 Cal. 497, 71 Pac. 617 (1903) (criminal took refuge in powder magazine and blew it up); *Morris v. Southern Pacific R. R.*, 168 Cal. 485, 143 Pac. 708 (1914) (railroad bridge washed out by unprecedented storm); *Fairbairn v. American River Electric Co.*, 170 Cal. 115, 148 Pac. 788 (1915) (boom of derrick came in contact with wires at apparently safe height); *Trice v. Southern Pacific R. R.*, 174 Cal. 89, 161 Pac. 1144 (1916) (car turned over in safe condition damaged by collision and brakeman injured); *Figone v. Guisti*, 43 Cal. App. 606, 185 Pac. 694 (1919) (minor shot plaintiff with gun kept under defendant's bar counter); *Solomon v. Red River Lumber Co.*, 56 Cal. App. 742, 206 Pac. 498 (1928) (children ingeniously tampering with safe swing); *Denman v. Pasadena*, 101 Cal. App. 769, 282 Pac. 820 (1929) (no liability where grandstand erected by third person collapsed during Tournament of Roses parade); *Sweatman v. Los Angeles Gas & Electric Corp.*, 101 Cal. App. 318, 281 Pac. 677 (1929) (metal rod thrust out of window came in contact with electric wire); *Ellis v. Burns Valley School District*, 128 Cal. App. 550, 18 P. 2d 79 (1933) (boy injured during properly supervised play); *Payne v. Santa Barbara Cottage Hospital*, 2 Cal. App. 2d 270, 37 P. 2d 1061 (1934) (improper use by nurse of "toothpick applicators" supplied by defendant); *Kerby v. Elk Grove Union High School District*, 1 Cal. App. 2d 246, 36 P. 2d 431 (1934) (basketball struck boy on head and ruptured cerebral artery); *Hayden v. Paramount Productions*, 33 Cal. App. 2d 287, 91 P. 2d 231 (1939) (steel column came in contact with wire at apparently safe height); *Reithardt v. Board of Education*, 43 Cal. App. 2d 629, 111 P. 2d 440 (1941) (one student pulled another off of window

tion,¹⁸⁴ or an automobile driver trying to avoid a collision¹⁸⁵ or a child¹⁸⁶ crashes into it.¹⁸⁷ Except where the intervening cause is the deliberate choice of a third person who can be regarded as assuming the responsibility,¹⁸⁸ it has been held in such cases¹⁸⁹ that the defendant is not relieved when the danger he has created is realized in a way that he could not anticipate, and the result against which he was obligated to protect the plaintiff has in fact occurred. The most remarkable case of this kind in California is *Carroll v. Central Counties Gas Company*,¹⁹⁰ where the defendant's gas pipe in the bed of a creek was in such proximity to a bridge that it was found to endanger the safety of the travelling public. An automobile went through the railing of the bridge, fell upon the pipe and broke it, and a guest in the car died from burns from the ignited gas. It was held to be error to instruct the jury that the "independent act of a third person" would relieve the defendant of liability.¹⁹¹

ledge); *Renzetti v. Los Angeles Motor Coach Co.*, 48 Cal. App. 2d 37, 119 P. 2d 164 (1941) (rear-end collision with bus while plaintiff alighting).

¹⁸⁴ *Williams v. San Francisco & N. W. R. R.*, 6 Cal. App. 715, 93 Pac. 122 (1907). *Accord*, *Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, 143 Pac. 257 (1914), where a horse was improperly hitched in the street, a boy fired a toy pistol in the vicinity, and the horse ran away.

¹⁸⁵ *Gerberich v. Southern California Edison Co.*, 5 Cal. 2d 46, 53 P. 2d 948 (1935); *Bosqui v. San Bernardino*, 2 Cal. 2d 747, 43 P. 2d 547 (1935).

¹⁸⁶ *Inai v. Ede*, 59 Cal. App. 2d 549, 139 P. 2d 76 (1943).

¹⁸⁷ *Jackson v. Utica Light & Power Co.*, 64 Cal. App. 2d 197, 148 P. 2d 405 (1944). *Cf.* *Lacy v. Pacific Gas & Electric Co.*, 220 Cal. 97, 29 P. 2d 781 (1934) (freakish injury as a result of pole left in the road); *Satterberg v. Pacific Gas & Electric Co.*, 58 Cal. App. 2d 296, 136 P. 2d 43 (1943) (defendant's uninsulated pipe came in contact with electric wire; plaintiff turning plow came in contact with pipe); *Gibson v. Garcia*, 96 A. C. A. 758, 216 P. 2d 119 (1950). The last named decision contains an especially good statement, and cites many cases from other jurisdictions.

¹⁸⁸ See *infra*, part 6.

¹⁸⁹ *Accord*, *Johnson v. Kosmos Portland Cement Co.*, 64 F. 2d 193 (6th Cir. 1933) (explosive gas residue in oil barge struck by lightning); *Moore v. Townsend*, 76 Minn. 64, 78 N. W. 880 (1899) (ladder left standing in street blown down by extraordinary wind); *McDowell v. Village of Preston*, 104 Minn. 263, 116 N. W. 470 (1908) (run-away horse collided with highway obstruction); *Baldwin v. Greenwoods Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33 (1873) (same). *Cf.* *Munsey v. Webb*, 231 U. S. 150 (1913); *Teasdale v. Beacon Oil Co.*, 266 Mass. 25, 164 N. E. 612 (1929); *Van Cleef v. Chicago*, 240 Ill. 318, 88 N. E. 815 (1909); *Dalton v. Great Atlantic & Pacific Tea Co.*, 241 Mass. 400, 135 N. E. 318 (1922).

¹⁹⁰ 74 Cal. App. 303, 240 Pac. 53 (1925), *aff'd* 96 Cal. App. 161, 273 Pac. 875, 274 Pac. 594 (1929).

¹⁹¹ "The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission." (Italics supplied). 74 Cal. App. 303 at 308 (1925), repeated in the second opinion 96 Cal. App. 161 at 167 (1929).

5. SHIFTED RESPONSIBILITY

Next is the issue which, for want of a better name, may be called that of shifted responsibility. It is very closely related to the issue of the superseding cause,¹⁹² and in many cases may amount to the same thing.¹⁹³ The question again is whether the defendant should be relieved of liability for what he has undoubtedly caused, but the reason now is that another responsible person has taken over the situation.

One case may illustrate the point. In *Stultz v. Benson Lumber Company*¹⁹⁴ the defendant sold to the plaintiff's employer a defective plank, knowing that it was to be used in a scaffold. The employer discovered the defect, but used the plank anyway, and the plaintiff, who was a painter, was injured when the scaffold collapsed. The result was of course precisely what was to be expected from the original negligence; and other cases¹⁹⁵ have made it clear that the employer's

¹⁹² The classification here made is one of convenience only, and has no inherent virtue. "Shifted responsibility" may differ from the "superseding cause" in at least the following respects:

1. The person who has the new responsibility may merely have done nothing, so that the situation created by the defendant remains unchanged. *Story v. Robinson*, 32 Cal. 205 (1867) (cattle turned out by defendant allowed to starve).

2. The result of his conduct may be precisely what was to be anticipated from the defendant's original negligence, yet the defendant may be relieved of responsibility. *Stultz v. Benson Lumber Co.*, 6 Cal. 2d 688, 59 P. 2d 100 (1936); *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 Pac. 29 (1916); *Roberts v. Southern Pacific R. R.*, 54 Cal. App. 315, 201 Pac. 958 (1921); *Schwartz v. California Gas & Electric Corp.*, 163 Cal. 398, 125 Pac. 1044 (1912).

3. The intervening conduct may be quite foreseeable, and the defendant may even be warned of it in advance, and yet be permitted to say that it is not his responsibility, as in the case of *The Lusitania*, 251 Fed. 715 (D. C. N. Y. 1918), where the steamship company had ample warning of the intention to sink the boat in violation of existing international law.

¹⁹³ Thus in *Johnson v. Union Furniture Co.*, 31 Cal. App. 2d 234, 87 P. 2d 917 (1939), the decedent's conduct might be regarded either as an abnormal intervening cause, or as his own assumption of responsibility.

¹⁹⁴ 6 Cal. 2d 688, 59 P. 2d 100 (1936).

¹⁹⁵ *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398 (1896); *John v. B. B. McGinnis*, 37 Cal. App. 2d 176, 99 P. 2d 323 (1940); *Monterrosa v. Grace Lines*, 90 Cal. App. 2d 826, 204 P. 2d 377 (1949). *Accord*, *Rosebrock v. Genral Electric Co.*, 236 N. Y. 227, 140 N. E. 571 (1923); *Ellis v. Lindmark*, 177 Minn. 390, 225 N. W. 395 (1929); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855 (1928); *Herman v. Markham Air Rifle Co.*, 258 Fed. 475 (D. C. Mich. 1918).

The implication to the contrary in *Solomon v. Red River Lumber Co.*, 56 Cal. App. 742, 206 Pac. 498 (1928), was disapproved in principle in *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P. 2d 372 (1945).

Rae v. California Equipment Co., 12 Cal. 2d 563, 86 P. 2d 352 (1939), appears in reality to hold that the employer was under no duty to inspect, and so was not negligent.

mere failure to inspect the plank or to discover the defect, even though negligent, would not relieve the defendant. Yet the element of the deliberate choice of a responsible third person induced the court to hold that there was an "intervening cause which served to break the chain of causation." There are several other very similar California cases¹⁹⁶ which agree.

This idea of shifted responsibility is of course not a new one in the law of negligence. The laborer hired to dig a ditch in the street may go home without setting out a red lantern to warn traffic, even though the consequences are entirely foreseeable, because that is his employer's affair.¹⁹⁷ In the ordinary case the employer of an independent contractor may leave all responsibility to him;¹⁹⁸ and in the absence of a covenant a landlord is under no obligation to repair the premises because the tenant has taken over.¹⁹⁹ If the seller of the plank had notified the buyer of the defect, he would have discharged his full duty, and from that point on it would have been the buyer's concern.²⁰⁰ It is only where there is some original negligence and the responsibility is assumed later that the issue gets mixed up with "proximate cause."

¹⁹⁶ In *Roberts v. Southern Pacific R. R.*, 54 Cal. App. 315, 201 Pac. 958 (1921), the defendant turned over a defective car to another railway, which accepted it with full knowledge of the defect. The defendant was held not liable when an employee of the second railway was injured.

In *Catlin v. Union Oil Co.*, 31 Cal. App. 597, 161 Pac. 29 (1916), the defendant sold gasoline as kerosene to a grocer, who discovered the mistake but resold it to the plaintiff as kerosene, relying on his own experience and tests. It was held that the "intervening act of a culpable, responsible person interrupted the chain of causation."

In *Gutehous v. General Electric Co.*, 37 Cal. App. 2d 455, 99 P. 2d 682 (1940), and *Youtz v. Thompson Tire Co.*, 46 Cal. App. 2d 672, 116 P. 2d 636 (1941), the plaintiff himself made use of a defective appliance with knowledge of the defect, and this was held to relieve the defendant of responsibility.

Accord, *Olds Motor Co. v. Shaffer*, 145 Ky. 616, 140 S.W. 1047 (1911); *Bergstresser v. Van Hoy*, 142 Kan. 88, 45 P. 2d 855 (1935). Compare also *Waterman v. Liederman*, 16 Cal. App. 2d 483, 62 P. 2d 142 (1936) (gross negligence of automobile driver relieves manufacturer of tire).

¹⁹⁷ *Jessup v. Sloneker*, 142 Pa. 527, 21 Atl. 988 (1891); *Schaefer v. Iron City Sand Co.*, 31 Pa. Super. 476 (1906).

¹⁹⁸ *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139 (1898); *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 93 Pac. 377 (1907); *Louthan v. Hewes*, 138 Cal. 116, 70 Pac. 1065 (1902).

¹⁹⁹ *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304 (1889).

²⁰⁰ *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 Pac. 945 (1926); *J. C. Penny Co. v. Morris*, 173 Miss. 710, 163 So. 124 (1935); *Harper v. Remington Arms Co.*, 156 Misc. 53, 280 N. Y. Supp. 862 (1935), *aff'd* 248 App. Div. 713, 290 N. Y. Supp. 130 (1935); *American Mutual Liability Insurance Co. v. Chain Belt Co.*, 224 Wis. 155, 271 N. W. 828 (1937).

There are other California cases in which this has occurred. The contractor who decides to move a pile driver without waiting for a power line to be removed,²⁰¹ the superintendent of a gas works who takes the weights out of a gasometer to increase the flow of gas when a pipe is clogged,²⁰² the passenger who is carried past his station and elects to walk back along the railroad track when there are other routes available,²⁰³ the owner who prefers to let his cattle starve when the defendant turns them out,²⁰⁴ the minor who gets drunk and runs a man down after the defendant illegally gives him liquor,²⁰⁵ all have been held to have the responsibility, and to be "intervening causes which break the chain of causation."

There are still other cases in which the same conclusion has been reached, with less obvious justification.²⁰⁶ One such is *Schwartz v. California Gas & Electric Corporation*,²⁰⁷ where the defendant dropped into the plaintiff's pasture an insulator with broken glass edges. Some unidentified person moved the insulator some sixty or seventy feet to another part of the pasture, where the plaintiff's horse stepped on it and was injured. The intervening act of the stranger was held to be the "proximate cause," rather than the defendant's negligence.

²⁰¹ *Stackpole v. Pacific Gas & Electric Co.*, 181 Cal. 700, 186 Pac. 354 (1919).

²⁰² *Taylor v. Baldwin*, 78 Cal. 517, 21 Pac. 124 (1889).

²⁰³ *Benson v. Central Pacific R. R.*, 98 Cal. 45, 32 Pac. 809 (1893). Otherwise where there is no such alternative route. *Miller v. Pacific Electric Ry.*, 169 Cal. 107, 145 Pac. 1023 (1915).

²⁰⁴ *Story v. Robinson*, 32 Cal. 205 (1867).

²⁰⁵ *Mann v. Chase*, 141 Cal. App. 2d 701, 107 P.2d 498 (1940).

Cf. Johnson v. Union Furniture Co., 31 Cal. App. 2d 234, 87 P. 2d 917 (1939) (sleeping on floor in a draft after defendant failed to deliver bed).

²⁰⁶ The writer disagrees with *Hartford v. All Night and Day Bank*, 170 Cal. 538, 150 Pac. 356 (1915), and *Bearden v. Bank of Italy*, 57 Cal. App. 377, 207 Pac. 270 (1922), holding that a bank which dishonors a check is not the "proximate cause" of arrest and prosecution of the drawer. Arrest under a bad check law appears to be an obvious risk against which the bank has undertaken to protect the depositor. In accord with the California decisions is *Waggoner v. Bank of Bernie*, 220 Mo. App. 165, 281 S. W. 130 (1926). The bank was held liable in *Mouse v. Central Savings & Trust Co.*, 120 Ohio St. 599, 167 N. E. 868 (1929); *Collins v. City National Bank & Trust Co.*, 131 Conn. 167, 28 A.2d 582 (1944); *Macrum v. Security Trust & Savings Co.*, 221 Ala. 419, 129 So. 74 (1930).

The writer also does not like *Poore v. Edgar Bros. Co.*, 33 Cal. App. 2d 6, 90 P. 2d 808 (1939), where the defendant replaced safety glass in the plaintiff's car window with ordinary glass, and the plaintiff was injured by flying glass in a collision. It was held that if the defendant was negligent it was not the "proximate cause," since the responsibility rested upon the other driver. The purpose of safety glass is to safeguard against the particular risk. *Cf. Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. 2d 409, 15 P. 2d 1118 (1932). See 1 WITKIN, SUMMARY OF CALIFORNIA LAW 763-4 (6th ed. 1946).

²⁰⁷ 163 Cal. 398, 125 Pac. 1044 (1912).

Such a casual interference, which did not essentially change the risk, scarcely seems such an assumption of responsibility as to relieve the defendant, as would clearly be the case if the stranger had removed the insulator, kept it for six months and then brought it back. The decision was overruled in *Mosley v. Arden Farms Company*,²⁰⁸ where the defendant left some crates piled between the sidewalk and the curb, and someone moved them a few feet, leaving them still an obstruction. The court said that this was to be anticipated; but whether it was or not, the stranger could scarcely be found to have taken over the exclusive responsibility.

One interesting case is *Lammers v. Pacific Electric Railway Company*.²⁰⁹ The plaintiff, who was so ill or intoxicated that he did not know what he was doing, was put off of the defendant's train at a junction, and staggered away into the darkness. Six hours later, and three-quarters of a mile away, he wandered into the path of a train and was injured. If he had done that immediately the defendant would no doubt have been liable for its failure to take care of him.²¹⁰ But because he had left the tracks, reached a place of safety and then come back, the responsibility was held to be his. The court laid stress on the fact that he was entitled to go where he liked and the defendant had no authority to restrain him.²¹¹ At least in such cases talk of either "cause" or "proximate" only obscures the ground of decision.

6. DUTY TO THE PLAINTIFF

Each of the foregoing issues might very well be stated in the form of a single question: was the defendant under any duty to protect the

²⁰⁸ 26 Cal. 2d 213, 157 P. 2d 372 (1945).

²⁰⁹ 186 Cal. 379, 199 Pac. 523 (1921).

²¹⁰ Cf. *Black v. New York, N. H. & H. R. R.*, 193 Mass. 448, 79 N. E. 797 (1907); *Atchison, T. & S. F. Ry. v. Parry*, 67 Kan. 515, 73 Pac. 105 (1903).

²¹¹ "There is no more reason for holding the defendant liable for the injury in this case than there would be had the plaintiff wandered into some neighboring yard and been shot as a burglar. In each case the injury would have been avoided had there been no ejection of the plaintiff from the defendant's train, but in each case the ejection is obviously not the proximate cause. In determining the responsibility of the defendant it must be recollected that the plaintiff, no matter how badly intoxicated he was, was entitled to go wherever he pleased and that the agents of the defendant had no authority to exercise any restraint whatever over his person. His ability to leave the scene of the ejection is demonstrated by the fact that his injuries occurred three-quarters of a mile away. That the injury was not the proximate result of the ejection is demonstrated by the fact that the plaintiff was able to, and did in fact, leave the place of danger and subsequently of his own volition returned to a position of danger on defendant's tracks, and that but for plaintiff's action in so returning to a position of danger the accident would not have occurred." 186 Cal. 379, at 385 (1921).

plaintiff against the event which did in fact occur?²¹² It is very seldom²¹³ that the question has been put in this way in California; yet it does much to direct attention to the real question of the extent or continuance of the original obligation, rather than to the mechanism of causal sequence and the confusing concepts of "proximity" and "remoteness" which are the legacy of Bacon. But in the ordinary use of the word to which we are accustomed, "duty" is applied only to the relation between the defendant and the plaintiff which gives rise to the obligation in the first instance. Even this narrow issue has become entangled with "proximate cause" and there are cases holding that a trespasser,²¹⁴ an invitee who exceeds the area of his invitation,²¹⁵ or in the old days a fellow servant,²¹⁶ is an "intervening cause which breaks the chain of causation."

This confusion of cause and duty has arisen quite frequently where a statute or ordinance is violated. If an automobile is operated without a license but otherwise in the exercise of reasonable care,²¹⁷ or liquor is given to a minor who gets drunk and drives a car,²¹⁸ it is said that the violation is not the "proximate cause" of the resulting damage. There is this much plausibility in the statement: that the violation of a statute, as such, never injures anyone, since if there were no statute the result would be precisely the same. On the other hand the prohibited act itself, of operating the car or giving the liquor, has an obvious and real causal connection with the result, and without it the injury would never have occurred.²¹⁹ What the statute does, or

²¹² GREEN, RATIONALE OF PROXIMATE CAUSE, 11-43 (1927); Campbell, *Duty, Fault and Legal Cause*, [1938] WIS. L. REV. 402.

²¹³ One outstanding exception is the concurring opinion of Traynor, J. in *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P. 2d 372 (1945), which seems to the writer to state the real issue better than any other California opinion.

²¹⁴ *Hale v. Pacific Telephone & Telegraph Co.*, 42 Cal. App. 55, 183 Pac. 280 (1919).

²¹⁵ *Dunlavy v. Nead*, 36 Cal. App. 2d 478, 97 P. 2d 1003 (1940). An employee in a machine shop threw a can of gasoline which had burst into flames out the rear door. A customer who had gone out the rear door without being observed was burned. It was held that the ignition of the gasoline and throwing it out the door was "not the proximate cause."

²¹⁶ *Colen v. Gladding, McBean & Co.*, 166 Cal. 354, 136 Pac. 289 (1913); *Thomas v. German General Benevolent Society*, 168 Cal. 183, 141 Pac. 1186 (1914).

²¹⁷ *Arrelano v. Jorgenson*, 52 Cal. App. 622, 199 Pac. 855 (1921). *Accord*, as to contributory negligence, *Shinoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109 (1914) (unregistered motorcycle); *Roos v. Loeser*, 41 Cal. App. 782, 183 Pac. 204 (1919) (unlicensed dog—see *supra*, text at note 3).

²¹⁸ *Mann v. Chase*, 41 Cal. App. 2d 701, 107 P. 2d 498 (1940). *Accord*, *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P. 2d 952 (1943) (selling liquor to intoxicated person).

²¹⁹ There are of course cases where the prohibited act is found not to have caused the injury. Thus *Henderson v. Northam*, 176 Cal. 493, 168 Pac. 1044 (1917) (failure to

does not do, is to give color to the act, by declaring it to be the breach of a duty imposed for the protection of the plaintiff.²²⁰ Where licensing statutes are found to set up a standard of skill or competence for the plaintiff's benefit, the courts have had no difficulty in concluding that the violation is the "proximate cause."²²¹

The essential question in these cases is whether the criminal statute is to be construed as imposing a tort duty to protect a class of persons in which the plaintiff is included²²² against the risk of the

stop and give name after accident not cause of injuries received in it); *Blodgett v. Preston*, 118 Cal. App. 297, 5 P. 2d 25 (1931) (crossing street diagonally not cause of being run down); *Blodgett v. H. B. Dyas Co.*, 4 Cal. 2d 511, 50 P. 2d 801 (1935) (absence of handrail not cause of fall downstairs); *Mountz v. Tzugares*, 9 Cal. App. 2d 327, 49 P. 2d 883 (1935) (parking on pavement not shown to have caused collision); *Williams v. Southern Pacific R. R.*, 173 Cal. 525, 160 Pac. 660 (1916) (employment of minor after 10:00 P. M. not cause of injury at 9:30); *Kauffman v. Machine Shirt Co.*, 167 Cal. 506, 140 Pac. 15 (1914) (elevator doors opening from outside not cause of fall down shaft where door left open).

The question is quite often one for the jury, as in *Fennessey v. Pacific Gas & Electric Co.*, 20 Cal. 2d 141, 124 P. 2d 51 (1942); *Mecchi v. Lyon Van & Storage Co.*, 38 Cal. App. 2d 674, 102 P. 2d 422, 104 P. 2d 26 (1940); *Harrison v. Gamatero*, 52 Cal. App. 2d 178, 125 P. 2d 904 (1942).

²²⁰ See Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933).

²²¹ In *Andreen v. Escondido Citrus Union*, 93 Cal. App. 182, 269 Pac. 556 (1928), the defendant, fumigating an orchard, employed an unlicensed foreman who was not familiar with fumigation regulations and other literature, and was held liable for damage to an adjoining orchard. "Had he submitted himself to the examination provided by law, his lack of knowledge and skill would either have prevented him from procuring a license, or he would have been required to familiarize himself with the well-recognized methods of fumigation before he would have been licensed to do such work."

In *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 98 Pac. 1063 (1908), the employer of an unlicensed elevator operator was held liable to the plaintiff for an injury resulting from the operation.

However, in *Bute v. Potts*, 76 Cal. 304, 18 Pac. 329 (1888), the fact that defendant had irregularly obtained diplomas from a medical school and used them to obtain a license to practice was held inadmissible as evidence bearing on his skill. The case looks wrong.

²²² Cf. *Corbett v. Spanos*, 37 Cal. App. 200, 173 Pac. 769 (1918) (fire ordinance prohibiting permanent flooring not intended for protection of licensee using toilet and falling through trapdoor); *Mora v. Favilla*, 37 Cal. App. 164, 173 Pac. 770 (1918) (ordinance against washing sidewalk in day hours intended to protect pedestrians as well as to conserve water); *King v. San Diego Electric Ry.*, 176 Cal. 266, 168 Pac. 131 (1917) (ordinance giving fire engines right of way intended to protect bystanders); *Murphy v. St. Claire Brewing Co.*, 41 Cal. App. 2d 535, 107 P. 2d 273 (1940) (ordinance against parking at an angle intended to protect travellers including street car passengers); *Flynn v. Bledsoe Co.*, 92 Cal. App. 145, 267 Pac. 887 (1928) (same, intended to protect guest in passing automobile); *Alechoff v. Los Angeles Gas & Electric Corp.*, 84 Cal. App. 33, 257 Pac. 567 (1927) (ordinance against burning rubbish intended to

event which has occurred.²²³ Once that question is answered in the affirmative, the only question of causation is the simple one of fact, whether the prohibited conduct has played a substantial part in the injury. Once it is determined that a statute requiring train signals at a crossing is intended to prevent frightening horses into a runaway,²²⁴ there is no more to be said.

It is remarkable that there is apparently no California decision²²⁵ which has even raised the issue presented in the most noted and controversial of all tort cases, *Palsgraf v. Long Island Railroad Company*.²²⁶ In that case the defendant's servants, assisting a passenger to board a moving train, dislodged a package from his arms, and it fell upon the rails. The package contained fireworks, which exploded with some violence. The concussion broke some scales, many feet away at the other end of the platform, and they fell upon the plaintiff and injured her. The defendant's servants, who were found by the jury to have been negligent, could have foreseen harm to the package, or at most to the passenger boarding the train; but no harm to the plaintiff could possibly have been anticipated. Judge Cardozo, speaking for a majority of four, held that there was no liability because there was no breach of any duty owed to the plaintiff. Negligence, he said, was a matter of some relation between the parties, which must be founded upon the foreseeability of harm to the person in fact injured. The defendant's conduct was not a wrong toward the plaintiff merely because it was negligence toward someone else. The plaintiff

protect property owners in vicinity); *Toomey v. Southern Pacific R. R.*, 86 Cal. 374, 24 Pac. 1074 (1890) (statute requiring bell and whistle at crossing not intended to protect trespasser beyond crossing).

²²³ *Harmon v. H. M. Sherman Co.*, 29 Cal. App. 2d 580, 85 P. 2d 205 (1938) (ordinance against toilet flushing directly from building water supply intended to protect against hot water and steam hacked up in supply); *Corbett v. Spanos*, 37 Cal. App. 200, 173 Pac. 769 (1918) (fire ordinance against permanent flooring not intended to prevent falling through trapdoor); *Mora v. Favilla*, 37 Cal. App. 164, 173 Pac. 770 (1918) (ordinance against washing sidewalk in day hours intended to prevent slipping); *cf. Rauch v. Southern California Gas Co.*, 96 Cal. App. 250, 273 Pac. 1111 (1929) (ordinance as to depth of gas pipe, excavating contractor broke pipe).

Compare, as to contributory negligence, *Muller v. Standard Oil Co.*, 180 Cal. 260, 180 Pac. 605 (1919) (riding tricycle on sidewalk); *Roos v. Loeser*, 41 Cal. App. 782, 183 Pac. 204 (1919), *supra*, text at note 3 (unlicensed dog attacked by other dog).

²²⁴ *Johnson v. Southern Pacific R. R.*, 147 Cal. 624, 82 Pac. 306 (1905). *Cf. Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, 143 Pac. 257 (1914) (improperly hitched horse frightened into runaway by toy pistol).

²²⁵ The *Palsgraf* Case was cited with approval in the concurring opinion of Justice Traynor in *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P. 2d 372 (1945), but since all of the court agreed that the events were foreseeable, the issue of the case was not raised.

²²⁶ 248 N. Y. 339, 162 N. E. 99 (1928).

"must sue in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."

Three judges, led by Andrews, dissented in the *Palsgraf Case*. They contended that the defendant was still at fault, even though only toward the passenger, and that this fault was the direct and "proximate" cause of the plaintiff's injury. "Every one owes to the world at large the duty of refraining from those acts which unreasonably threaten the safety of others. . . . Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone."

The *Restatement of Torts*²²⁷ has agreed with Cardozo, that there is no duty to the unforeseeable plaintiff; but the decisions in other states are divided in their results.²²⁸ The controversy has continued to rage, and it cannot be regarded as settled for the country. It must inevitably arise sooner or later in California. It is not to be settled by begging the question of whether there is or is not a duty, which is merely a word with which we state our conclusion. Essentially the problem is the same as that of unforeseeable consequences to the plaintiff who is threatened with a different kind of harm,²²⁹ and the addition of the fact that a new *person* has appeared does not change its nature. It would be difficult to justify a distinction which holds that one who can anticipate injury to *A* is liable for unforeseen consequences to *A*, but not for unforeseen consequences to *B*. If the decision is to be that the boundaries of liability are set by the scope of the original foreseeable risk, it should be made in both cases; and if it is to be that, subject to the limitation of superseding causes, the loss which exceeds the fault should fall upon the defendant who is at fault rather than the innocent plaintiff, it should still be made in both.

7. PLAINTIFF'S FAULT

In cases where contributory negligence,²³⁰ or even assumption of risk,²³¹ is in issue, it is said all too frequently that the plaintiff's own

²²⁷ Section 281, Comment *c*.

²²⁸ See PROSSER, TORTS, 186-187 (1941).

²²⁹ *Supra*, part 3.

²³⁰ See for example *Oakland Bank of Savings v. Murfey*, 68 Cal. 455, 9 Pac. 843 (1886); *Studer v. Southern Pacific R. R.*, 121 Cal. 400, 53 Pac. 942 (1898); *Orcutt v. Pacific Coast R. R.*, 85 Cal. 291, 24 Pac. 661 (1890); *cf. Peters v. United Studios, Inc.*, 98 Cal. App. 373, 277 Pac. 156 (1929) (instruction on "sole proximate cause").

²³¹ In *Fresno Traction Co. v. Atchison, T. & S. F. R. R.*, 175 Cal. 358, 165 Pac. 1013 (1917), safety gates required by statute had been discontinued by mutual consent of the parties, and a system of signals by watchmen substituted. It was held that

conduct, rather than the defendant's negligence, is or is not "the proximate cause" of the injury. There is just enough truth in this, in occasional cases, to be misleading. There are cases in which the plaintiff's conduct has not in fact contributed to the result at all, and it would have occurred even if he has exercised all reasonable care.²³² There are other cases in which his acts are so clearly a superseding cause divorced from the original risk, or an assumption of his own responsibility in the matter,²³³ as to relieve the defendant of liability. Finally there are cases, such as the one where the defendant stood the intoxicated plaintiff up and left him,²³⁴ where the defendant's wrong is no part of the risk created by the negligence of the plaintiff, or the responsibility can be found to have been assumed in turn by the defendant.

Such instances, however, are rare. In the ordinary contributory negligence case, such as the collision of two negligently driven automobiles, it is quite clear that there are merely two concurring causes which would have made both drivers liable for an injury to a third person.²³⁵ The reason that contributory negligence is a defense when one driver sues the other never has been that the defendant's fault ceases to be a responsible cause.²³⁶ It is to be sought rather in the in-

these facts "constitute a complete showing that the negligence involved in the violation of law was not the proximate cause of any collision."

In *Hawthorne v. Gunn*, 123 Cal. App. 452, 11 P. 2d 411 (1932), the position of the plaintiff, a young lady riding in a car on a young man's lap, was held not to be the proximate cause of injuries received in a collision. It was said that she assumed certain risks (!) but that the risk of negligence of the driver of another car was not among them. "Whether or not a reasonable person would assume such a position, depends upon many conditions of time, place and circumstance."

²³² *Blodget v. Preston*, 118 Cal. App. 297, 5 P. 2d 25 (1931); *Jennings v. Day*, 7 Cal. App. 2d 555, 46 P. 2d 193 (1935); *Ingram v. Wessendorf*, 14 Cal. App. 2d 16, 57 P. 2d 989 (1936); *Hawthorne v. Gunn*, 123 Cal. App. 452, 11 P. 2d 411 (1932). The "substantial factor" formula (*supra*, text at notes 26-31) appears equally applicable here; and it has been recognized that an instruction as to any contribution, "however slight," is incorrect, although not necessarily prejudicial. *Creamer v. Cerrato*, 1 Cal. App. 2d 441, 36 P. 2d 1094 (1934); *Speidel v. Lacer*, 2 Cal. App. 2d 528, 38 P. 2d 477 (1934).

²³³ *Taylor v. Baldwin*, 78 Cal. 517, 21 Pac. 124 (1899). Cf. *Johnson v. Union Furniture Co.*, 31 Cal. App. 2d 234, 87 P. 2d 917 (1939); *Lammers v. Pacific Electric Ry.*, 186 Cal. 379, 199 Pac. 523 (1921); *Gutelius v. General Electric Co.*, 37 Cal. App. 2d 455, 99 P. 2d 682 (1948); *Youtz v. Thompson Tire Co.*, 46 Cal. App. 2d 672, 116 P. 2d 636 (1941); and consider *Benson v. Central Pacific R. R.*, 98 Cal. 45, 32 Pac. 809 (1893), if the father should sue for the death of the child.

²³⁴ *Doherty v. California Navigation & Improvement Co.*, 6 Cal. App. 131, 91 Pac. 419 (1907). Cf. *Roos v. Loeser*, 41 Cal. App. 782, 183 Pac. 204 (1919) (the unlicensed Pomeranian, *supra*, text at note 3); *Shimoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109 (1914) (unregistered automobile in collision).

²³⁵ See cases cited *supra*, notes 35 and 36.

²³⁶ *Bohlen, Contributory Negligence*, 21 HARV. L. REV. 233 (1908); *Lowndes, Con-*

dividualistic point of view of the common law, that one who fails to look out for himself is not entitled to demand in court that he be compensated for the consequences, and in the impossibility of finding any logical basis for apportionment of the damages.²³⁷

When the last clear chance enters the picture, the confusion is increased. The California courts almost invariably have explained their application of the doctrine, or their refusal to apply it, on the ground of "proximate cause."²³⁸ Yet, as indicated above,²³⁹ the last clear chance would not prevent the liability of both plaintiff and defendant to any third person who might be injured,²⁴⁰ and it is quite impossible to explain how the causal connection can be different when the plaintiff himself is hurt. Nor is it any easier to explain in terms of causal sequence the limitation of the doctrine to cases where the plaintiff is either helpless or unaware of his danger²⁴¹ and the defendant has discovered it.²⁴² It has been said that negligence after his-

tributory Negligence, 22 GEO. L. J. 674 (1934); Green, *Contributory Negligence and Proximate Cause*, 6 N. C. L. REV. 3 (1927).

Thus there is no inconsistency in findings that the negligence of both plaintiff and defendant proximately caused the accident. *Hartford v. Pacific Motor Trucking Co.*, 16 Cal. App. 2d 378, 60 P. 2d 476 (1936). And it is proper to refuse an instruction that contributory negligence must be the "sole proximate cause." *Dicken v. Souther*, 59 Cal. App. 2d 203, 138 P. 2d 408 (1943).

²³⁷ *Needham v. San Francisco & San Jose R. R.*, 37 Cal. 409 (1869); *Fujise v. Los Angeles R. R.*, 12 Cal. App. 207, 107 Pac. 317 (1909). Where a logical basis can be found for apportionment, it has been made in such cases as *Randolf v. Town of Bloomfield*, 77 Iowa 50, 41 N. W. 562 (1889); *Bowman v. Humphrey*, 132 Iowa 234, 109 N. W. 714 (1906); *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705 (1878); *Philadelphia & Reading R. R. v. Smith*, 64 Fed. 679 (3d Cir. 1894); *Wright v. Illinois & Mississippi Tel. Co.*, 20 Iowa 195 (1866); *O'Keefe v. Kansas City Western R. R.*, 87 Kan. 322, 124 Pac. 416 (1912).

²³⁸ *Needham v. San Francisco & San Jose R. R.*, 37 Cal. 409 (1869); *Esrey v. Southern Pacific R. R.*, 103 Cal. 541, 37 Pac. 500 (1894); *Lee v. Market Street Ry.*, 135 Cal. 293, 67 Pac. 765 (1901); *Harrington v. Los Angeles Ry.*, 140 Cal. 514, 74 Pac. 15 (1903); *Bidwell v. Los Angeles & San Diego Beach R. R.*, 169 Cal. 780, 148 Pac. 197 (1915); *Langford v. San Diego Electric Ry.*, 174 Cal. 729, 164 Pac. 398 (1917); *Read v. Pacific Electric Ry.*, 185 Cal. 520, 197 Pac. 791 (1921); *Clay v. Sanford*, 57 Cal. App. 218, 207 Pac. 45 (1922); *Center v. Yellow Cab Co.*, 216 Cal. 205, 13 P. 2d 918 (1932); *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P. 2d 915 (1932); *Bogardus v. Snyder*, 17 Cal. App. 2d 411, 62 P. 2d 153 (1936).

²³⁹ *Supra*, text at notes 7-9.

²⁴⁰ See cases cited *supra*, notes 8-9.

²⁴¹ *Green v. Los Angeles R. R.*, 143 Cal. 31, 76 Pac. 719 (1904); *Matteson v. Southern Pacific R. R.*, 6 Cal. App. 318, 92 Pac. 101 (1907); *Everett v. Los Angeles Cons. Elec. Ry.*, 115 Cal. 105, 43 Pac. 207 (1896); *Young v. Southern Pacific R. R.*, 189 Cal. 746, 210 Pac. 259 (1922); *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P. 2d 915 (1932); *Center v. Yellow Cab Co.*, 216 Cal. 205, 13 P. 2d 918 (1932).

²⁴² *Herbert v. Southern Pacific R. R.*, 121 Cal. 227, 53 Pac. 651 (1898); *Collins v. Marsh*, 176 Cal. 639, 169 Pac. 389 (1917); *Thompson v. Los Angeles & San Diego*

covery of the peril of another amounts to wilful or wanton misconduct;²⁴³ but this can scarcely be true where it consists of mere inadvertence, or in an honest mistake of judgment, or in excitedly stepping on the accelerator instead of the brake.

The real explanation of the "last clear chance" appears to be nothing more than the court's dislike for the hardship of the defense of contributory negligence, which visits upon the plaintiff, who is normally least able to bear it, the entire loss resulting from the fault of two parties. The courts have rebelled against this hardship in cases where it is most obvious, and in the search for some way to avoid it have accepted without reasoning the conclusion that the last wrongdoer is necessarily the worst wrongdoer, or at least the decisive one, and so should pay. Since the entire loss is placed upon the defendant where two parties are still at fault, the last clear chance is still an unjust rule. It has been called a transitional doctrine, a way station on the road to apportionment of the damages;²⁴⁴ and it is probable that the development of the law will be along the lines of "comparative negligence" statutes, such as that of Wisconsin,²⁴⁵ which provides for the arbitrary apportionment of damages in proportion to estimated fault. In any event the introduction of "proximate cause" into the last clear chance cases has done nothing to clarify the problem; and when such cases are cited in turn as bearing on other "proximate cause" issues, chaos reigns.

THE JURY

If there is one statement that is repeated more often than any other in California, it is that proximate cause is a question of fact for the jury,²⁴⁶ subject only to the usual qualification that it becomes a

Beach R. R., 165 Cal. 748, 134 Pac. 709 (1913); Riney v. Pacific Electric Ry., 45 Cal. App. 145, 187 Pac. 50 (1919); Read v. Pacific Electric Ry., 185 Cal. 520, 197 Pac. 791 (1921).

²⁴³ Young v. Southern Pacific R. R., 189 Cal. 746, 210 Pac. 259 (1922); Esrey v. Southern Pacific R. R., 103 Cal. 541, 37 Pac. 500 (1894).

²⁴⁴ James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L. J. 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

²⁴⁵ WIS. STATS. § 331.045. See Campbell, *Wisconsin's Comparative Negligence Law*, 7 WIS. L. REV. 224 (1932); Whelan, *Comparative Negligence*, [1938] WIS. L. REV. 465.

²⁴⁶ This has been said so often that it is almost a waste of time to cite cases. Among others may be mentioned Newman v. E. E. Overholtzer Sons Co., 182 Cal. 778, 190 Pac. 175 (1920); Smith v. Occidental & Oriental S. S. Co., 99 Cal. 462, 34 Pac. 84 (1893); Titlow v. Florence Trading Co., 35 Cal. App. 457, 170 Pac. 172 (1917); Mansfield v. Eagle Box & Mfg. Co., 136 Cal. 622, 69 Pac. 425 (1902); Vizelech v. Southern Pacific R. R., 126 Cal. 587, 59 Pac. 129 (1899); Barbieri v. Law, 209 Cal. 429, 287 Pac. 464 (1930); Moore v. Re, 131 Cal. App. 557, 22 P. 2d 45 (1933); Lacy v. Pacific Gas &

question of law "where the facts are uncontroverted and only one deduction or inference is deducible therefrom."²⁴⁷ There undoubtedly has been a very definite tendency of the courts, which has even received judicial recognition,²⁴⁸ to avoid consideration and analysis of the more difficult problems, and to abdicate decision by leaving the entire set of troublesome issues to the twelve men in the box. Accompanying this is a more or less standardized instruction requiring them to find proximate cause—a term which few lawyers would voluntarily attempt to define, and which must inevitably be beyond the comprehension of the ordinary citizen. The effect is to leave the decision to nothing more than the good sense of the jury.

It must be admitted that in the ordinary case the good sense of the jury has done well enough. But if the foregoing discussion indicates anything, it is that "proximate cause" is not a single issue, but a complex of a number of unrelated issues, and that some of them are not issues of fact at all, but are issues of law. Again breaking the whole down into its component parts, the issues may be classified as follows.

1. The issue of causation²⁴⁹ is purely one of fact. The question is merely whether the defendant has in fact caused or contributed to the result at all. It is necessarily for the jury, unless the conclusion is so clear that reasonable men could not differ.²⁵⁰ It is quite probably the only issue that the jury usually understands when it is instructed on "proximate cause," and very often the only one that it does in reality determine. The commonest error has been an instruction that the defendant's conduct must be found to be "the" proximate cause,²⁵¹ or

Electric Co., 220 Cal. 97, 29 P. 2d 781 (1934); Olden v. Babicora Development Co., 107 Cal. App. 399, 290 Pac. 1062 (1930); Hill v. Peres, 136 Cal. App. 132, 28 P. 2d 946 (1934); Carroll v. Central Counties Gas Co., 96 Cal. App. 161, 273 Pac. 875, 274 Pac. 594 (1929).

²⁴⁷ Traylen v. Citraro, 112 Cal. App. 172, 297 Pac. 649 (1931).

²⁴⁸ "The difficulty of laying down a rule which will include all possible cases has caused some of the ablest judges to decline to state any fixed rule, thus indicating a disposition of the courts to leave all doubtful cases to the jury." Williams v. San Francisco & Northwestern R. R., 6 Cal. App. 715, 93 Pac. 122 (1907).

²⁴⁹ *Supra*, part 1.

²⁵⁰ See cases cited *supra*, note 44.

²⁵¹ Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 Pac. 391 (1919); Briggs v. Jess Mead, Inc., 93 Cal. App. 666, 270 Pac. 263 (1928); Morris v. Purity Sausage Co., 2 Cal. App. 2d 536, 38 P. 2d 193 (1934); Brainble v. McEwan, 40 Cal. App. 2d 400, 104 P. 2d 1054 (1940); Dieterle v. Yellow Cab Co., 53 Cal. App. 2d 691, 128 P. 2d 132 (1942) (prejudicial). Cf. Freiburg v. Israel, 45 Cal. App. 138, 187 Pac. 130 (1919) ("a proximate cause" held proper); Craig v. Boyes, 123 Cal. App. 592, 11 P. 2d 673 (1932) ("the" in California Vehicle Act construed to mean "a").

the "sole" proximate cause,²⁵² although either is not necessarily prejudicial. An instruction that the injury must be found to have happened "because of"²⁵³ or "by reason of"²⁵⁴ the conduct has been held to be sufficient, and it is clear that no very formal language is required. As an instruction submitting the question of causation in fact to the jury in intelligible form, it appears impossible to improve on the Restatement's "substantial factor;" but there are only three California cases²⁵⁵ which contain any hint of the idea.

2. The issue of apportionment of damages²⁵⁶ involves first of all a determination of whether the damages are capable of being apportioned. This is clearly a question of law for the court. If the decision is that no apportionment can be made, the jury will be instructed that if each defendant is liable at all he is liable for the entire damages. If it is that there can be apportionment to two or more causes, the California rule,²⁵⁷ that a defendant who is shown to be at fault has the burden of proof on any issue of apportionment, may still require the court to hold as a matter of law that the burden has not been sustained.²⁵⁸ The only function of the jury is to make the apportionment itself upon whatever evidence there may be,²⁵⁹ once it is decided that it can be made.

3. The issue of liability for unforeseeable consequences²⁶⁰ re-

²⁵² *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 Pac. 913 (1923); *Bickford v. Pacific Electric Ry.*, 120 Cal. App. 542, 8 P. 2d 186 (1932) (prejudicial); *Mahoney v. Murray*, 140 Cal. App. 206, 35 P. 2d 612 (1934); *Miller v. Cranston*, 41 Cal. App. 2d 470, 106 P. 2d 963 (1940); *Ross v. Baldwin*, 44 Cal. App. 2d 433, 112 P. 2d 666 (1941) (prejudicial); *Scott v. Renz*, 67 Cal. App. 2d 428, 154 P. 2d 738 (1945) (prejudicial); *Polk v. Weinstein*, 12 Cal. App. 2d 360, 55 P. 2d 588 (1936) (properly refused); *Condon v. Ansaldi*, 203 Cal. 180, 263 Pac. 198 (1928) ("solely responsible" held prejudicial).

CALIFORNIA JURY INSTRUCTIONS, CIVIL §s 104-A, 104-B (1943) make it clear that each of two or more causes may be "proximate" and responsible.

²⁵³ *Merrill v. Los Angeles Gas & Electric Corp.*, 158 Cal. 499, 111 Pac. 534 (1910).

²⁵⁴ *Dougherty v. Ellingson*, 97 Cal. App. 87, 275 Pac. 456 (1929). In *Jewell v. Bell*, 120 Cal. App. 682, 8 P. 2d 223 (1932), "contributed proximately" was held to be the equivalent of "contributed as a proximate cause." In *Miner v. Dabney-Johnson Oil Corp.*, 219 Cal. 580, 28 P. 2d 23 (1933), this was said to be error, but not prejudicial.

²⁵⁵ In *Rogers v. Central Pacific R. R.*, 67 Cal. 607, 8 Pac. 377 (1885), it was held error to instruct that defendant was liable if its negligence "co-operated and commingled to any extent, however slight" with an act of God. In *Creamer v. Cerrato*, 1 Cal. App. 2d 441, 36 P. 2d 1094 (1934), and *Speidel v. Lacer*, 2 Cal. App. 2d 528, 38 P. 2d 477 (1934), the same type of instruction as to contributory negligence was said to be error, but not prejudicial.

²⁵⁶ *Supra*, part 2.

²⁵⁷ *Supra*, text at notes 79-81.

²⁵⁸ See cases cited *supra*, notes 80 and 81.

²⁵⁹ See *supra*, notes 75-77 and text.

²⁶⁰ *Supra*, part 3.

quires a decision as to whether the defendant can be liable for results that he could not reasonably have anticipated, or in other words whether liability for negligence is limited to the scope of the original foreseeable risk. That decision has yet to be made clearly and satisfactorily in California.²⁶¹ When it is made, it will be a decision of law; and it is important that it should not be made by default, by abandoning the issues to the jury. If the decision is that there is no such limitation, the issue vanishes from the case. If it is that liability does not extend beyond the risk, there remains the further question whether the particular consequences were to be anticipated by a reasonable man of ordinary prudence in the defendant's place. This is obviously for the jury, unless it is beyond dispute.

4. The issue of superseding causes²⁶² calls for a decision as to whether an intervening cause, whether it be the act of a human being or a natural event, is sufficient to relieve the defendant of responsibility for what he has caused. This is essentially a question of law. There may be incidental matters of fact for the jury to determine under proper instructions, as to the nature of the intervening cause itself, where it came from and how it changed the course of events, and whether it was of a normal or an abnormal character. But once these facts are determined, the issue is only one of the legal liability of the defendant for the intervening cause and its effects, which is definitely not an issue of fact. It is here that the complaint is most often justified, that the court has abdicated its functions by leaving law to the jury.²⁶³

5. The issue of shifted responsibility²⁶⁴ is even more clearly a pure

²⁶¹ See *supra*, text at notes 104-118.

²⁶² *Supra*, part 4.

²⁶³ CALIFORNIA JURY INSTRUCTIONS, CIVIL #104-C (1943), seems especially calculated to leave this issue to the jury. It says in part: "If the original actor was negligent, then you have to consider whether the effect of that negligence was broken, or changed from a normal course, by an efficient intervening cause. Was the conduct of the secondary actor such an efficient intervening cause, which displaced the original conduct in proximate relationship to the injury? Or was that later conduct merely a concurring cause? This is the test: If the original actor foresaw, or by exercising ordinary care would have foreseen, the probability of the conduct of the secondary actor and the probability that the original conduct plus the secondary conduct would result in injury to a third person, then the conduct of both the original and secondary actors was a proximate cause of that injury. But if the probable result was not thus foreseen or foreseeable, and if the *immediate* cause of the injury was the conduct of the secondary actor, then it may not be held that the conduct of the original actor was a proximate cause."

As to "foreseeability" of intervening causes, see *supra*, text at notes 175-183.

²⁶⁴ *Supra*, part 5.

issue of law, and in general the California courts have treated it as one. Again there may be incidental questions of fact, as to what the conduct of the third person has been, his relation to the defendant or the plaintiff, and particularly as to his knowledge of the situation and the intentional character of his act or omission; but with these facts decided, the question whether the defendant is relieved because legal responsibility has passed to another is clearly for the court.²⁶⁵

6. The issue of duty to the plaintiff²⁶⁶ is very definitely one of law, and can be nothing else. It is no part of the province of a jury to decide whether the defendant stands in such a relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct for the plaintiff's benefit. It is not for the jury to say whether the manufacturer of goods has a duty to the ultimate consumer which does or does not include protection against the possible negligence of an intermediate dealer; or whether the railroad company is required to protect Mrs. Palsgraf from scales that fall on her as the result of a firework explosion brought about by a misguided effort to help a passenger board a train.²⁶⁷ It is even less the jury's concern to construe a statute and say whether it is intended to create a duty to the class of persons of which the plaintiff is a member, or to protect them against the particular hazard of the event which has occurred. Whenever such issues are left to the jury in the great grab-bag of proximate cause, the court is again abdicating decision in favor of men who do not know the law.

7. The issues of contributory negligence and the last clear chance²⁶⁸ are familiar enough, and normally offer nothing but questions of fact for the jury. The only thing that can be said about them is that they do not ordinarily involve any question whatever of either "cause" or "proximate," and that it would be a consummation devoutly to be wished if both words should cease to be mentioned in connection with them.

The trial judge is in the dilemma that a failure to instruct at all on proximate cause is very likely to be error,²⁶⁹ while any instruction

²⁶⁵ The instruction quoted *supra*, note 263, appears to invite the jury to consider this issue.

²⁶⁶ *Supra*, part 6.

²⁶⁷ *Palsgraf v. Long Island R. R.*, 248 N. Y. 339, 162 N. E. 99 (1928) *supra*, text at note 226.

²⁶⁸ *Supra*, part 7.

²⁶⁹ *Long v. Barbieri*, 120 Cal. App. 207, 7 P. 2d 1082 (1932); *Brower v. Arnstein*, 126 Cal. App. 291, 14 P. 2d 863 (1932) (not prejudicial); *Craven v. Central Pacific R. R.*, 72 Cal. 345, 13 Pac. 878 (1887) (not prejudicial).

he gives runs the risk of being so complicated and vulnerable to attack in its ideas or language that it invites appeal. The natural tendency is to seek a formula instruction, in as general terms and saying as little as possible, which has stood the test in the appellate courts. The standard one in California²⁷⁰ runs as follows:

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

There are probably few judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury. The first sentence was lifted by a California opinion²⁷¹ long since from *Shearman and Redfield on Negligence*, a text written for lawyers and not expected to be comprehensible to laymen, and none too good a text at that. The second, which was borrowed from a casual sentence of the United States Supreme Court,²⁷² complicates the puzzle of "proximate" by adding the enigma of "efficient," and points out that one thing can set another in operation, if that needs pointing out. The third appears to be chiefly a safeguard against California decisions²⁷³ which have said that it is error to instruct that the causation must be "direct." With this guidance the jury is handed all of the issues discussed above that may be involved in the particular case, wrapped up in one package, and permitted to retire to the privacy of its deliberations. Is it any wonder that it throws the whole thing out of the window, and proceeds to decide only whether it thinks that by rights the defendant ought to pay for the plaintiff's damages? Is that instruction really any more enlightening

²⁷⁰ CALIFORNIA JURY INSTRUCTIONS, CIVIL #104 (1943), approved in *Chutuk v. Southern Counties Gas Co.*, 21 Cal. 2d 372, 132 P. 2d 193 (1942). See also *Baillargeon v. Myers*, 180 Cal. 504, 182 Pac. 37 (1919).

²⁷¹ In *Williams v. San Francisco & Northwestern R. R.*, 6 Cal. App. 715, 93 Pac. 122 (1907).

²⁷² In *Aetna Insurance Co. v. Boon*, 95 U. S. 117, 130 (1877), quoted in *Brown v. Beck*, 63 Cal. App. 686, 691, 220 Pac. 14 (1923).

²⁷³ *Dowd v. Atlas Taxicab & Auto Service Co.*, 69 Cal. App. 9, 230 Pac. 958 (1924); *Ramos v. Service Bros.*, 118 Cal. App. 432, 5 P. 2d 623 (1931); *Ward v. Read*, 219 Cal. 65, 25 P. 2d 821 (1933); *Weaver v. Landis*, 66 Cal. App. 2d 34, 151 P. 2d 884 (1944).

than the "approximate cause" which has been held to be error,²⁷⁴ but on two occasions²⁷⁵ has actually been uttered by justices of the supreme court of California itself?

CONCLUSION

All this leads to these conclusions:

1. "Proximate cause" is not a single issue. It is a phrase of very uncertain meaning which includes and covers a number of unrelated issues. Only one of these, the issue of the fact of causation, has anything to do with "cause." The rest, buried under "proximate," involve various rules and policies which may limit legal liability for what has been caused. "Proximate cause" puts the emphasis in the wrong place, and concentrates attention upon the causal sequence where it is of no real importance, rather than upon the real reasons for holding that the defendant is or is not liable.

2. A decision upon one issue, and the language used in it, has no bearing on any other. The confusion which surrounds the whole subject results very largely from carrying over such language to another entirely unrelated problem. The first essential step in any clarification of "proximate cause" is a separation of the issues.

3. Some at least of the issues are issues of law, which should not be left to the jury.

This has all been said before; and no doubt this writer, too, would have done well to hold his peace.

²⁷⁴Hart v. Ferris, 218 Cal. 69, 21 P. 2d 432 (1933) (properly refused); State Compensation Insurance Fund v. Jorn, 186 Cal. 782, 200 Pac. 724 (1921) (not prejudicial).

²⁷⁵Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292 (1905); Lee v. Market Street R. R., 135 Cal. 293, 67 Pac. 675 (1901) (McFarland, J., dissenting).