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Who Pays for Progress?: Accident Law in Florida, 1845-1886

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Few residents of twenty-first-century Florida are unfamiliar with the notion of legal liability for accidental injuries. The image of the "ambulance chasing" attorney, the call for "tort reform," and a recurring medical malpractice insurance "crisis" are well-known to the casual observer of affairs. In fact, much of the modern business of Florida trial courts concerns automobile accidents, injuries from products, and professional malpractice. In 2000-2001, approximately 35,000 such cases were filed in the state's circuit courts, roughly 23 percent of all civil cases. About 2,000 involved professional malpractice, 4,600 products liability, and 17,000 automobile accidents.[1] Despite its current prominence, legal responsibility for accidental injury to persons or property is not a new phenomenon. Since 1845, individuals, companies, and the state have been confronted with the need to create and implement rules that address accidentally caused

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1. These numbers are significant, but they constitute only a small part of the caseload in Florida trial courts, which amounted to almost 2.8 million civil and criminal filings in 2000-2001. Even within the subcategory of civil cases in the circuit courts, most were disputes over contracts, not accidental injury. Criminal, juvenile, and domestic cases (divorce and child custody, e.g.) are of much greater numerical importance in modern Florida than accident cases. Florida Office of State Courts Administration, *Statistical Reference Guide: Florida's Trial Courts, 2000-2001* (Tallahassee, Fla., 2002), sec.1: 2, 5; sec. 3: 1, 3, 9, 10.

death, maiming, and property damage. The persistent question has been, "Who should pay for unintended injuries to persons and property?"

One answer has been the legal doctrine of negligence. In general, negligence rules are not complex. Liability based on negligence is determined by whether the person's action or inaction was "unreasonable" or lacking in "ordinary care" under the circumstances. In order to recover damages, an injured person must also show that there was a sufficient causal connection between the unreasonable action and any injury. Under the rule of "contributory negligence," the injurer's responsibility might be diminished or even eliminated if the injured person acted unreasonably. Although the legal principles are straightforward, their application to real disputes has often raised difficult problems. During the past 150 years, lawyers and judges have written volumes about the meaning of "negligence" in specific contexts. Predictably, given the uniqueness of each accident and the economic costs at stake, judges, legislatures, and juries have expressed contrasting views about who should bear the costs of injuries.[2]

The law of accidents and its history should not concern only judges, juries, lawyers, legal scholars, or the injured. Historians of all kinds can learn a great deal about the priorities of government and the patterns of shifting social and economic relations: how a society defines and treats victims of harm and the persons who cause harm is an important measure of its social, economic, and political values. Florida historians, however, have not fully integrated this story into the state's past. As a result, this article seeks to shed light on life and law in nineteenth-century Florida by describing the state's experience with accidental injuries between 1845 and 1886. It explores the decisions of Florida's Supreme Court, accident cases in several of the state's trial courts, and the actions of the state legislature. The special characteristics of nineteenth-century Florida provide unique grounds on which to use legal history to evaluate political, social, and economic conditions in the early history of the state.[3]

2. On the essential elements of negligence, see Dan D. Dobbs, *The Law of Torts* (St. Paul, Minn., 2000), 269-73.

3. Florida legal history is fortunate in that several fine studies address its state and federal courts. See Walter W. Manley II, E. Canter Brown, and Eric W. Rise, *The Supreme Court of Florida and its Predecessor Courts, 1821-1917* (Gainesville, Fla., 1997); Kermit L. Hall and Eric W. Rise, *From Local Courts to*

No legal system develops in a social and economic vacuum, and Florida's has been no exception. A critical early influence was the low degree of urbanization, mechanized transportation, and industry. Although permanent European settlement began in the 1560s, for the next three hundred years immigration was slow and largely restricted to the peninsula's northern half. When admitted to the Union in 1845, there were no towns of any size. Jacksonville contained just over 1,000 souls in 1850, while Key West counted less than 3,000. Nonetheless, the rate of growth in the fifteen years before and after statehood was substantial. The population grew from 34,000 in 1830 to about 140,000 in 1860. The state's first economy was almost entirely agricultural, with black slavery and livestock particularly important. Manufacturing fared poorly, and compared to other southern states, railroad development progressed at a snail's pace. This economic background is critical to understanding accident law. Outside Florida, industrial development, including railroads, was the most consistent source of accidental injury to persons and property. Steam power, despite its great benefits, caused death, personal injury, and property damage. Yet, little railroad mileage was constructed in Florida before 1860, and much of it covered only short distances. River, ocean, and gulf traffic, some of it steam-driven, remained the primary

National Tribunals: The Federal District Courts of Florida, 1821-1990 (Brooklyn, N.Y., 1991); James M. Denham, *"A Rouge's Paradise": Crime and Punishment in Antebellum Florida* (Tuscaloosa, Ala., 1997). A broad discussion of accident law is beyond the scope of any of these books, however; see for example, Manley et al., *Supreme Court of Florida,* 180-81; Hall and Rise, *From Local Courts to National Tribunals,* 47. Two other studies that address relevant topics in Florida's legal history are James M. Denham, "From a Territorial to a State Judiciary: Florida's Antebellum Courts and Judges," *Florida Historical Quarterly* 73 (April 1995): 443-55; Robert B. Lewis, "Railroad Cases in the Florida Supreme Court, 1845-1887," *Florida Supreme Court Historical Society Review* 1 (winter 1985): 3-5, 10-12. The nature and purpose of accident law has generated considerable heat and light among legal historians, but unfortunately little of this learning has been incorporated into the dialogues of American historians outside that specialty. Some of the contours of this debate can be gleaned from Lawrence M. Friedman and Thomas D. Russell, "More Civil Wrongs: Personal Injury Litigation, 1901-1910," *American Journal of Legal History* 34 (July 1990): 296-414; Morton Horwitz, *The Transformation of American Law, 1780-1860* (New York, 1977), 85-99; Gary T. Schwartz, "Tort Law and the Economy in Nineteenth-Century America," *Yale Law Journal* 90 (July 1981): 1717-75; John F. Witt, "Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement," *Harvard Law Review* 14 (January 2001): 690-841.

means of long-distance transportation. Altogether, slavery, the dominance of agriculture, the lack of urban areas, and the persistence of a water-based transportation system shaped the state's earliest experiences with accidental injuries.[4]

Between 1845 and 1865, the clearest legal effect of Florida's undeveloped economy was that the use of negligence law concepts was infrequent, both in the state's trial courts and in the Florida Supreme Court. A review of circuit court minute books and other trial court records from Escambia, Marion, Leon, Gadsden, Madison, and Hillsborough Counties during the first two decades of statehood reveals few cases that might have been based on accidental harm. All of these counties maintained "minute books" of the circuit courts, which listed the names of cases and any disposition by the court. They also signified the type of case by noting the technical name for its pleading, the form in which the dispute was presented to the court. The typical form of pleading for an accident case in antebellum Florida was "trespass on the case." Unfortunately, the "trespass on the case" pleading was sometimes used in cases involving facts other than accidents. Still, it was apparent from the minute books that all uses of "trespass on the case" were rare, suggesting claims based on negligence were infrequent. They were certainly insignificant compared to the flood of criminal prosecutions and disputes over debt that dominated Florida's circuit courts. Civil disputes in Florida usually involved breaches of contract and competing claims to property ownership. The new railroad companies occasionally appeared as participants in cases, but generally as debtors or creditors.[5]

4. The frontier nature of pre-Civil War Florida is surveyed in Michael Gannon, ed., *The New History of Florida* (Gainesville, Fla., 1996), 40-230; Charlton W. Tebeau, *A History of Florida* (Coral Gables, Fla., 1971), 133-98. On the limitations of early Florida railroads, see Gregg Turner, *A Short History of Florida Railroads* (Charleston, S.C., 2003), 12-32; George W. Pettengill Jr., *The Story of the Florida Railroads, 1834-1903* (Boston, 1952), 10-28.

5. An impediment to trial-level research is that nineteenth-century court records are stored by county clerks rather than at the state archives, producing widely varying circumstances of maintenance and access. Altogether, I contacted clerk's offices in Escambia (Pensacola), Franklin (Apalachicola), Gadsden (Quincy), Leon (Tallahassee), Jefferson (Monticello), Madison (Madison), Columbia (Lake City), Alachua (Gainesville), Duval (Jacksonville), St. Johns (St. Augustine), Marion (Ocala), Hillsborough (Tampa), and Monroe (Key West) Counties about nineteenth-century trial court records. Several offices, including those in Duval, Columbia, and Franklin, reported that their records for the years before 1880 had been destroyed. Others had real difficulty

Despite the infrequency of accident claims, surviving case files in Escambia and Marion Counties indicate that antebellum Florida lawyers were well aware of the negligence concept. In *Goodman v. Ramsey*, an 1851 Pensacola case, the plaintiff claimed he lost $600 worth of lumber when the defendants "negligently, carelessly, and improperly conducted themselves." In *Shield v. Pendleton*, heard in 1859 also in Pensacola, the plaintiff sought damages for hides lost in a wrecked ship. Another shipping case was *Howard v. McGahagan*, decided in Marion County just before the Civil War. There the defendant warehouse owner, according to Howard, "carelessly and negligently conducted themselves" so as to destroy $1,200 worth of cotton. Importantly, all of these cases involved losses in commercial contexts, specifically in the transportation of goods—lumber, hides, and cotton—to market.[6]

Naturally, the lack of accident litigation extended to the antebellum supreme court, which depended on the trial courts for its business. During the 1840s and 1850s, there was not a single reported appeal in Florida involving a negligently caused injury among persons or companies lacking a prior business relationship. Nor were there any personal injury cases, including employee injury cases. There were not any appeals involving damage to either livestock—a critical part of the Florida economy—or to persons resulting from railroad collisions. Moreover, the Florida Supreme Court did not address in any depth the standard of liability for freight carriers, a hot and common dis-

identifying what they might have. A few counties, including Escambia and Marion, have preserved both minute books and a significant number of original case files with pleadings and evidence. Alachua County has placed a huge variety of its records on the clerk's web page, making them available around the globe; see http://www.clerk-alachua-fl.org/clerk. I also consulted copies of Justice Court (a small claims court) documents for Hillsborough County (1850-1885) in the Special Collections Department at the University of South Florida Library, Tampa. For a good discussion of antebellum trial courts and their records, see Denham, *A Rogue's Paradise*, 24-58, 212-13, 339-41. A succinct presentation of the highly technical question of "trespass" and nineteenth-century pleading in accident cases is Dobbs, *The Law of Torts*, 25-27, 259-63.

6. *Goodman v. Ramsey*, file no. 2054, and *Shield v. Pendleton*, file no. 3515, both in Escambia County Clerk's Office, Pensacola, Fla.; *Howard v. McGahagan*, file no. 1657, and *Howard v. McGahagan*, Marion County Circuit Court Minutes, 1 May 1860, both in Marion County Clerk's Office, Ocala, Fla.

pute in neighboring states. As a result, the rural and agricultural condition of the state delayed the full development of negligence law before 1865.[7]

Nonetheless, the antebellum supreme court did consider a few cases involving accidental injury. In fact, its earliest confrontations with liability for accidents provide strong evidence of how American law drifted across state borders. One subtle influence was the fact that Florida in the 1840s and 1850s was a state of immigrants, a condition that of course applied to its judges. The forces propelling the importation of law were so strong that they occurred despite limited printed resources. In the 1850s, the supreme court confessed, "Unfortunately, we have no [access] to [law] books, and particularly those bearing most directly on the points [at issue], and are confined, in some degree, to digests."[8] The "Catalogue of Books" in the state's judicial library reflected the primitive state of Florida's law libraries at late as 1861. The court possessed incomplete reports, digests, and statutes from other states, some federal reports and statutes, and a few treatises, altogether less than a few hundred volumes. Given that the state library was probably the best law library in Florida, it is not surprising that many of the court's early opinions dealing with accidental injury relied on presumed general principles of law.[9]

The antebellum supreme court considered accidental injuries in several contexts. Its first cases arose out of situations involving special agreements or public duties. The small number of these appeals addressed the obligations of attorneys,[10]

7. In *Bennett v. Filyaw*, 1 Fla. 403 (1847), an early decision involving the loss of three boxes of tobacco on a steamboat, the supreme court defined common carriers to include steamboats and certain ferries for hire. The court held, in upholding liability against a steamboat owner, that the burden was on him to demonstrate that "in virtue of some special public notice, or other good legal ground" that he was not liable as a common carrier. The rule governing the liability of carriers was liability without negligence, or fault, the traditional common law doctrine. The lost tobacco was carried on the Appalachicola River to Appalachicola in December 1842.
8. *Kelly v. Wallace*, 6 Fla. 690, 707 (1856).
9. Supplement, 10 Fla. at I-VIII.
10. *Hale v. Crowell's Admr.*, 2 Fla. 534 (1849), a curious Leon County case involving a disputed contract, addressed the "negligence" of an attorney who obtained a default judgment which was actually to the disadvantage of his clients. The court allowed the default to be reversed. *Waterson v. Seat and*

cities,[11] and parties in bailments,[12] with the last, as in other southern states, primarily involving injuries to hired slaves.

Slave hire accidents were the most frequent disputes involving accidental injury considered by the Florida Supreme Court. The legal rules governing the slave cases were similar to those adopted in other southern jurisdictions. For example, in an appeal involving a slave, Esop, who died while hired to lay track for the Pensacola and Georgia Rail-Road in Leon County, the justices announced that "Courts of the Southern States, in adjudicating the question as to what shall constitute negligence in the bailee of a slave, have justly and humanely defined the rule to be any failure

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Crawford, 10 Fla. 326 (1864), a dispute over ownership of lumber in Hillsborough County, provided that the "negligence" of an attorney could be the basis of an action for damages by the attorney's client.

11. *Tallahassee v. Fortune*, 3 Fla. 19 (1850), a case in which a city was successfully sued for property damage, involved a gully in a public road that caused the death of the plaintiff's horse. The plaintiff tied the horse in front of his tin shop in the town, but the horse got loose, was injured, and died. The case file reveals that the plaintiff sought $200 for "trespass on the case," alleging that the city was "in no wise ignorant of the premises, but [was] unmindful of its duty in this behalf" by not filling the ditch. The city responded that as a municipal corporation it could not be liable for trespass and that the plaintiff had negligently tied the horse. The "contributory negligence" of the plaintiff—his failure to act with "ordinary care"—the city suggested, should bar any recovery. The supreme court, however, held that the gully was a nuisance, that under its charter Tallahassee had the power to remove nuisances, and that it was therefore obligated to remove nuisances and would be liable to the plaintiff unless the injury to the horse occurred by the plaintiff's own gross negligence, which was defined as an absence of "ordinary care." The court found the plaintiff was not negligent because horses often escaped from their hitchings, and this horse was likely trying to get back to its stall. A trial judgment against the defendant city was affirmed; *Tallahassee v. Fortune*, Florida Supreme Court Folder 0854, Florida State Archives, Tallahassee.

12. A bailment is the delivery of personal property to a person (the bailee) in trust to be used by the bailee for some particular purpose and then returned. This was the legal arrangement for the hiring of slaves, who were considered personal property. In *Ferguson v. Porter*, 3 Fla. 27, 38-39 (1850), the court held that a bailee who receives no benefit from a bailment is only liable for "gross negligence." In contrast, a bailee who benefits from the arrangement, such as someone who hires a slave, is to act with "diligence and skill." If the bailee failed to follow the instructions of the property owner, he was liable for any injury to the property. *Ferguson* involved a business transaction in Monroe County in which Porter agreed to ship arrowroot to New Orleans but instead shipped it to Charleston where it was lost. The trial court found in favor of the defendant, but the supreme court reversed on the ground that the duty of the defendant was not properly considered. The issue of slave bailments in law is addressed at length in Thomas D. Morris, *Southern Slavery and the Law* (Chapel Hill, N.C., 1996), 132-58.

to bestow that degree of care and attention which a kind and humane master would bestow under the circumstances."[13] In another dispute, involving the drowning of a hired slave, Peter, at a lumber mill in Duval County, the court imposed a duty on the slave hirer to not subject a slave to work for which he was not fit. Peter was sent into an area of the mill where the water was up to eight feet deep, but he could not swim. The court affirmed a finding of liability in the trial court.[14]

The most important case involving the liability of slave hirers was *Forsyth & Simpson v. Perry*, in which the court refused to apply

13. *Tallahassee R.R. Co. v. Macon*, 8 Fla. 299, 304 (1859). Esop was sub-leased by the defendant to the Pensacola and Georgia Railroad, apparently a common practice; Larry E. Rivers, *Slavery in Florida* (Gainesville, Fla., 2000), 30-32, 80-81. The core of the claim was that Esop fell ill, and the railroad failed to provide medical care. The railroad responded that it allowed Esop to stop work when he did not feel well (he was ramming dirt under new cross-ties), gave him alcohol, pills, and a visit from a physician. The parties quibbled over Esop's age, as it naturally affected the damages. Esop's owner claimed he was between forty and forty-five years of age and valued at $1,500; the railroad said he was an old man only worth $300. The court affirmed a verdict for the plaintiff for $600; *Tallahassee R.R. Co. v. Macon*, Florida Supreme Court Folder 0853, Florida State Archives. In *McRaeny v. Johnson & Moore*, 2 Fla. 520, 527 (1849), the court stated, apparently without any sense of irony, "In cases of injury to this species of property [slaves], the American courts, by a spirit of enlightened humanity, have extended a more enlarged protection than prevails in cases of mere chattels." Of course, the slave in all of these cases was either dead or injured, and at any rate could not benefit from any damages that instead went to owners. In fact, in *McRaeny*, a white man beat the slave Sam to death. The lawsuit was about who owned Sam and therefore who had the right to compensation for his death.

14. *Kelly v. Wallace*, 6 Fla. 690, 704-705. The mill owner beat and otherwise harassed Peter and routinely sent him to recover logs in deep water although he knew Peter could not swim. The trial judge charged the jury that the claim was based on "negligence and want of ordinary care," and that a key question was whether the slave received an order that "no ordinary prudent man would have given"; *Kelly v. Wallace*, Florida Supreme Court Folder 0776, Florida State Archives. Another slave bailment case, originally filed in 1860, was *Pensacola & Georgia R.R. v. Nash*, 12 Fla. 497 (1869). A slave, Jackson, was hired as a locomotive fireman. He was ordered to jump from the locomotive and attach a rope to a moving train as it pulled into Tallahassee from St. Marks. He fell while getting back on the locomotive, and the engine crushed his foot. After its amputation, Jackson's leg became infected and he died of "lockjaw." The slave's owner argued that Jackson was hired only as a fireman and was not hired for the more dangerous job of coupling and uncoupling cars. The defendant claimed that it was all Jackson's fault. He was not ordered to try to get back on the moving locomotive. That was his negligent decision and should bar any recovery. The supreme court accepted the latter argument and reversed an $1,800 jury verdict for the plaintiff; *Pensacola and Georgia R.R. Co. v. Nash*, Florida Supreme Court Folder 0837, Florida State Archives.

the fellow servant rule. The rule, well established in other states, provided that a worker could not recover damages if his on-the-job injury was caused by the negligence of a "fellow servant," or co-worker.[15] Given that any injury of a worker was likely to be the result of errors of "fellow servants," the rule presented a substantial barrier to recovery. In *Perry*, a slave in Santa Rosa County drowned while attempting to follow an order to jump to a steamboat from a flatboat. The slave tried but fell into the water and drowned.[16] In his defense, the boat owner argued that the mate, not the owner, was negligent.[17] The court interpreted this as an argument that the employer was not responsible for the actions of his employees, and that workers in general assumed all risks of injury or death resulting from the negligence of fellow servants.[18] Although the court agreed the rule applied to free workers, it rejected its application to a case involving a slave, reasoning that "[u]nlike white persons, the slave does not, upon entering into the service of another, voluntarily incur the risks and dangers incident to such service."[19] Further,

> The [fellow servant] rule applies to [free] *persons* necessarily—those who are competent to contract, and who, while they are responsible for the consequences of their own misconduct, have the same rights and remedies as their co-agents. Why [include] slaves, when it is manifest they have none of those rights or remedies against others, and are not liable in a civil suit for their own acts and misconduct? . . . Apart from the views we have presented, considerations of public policy, the interest of the master, and humanity to the slave, require that . . . [the slave] should be shielded from the unrestricted control and oppression of irresponsible subordinates. The liability of the employer . . . , for the misconduct of his subordinates, will naturally add to the personal security and protection of the slave.[20]

15. *Forsyth & Simpson v. Perry*, 5 Fla. 337 (1853). On slaves as fellow servants, see Morris, *Southern Slavery and the Law*, 147-58.
16. *Forsyth & Simpson v. Perry*, 5 Fla. at 341.
17. Ibid., 5 Fla. at 341-42.
18. Ibid., 5 Fla. at 342. The only citation was to Joseph Story's *Commentaries on the Law of Agency* (Boston, 1839).
19. *Forsyth & Simpson v. Perry*, 5 Fla. at 343.
20. Ibid., 5 Fla. at 343-45.

In the court's mind, it was more "humane" in this context to view slaves as property than persons.[21]

Courts were not the only part of Florida's government concerned with accidents. Before the Civil War, the state legislature passed a number of statutes dealing with the potential for injury. Most important, in 1859 and 1861, it adopted laws describing what should happen when railroads killed or injured livestock, suggesting that livestock was already being killed by locomotives. Florida was a common pasturage jurisdiction; owners of roaming livestock could let their herds range freely over others' property. Landowners wishing to keep livestock out of their land had the legal burden of "fencing out" the animals. Otherwise, they could not complain about damages caused by foraging livestock. Showing a desire to protect the free-range property right, the general assembly challenged the use of a negligence standard in this context. Its statutes provided that railroad companies "shall pay for all cattle and other live stock killed" regardless of any need to prove fault by the company. The laws established a process of informal application to the railroad companies for payment. Further, engineers and conductors were required to report all livestock injuries to their employers, and the railroads were charged with keeping public records of all livestock accidents.[22] The statutes clearly intended to protect the state's livestock interests by making it easier to impose liability on the new railroads.

Altogether, the infrequent application of accident law in antebellum Florida was caused by a lack of urban, industrial, and transportation development. The economic context of the few decided cases—lost goods on a steamboat, killed slaves hired out to a lumber mill or a ship owner, Tallahassee's poor streets, and the mistakes of attorneys—suggests the relevance of the urban and industrial capacity to kill or to damage property. Yet, there was not much that was either urban or industrial in early Florida, evidenced especially by the general absence of railroads. Moreover, the few disputes addressing liability for accidental harm arose out of existing legal relationships: carriers and shippers, bailors and bailees, cities and citizens, and attorneys and their clients. All of the earliest disputes involved injury to property, often slaves. The

21. Ibid., 5 Fla. at 344.
22. *Digest of the Statute Law of Florida* (Tallahassee, Fla., 1872), 125-27.

general assembly's interest in accidents was directed to railroads and livestock. In pre-Civil War Florida, personal injury claims arising out of accidents were simply not a meaningful component of the state's law.

In this environment both the general assembly and the supreme court did not mind crafting rules that held injurers of property liable. In fact, under Florida law livestock killings by railroads and injury to property on common carriers such as steamboats resulted in liability even without the fault of the defendant. Similarly, the supreme court did not apply the fellow servant rule to slaves, and towns and attorneys were held liable for their negligence. The willingness to impose responsibility, however, was not the result of any animus toward modern devices. Florida's legislature actively participated in the development of railroads, and in 1859, the supreme court proclaimed that "Railroads in cities and towns cannot with propriety be termed nuisances. . . . They are in use in the principal cities of Europe and this country, and, when regulated by proper restrictions, are valuable aids to commerce."[23] Instead, accident law in early Florida tried to balance the interests of old and new forms of property, seeking a middle ground among slave owners, boat owners, the new railroads, and livestock owners that held injurers to account in an environment in which personal injury was not a factor and the overall numbers of claims was small.

The antebellum liability system did not last, however, as economic transformation between 1865 and 1886 changed the meaning of accident law in Florida. Slave hires, which had generated the most common kind of pre-Civil War accident case, ended with Emancipation. After a series of setbacks related to railroad line destruction during the Civil War and financial corruption during Reconstruction, railroads expanded at an unprecedented pace. Between 1880 and 1885, railroad mileage increased from less than 500 to more than 1,650. The total was just under 2,500 in 1890. The number of Floridians also grew, if slowly. In 1880, the state's population was less than 270,000, one of the lowest in the federal union. No place had more than 10,000 persons, including

23. *Geiger v. Filor*, 8 Fla. 325, 332 (1859). For a discussion of state sponsorship of railroad construction before and after the Civil War and the personal financial interests of supreme court justices in internal improvements, see Lewis, "Railroad Cases in the Florida Supreme Court," 3-5, 10.

Jacksonville, Pensacola, and Key West, the leading towns. Tampa counted less than 1,000.[24] Nonetheless, legislators and judges gave increased attention to the injuries that resulted from improvements in transportation.

As before the Civil War, the supreme court decided several lawsuits involving goods destroyed while being transported. Damages to goods shipped on railroads produced appeals for the first time. One such case, heard in 1872, arose when shoes, clothes, and furniture shipped from New York to Gainesville were lost. The court reversed a trial verdict against the Florida Railroad Company on the ground that the more than $700 awarded was excessive.[25] In another appeal, a dentist's implements valued at more than $500 were lost on a steamer in the St. Johns River. The supreme court, however, refused the plaintiff compensation for his inability to practice dentistry and also denied any special recovery for the tools, which allegedly were set with gold, diamonds, and rubies.[26] In contrast, in *Southern Express Co. v. Van Meter*, the court held an express company in Alachua County liable for a misdelivered package under the prevailing strict liability standard for common carriers.[27] Altogether, the results in the carrier cases were primarily determined by the terms of agreement between the shipper and carrier. The contractual basis of carrier liability law in Florida, as opposed to negligence, was recognized in an 1885 statute requiring common carriers to deliver freight strictly according to their agreements with the shipper, whether represented by a bill of lading or some other document.[28]

A second type of property case, the accidental killing of livestock by railroads, had received the legislature's attention before the Civil War. After the war, the issue of liability for livestock killings produced a dramatic and well-defined contest between the legislature and the supreme court. The conflict was predictable. Divisions in Florida politics frequently resulted from disagree-

24. Turner, *A Short History of Florida Railroads*, 33-92; Pettengill, *The Story of the Florida Railroads*, 8; Gannon, ed., *The New History of Florida*, 249-86. On the general failure of Florida's railroads to expand between 1865 and 1880, see Edward C. Williamson, *Florida Politics in the Gilded Age, 1877-1893* (Gainesville, Fla., 1976), 7-8, 15-16, 30-31; Manley et al., *The Supreme Court of Florida*, 261.
25. *Florida R.R. v. Gensler & Silberstein*, 14 Fla. 122 (1872).
26. *Brock v. Gale*, 14 Fla. 523 (1874).
27. *Southern Express Company v. Van Meter*, 17 Fla. 783 (1880).
28. *Revised Statutes of the State of Florida* (Jacksonville, Fla., 1892), s. 2348.

ments about the legal status of railroads, and competition between farmers and the railroads in livestock cases was simply part of that larger contest.[29] Property in livestock was often the critical capital of the yeoman farmer, a class that possessed considerable political clout in late nineteenth-century Florida. And legally the livestock owner had long held an established property right in the free range of his animals. Further, prior to the Civil War, the Florida legislature endorsed both an abbreviated legal process and railroad liability for livestock killings even without any negligence by the railroad.

After the Civil War, the growth of railroads produced more livestock accidents, and for the first time the property rights of the farmer became subject to evaluation in the supreme court. During the 1870s, the state's Reconstruction legislature passed a provision that made it illegal to allow any animals to stray onto railroad tracks. With Republicans in retreat as Reconstruction ended, a Conservative-Democratic legislature overturned this potentially radical pro-railroad change by providing that companies "shall be held liable" for damages to livestock caused "by the cars or trains of such company." Proof of damages could be provided by affidavit of the owner, reaffirming antebellum principles.[30] The legislature also permitted levies on railroad property and garnishment of railroad depot agents in order to collect damages for livestock injuries. Still, the legislature repealed former provisions requiring informal claims before instituting a lawsuit in a court.[31]

The legislature's preference for railroad liability was not tested in the supreme court until 1886 with *Savannah, Florida and Western Ry. Co. v. Geiger.* Florida statutory law provided that railroads "shall be held liable" for injuries to stock.[32] *Geiger* involved a claim for damages to livestock in Nassau County for which the plaintiff won a verdict at trial. Yet, *Geiger* was not simply a contest over a few ani-

29. According to Edward C. Williamson, arguments over the financial and political power of railroads, especially those controlled by out-of-state interests, were at the forefront of state politics after 1880; *Florida Politics in the Gilded Age,* 144-62, 193.

30. *Digest of the Laws of the State of Florida* (Tallahassee, Fla., 1881), 125-26, 856; *Savannah, Florida and Western Ry. Co. v. Geiger,* 21 Fla. 669, 685-86 (1886).

31. *Digest of the Laws of the State of Florida,* 125-26, 856.

32. *Savannah, Florida and Western Ry. Co.,* 21 Fla. 669; *Digest of the Laws of the State of Florida,* 356.

mals. It confronted the supreme court with the larger question of the relative property rights of farmers and industry and who would be asked to bear the costs of modernization. Few policy questions in a capitalist economy were more important than the definition of relative property rights. Farmer Geiger's predicament was undoubtedly common. Ten of his cattle, two sheep, and five hogs were killed by the railroad in less than a year. Fed up, he proceeded to court on the evidence of carcasses found alongside the tracks and claimed roughly $150 in damages. His claim relied on ancient property rights as well as the livestock statute: "The custom of the County is that stock grase [*sic*] in the woods wherever they please, and it was the same custom before the [Savannah, Florida & Western] was built." From the beginning, the key legal question was the standard of liability. The railroad maintained that the claim failed because there was no allegation of negligence. Geiger responded, "[T]here is no law requiring him to set out or prove negligence." The trial court, following the livestock statute, agreed with Geiger and instructed the jury that the killings were *prima facie* evidence of negligence. The jury awarded Geiger $146.[33]

Savannah, Florida & Western Railway appealed to the supreme court. Robert Davis, a Jacksonville attorney who represented the railroad, prepared an elaborate six-page printed brief in which he argued that negligence could not be presumed; it had to be proven by the plaintiff. He attacked the livestock statute as imposing unfair punishment when there was no evidence of fault. The statute "attempts to hold all railroad companies in this State liable for damages to live stock on their roads absolutely, and provides an *ex parte* method of proving the amount of the damage by the affidavit of a witness." According to Davis, this violated economic efficiency because "it would be absolutely impossible for the engineers to run their trains so as to make half the time now universally required by the traveling public without occasionally killing an animal." He believed the law considered the "efficient operation of railroads" to be of much more importance "than the avoiding of injury to live-stock." As a result, locomotives were not required to slow down when livestock was seen. Economics aside, according to

33. *Savannah, Florida, and Western Ry. Co. v. Geiger*, Florida Supreme Court Folder 0808, Florida State Archives.

Davis, the statute was invalid because of the due process requirements of the federal and Florida constitutions. As a matter of constitutional law, the legislature could not impose liability without fault. It could not take the property of one person and give it to another without proof of negligence. Davis conceded that livestock owners would probably not be able to prove negligence very often, given that all that would be left after a killing would be a rotting carcass. Yet, the "law is the law, work a hardship on whom it may." Further, because 90 percent of these cases were for small amounts and brought before justices of the peace, where there were no written pleadings, the companies were unable to adequately defend claims under the current standard. Altogether, economic efficiency, due process, and the informal procedural context (which hampered railroad defense strategies) required a negligence standard.[34]

Geiger's response, handwritten by his attorney on three pages, put the matter in a different light. It maintained that the legislature clearly intended to change the common law negligence rule: "[A]ll the Plaintiff has to prove is the killing[,] the value of property[,] and ownership which make a prima facie case." Still, the burden was on the defendant to prove the killing was unavoidable, reflecting the sound policy that railroads should "Exercise the utmost care and diligence in the Exercise of their privilege." On a practical level, the legislature's rule was just common sense. The company had at least two witnesses—the fireman and the engineer—present at every killing, while the "Plaintiff is at his house following his daily business." As a result, the plaintiff could never produce evidence of negligence. Further, according to Geiger, the plaintiff was never at fault while the railroad always caused the killing. Surely the legislature had the power to take such matters into consideration when devising a rule of responsibility.[35]

The court took its time in reaching a decision. Anxiously, the railroad contacted the court's clerk several times, and on November 16, 1885, Attorney Davis rather oddly requested that "as soon as the case is decided you will send us a copy of the decision provided the decision is in favor of the Rail Road Company, which I have every reason to believe will be the case." He need not have been concerned. The supreme court's decision began with a dis-

34. Ibid.
35. Ibid.

cussion of fence laws in territorial Florida, which since 1823 recognized "a right in resident owners of stock for their cattle and other domestic animals to range and graze on all uninclosed lands free of change, and without any liability for any damage resulting from their going upon or grazing on any lands whatsoever not inclosed by a lawful fence." The court concluded, "No special interest is of as much if any more moment to our State, and none elicited earlier legislative attention than stock raising."[36] The court believed the current livestock liability statute, passed in 1875, did not impose any legal duty on livestock owners to keep their animals off railroad tracks. Despite this background, the court rejected the liability standard articulated by the legislature. It maintained that liability for livestock killings depended on whether both parties exercised proper care and that the plaintiff must prove the defendant's negligence in order to prevail.

The *Geiger* ruling defended the negligence principle, as opposed to liability without fault. It defined negligence as "reasonable care under the circumstances" and stated there could be no recovery if the livestock killing could not have been avoided by the railroad or was caused by the plaintiff's own negligence. The court disagreed with Geiger's idea that the burden of disproving negligence should be on the railroad. It assumed that even though a railroad might be dangerous, it was nonetheless lawful, and its lawfulness acted as notice to the livestock owner that the state would tolerate its dangers. The court considered but eventually rejected a rule that presumed the negligence of a railroad in livestock cases, a rule common before the Civil War in some southern states. Instead, in "running at ordinary speed, [a railroad] is doing nothing forbidden, but the very thing required by its organization and required by the commerce of the country."[37] Moreover, the court concluded that Florida's statutes did not impose a presumption of negligence.[38] The court dismissed the notion that the applicable statute, with its "shall be held liable" language, could possibly impose liability without fault. Citing the Michigan jurist Thomas Cooley's writings on limitations on legislative powers, it held that such a standard would violate constitu-

36. Ibid.; *Savannah, Florida, and Western Ry. Co.*, 21 Fla. at 684.
37. *Savannah, Florida, and Western Ry. Co.*, 21 Fla. at 689-96.
38. Ibid., 21 Fla. at 697-700.

tional due process: "The legislature cannot thus create judgment, even as to the single element of the amount of the damage upon the basis of an ex-parte affidavit, nor as to such element [regarding] those of the killing or injury and negligence."[39]

The court's reference to due process and to Cooley implied a substantive due process constitutional right to negligence before a railroad corporation could be held liable. This astonishing conclusion was not really explained. The opinion was not clear whether it derived the right from the federal constitution, the state constitution, or both, as no specific provision was referenced. Nonetheless, the supreme court's citation to Cooley suggests it was willing to imply a substantive due process right to negligence for a corporation from the federal Fourteenth Amendment. Thus, the 1886 *Geiger* decision predated the important series of decisions in the United States Supreme Court between 1887 and 1898 that established substantive due process as a federal limitation on state regulation of business. Equally remarkably, the court presumed without explanation that a corporation as well as a natural person was entitled to constitutional protections, although the Fourteenth Amendment was adopted to protect the civil rights of former slaves, not incorporated businesses. That critical issue was not addressed in the United States Supreme Court until May 1886, several months after *Geiger*.[40]

Analysis of the decision is noteworthy in other ways. It was issued by a Democratic and ex-Confederate majority. One would expect such men to have little sympathy for expanding the reach of the Fourteenth Amendment, a product of Radical Republican Reconstruction, but apparently their interest in railroad development overcame any possible doubts. The composition of the court had changed dramatically in the months preceding the *Geiger* decision. The new governor, former Confederate general and Democrat Edward A. Perry, appointed Democrats George G. McWhorter and George P. Raney to the court in 1885. McWhorter was a leading figure in the West Florida faction of the party, a close ally of William D. Chipley, manager of the Louisville & Nashville

39. *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Boston, 1874); *Savannah, Florida, and Western Ry. Co.*, 21 Fla. at 698-99.

40. On the corporation as legal person, see *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394 (1886).

Railroad, and an eager supporter of railroad construction. McWhorter even endorsed West Florida's secession from the state and incorporation into Alabama if the legislature did not subsidize railroad construction. He eventually resigned from the supreme court to chair Florida's railroad commission. As for Raney, as an attorney he represented the state's internal improvement fund, which was designed to help fund railroad construction. He helped to negotiate the sale of four million acres of land to Philadelphia businessman Hamilton Disston, a critical factor in facilitating railroad expansion in the 1880s. After leaving the supreme court, Raney became counsel for the Seaboard Air Line Railway.[41]

The radical potential of the court's ruling cannot be overemphasized. In the 1873 *Slaughterhouse Cases*, the United States Supreme Court repudiated a proposition for a substantive due process right under the federal Constitution similar to that proposed by the railroad in *Geiger*. That decision was still good law in early 1886.[42] Moreover, *Geiger*, although emanating from backwoods Tallahassee, was published just a few months after the more celebrated case of *In re Jacobs*, in which the New York Court of Appeals, the most important state court in the nation, held a labor regulation invalid under the state's constitution as an arbitrary deprivation of liberty and property.[43] *Jacobs* is often viewed as a precursor to the development of the doctrine of substantive due process under the federal constitution. But *Geiger* could be viewed as more sweeping, given that it concerned competing rights to protection of property for accidental harm without the complications of contract and labor regulations.

Geiger triggered a contest over liability standards between the court and the legislature. The supreme court had expressed a philosophical and constitutional preference for negligence. As a result, *Geiger* identified the kind of property the supreme court was most willing to protect. Livestock owners would have an increased share of the burdens resulting from the new transportation network. As everyone understood, the practical difficulty of proving railroad negligence in livestock cases—railroad employees were usually the only human witnesses—made claims less likely or even

41. Manley et al., *The Supreme Court of Florida*, 261, 266, 275-83; Williamson, *Florida Politics in the Gilded Age*, 73-80.
42. *The Slaughterhouse Cases*, 83 U.S. 36 (1873).
43. *In re Jacobs*, 98 N.Y. 98 (1885).

impossible. The legislature perceived this and immediately expressed extreme hostility to *Geiger*, enacting a law requiring railroads to fence their tracks and making them strictly liable for any injury "whether [acting] negligently or not" if there was inadequate fencing. The legislature imposed a process by which the owner of killed livestock would make a direct claim to the company for compensation, allowing the claim to be enforced by attachment and lien against the railroad, and providing that if the railroad failed to pay the claim and it was necessary for the livestock owner to seek enforcement in court that the court should award the value of the livestock plus 50 percent interest on the livestock from the date of the initial claim, and attorney's fees. Two years later, the legislature imposed a presumption of railroad negligence in livestock cases, further overruling *Geiger*.[44]

The supreme court also heard property damage cases after 1865 that did not involve goods on carriers or livestock. Most concerned the application of negligence concepts to duties imposed by contract or on a local government. Post-Civil War bailment disputes, for example, tended to be decided in the context of well-established doctrine. In adjudicating liability arising from a horse bailment in Jackson County, in which a man hired a horse but mistreated it, the supreme court restated the principle formerly applied to slaves that a bailee is required to exercise "ordinary diligence," which is "such as men of common prudence generally exercise about their own affairs."[45] In a dispute involving Jacksonville, a plaintiff had fallen through the Hogans' Creek Bridge and "his buggy was broken, his harness ruined, and his horse seriously injured and rendered unfit for . . . use thereafter." The court held that an incorporated municipality could be liable for injuries on its streets and bridges if its charter included a duty to maintain public streets.[46] Other property cases addressed the negligence of an attorney,[47] a timber operation that obstructed the

44. *Revised Statutes of the State of Florida*, ss. 2271-76, 2280.
45. *West v. Blackshear & Co.*, 20 Fla. 457 (1884); *McMurray v. Bassett*, 18 Fla. 609 (1882) (without the permission of its owner, a mare became pregnant while being held at the defendant's livery stable).
46. *Jacksonville v. Drew*, 19 Fla. 106 (1882) (city charged with the control and regulation of its streets and bridges).
47. *Young v. Whitney*, 18 Fla. 54 (1881) (negligence unsuccessfully used as a defense to paying attorney's fee).

Escambia River,[48] the negligence of a partner in running a business,[49] and a fire set by a railroad.[50] The last, against the South Florida Railroad Company in Orange County, involved a railroad's attempt to burn woods adjacent to its property. The fire spread and destroyed a house and several orange trees.

Two other property cases addressed negligence concepts in special business relationships. In *O'Brien v. Vaill*, decided in 1886, a man who left a trunk at a St. Johns County hotel—the trunk was later stolen—claimed the innkeeper was responsible. The court held that because the man checked out of the hotel and left the trunk without any compensation to the innkeeper, the hotel was responsible only if it was grossly negligent. Unfortunately for the plaintiff, there were no facts to support such a finding.[51]

In another dispute, the Western Union Telegraph Company failed to deliver a message in Pensacola sent from Barbados. The message concerned an agreement to hire a vessel in Barbados that would come to Pensacola and carry lumber to the United Kingdom. Thinking the deal was final, the ship sailed to Pensacola only to discover that, because its accepting telegram had not been delivered by Western Union, the shipper hired another ship. There was no doubt that the failure to deliver the message was negligence. Instead, the question was what damages could be allowed: the mere cost of sending the telegram or the consequential damages flowing from the fact that the message was not delivered. Despite the potential burden on telegraph companies, and a contrary rule in other jurisdictions, the court held that the sender could recover damages resulting in the usual course of business from the failure to deliver the message. It affirmed a trial judgment against Western Union for more than $600.[52]

After the Civil War, property damage cases still made up the majority of all Florida accident cases. Damages to goods shipped

48. *Sullivan v. Jernigan*, 21 Fla. 264 (1885) (defense of claim depended partly on whether there was a breach of "the care, diligence and skill ordinarily exercised by timber raftsmen on the Escambia river"); *Simpson & Co. v. Daniels*, 16 Fla. 672 (1878) (Blackwater River in Santa Rosa County obstructed by logs, other logs damaged).
49. *Richardson v. Ross*, 14 Fla. 463 (1874).
50. *Saussy v. South Florida R.R. Co.*, 22 Fla. 327 (1886) (A verdict for the railroad was reversed on the grounds that its attorney improperly questioned a witness).
51. *O'Brien v. Vaill*, 22 Fla. 627 (1886).
52. *Western Union Telegraph Co. v. Hyer Bros.*, 22 Fla. 637 (1886).

by common carriers, injuries to livestock by railroads, poorly maintained municipal streets, the incompetence of an attorney, a horse mistreated by a person other than its owner, rivers obstructed by timber, goods lost in a hotel, a spreading fire, and an undelivered telegraph message were the factual contexts for applying the law. With the notable exceptions of the livestock cases, which generated intense debate between the legislature and the supreme court, and the spreading fire case, all of the claims arose out of failures in contract performance or the duties of local government. As a result, accident law concepts in property cases between 1865 and 1886 were predominantly linked to failures in meeting reasonable expectations in commercial or government relationships.

Despite the continued prominence of property claims, by 1886 there were hints that the greater future of accident law and negligence would be with personal injuries. One variety of this kind of case involved injuries to railroad passengers.[53] The only Florida passenger case before 1887, which generated two appeals in the 1880s, involved an injury to an elderly man riding a Jacksonville streetcar.[54] Plaintiff Adolpho Chappell, apparently using a crutch, claimed that a streetcar driver started the horse-drawn vehicle in a manner that shook the car and then threw him to its floor before he could get seated. He claimed damages of $5,000. In the first appeal, a trial verdict for Chappell was reversed on the ground that there was no proof of negligence. According to the court, the mere fact of an accident did not establish negligence by the street railway, and moreover, the relevant standard was "ordinary care and prudence." It saw "no proof of such acts or omissions upon the part of the driver as show a failure to observe such care, precaution and vigilance as the circumstances demanded—in a word, no affirmative proof of negligence."[55] A new trial was awarded on appeal, but before the second trial, Chappell died. His wife pursued the case and won another verdict in Duval County. Yet, on appeal the court gave a narrow view of the state's wrongful death

53. An infrequent type of personal injury litigation involved claims against local government. A rare decision finding liability against a city arose when lawyers for Jacksonville neglected to file a required bill of exceptions so as to perfect an appeal; *Jacksonville v. Lawson*, 16 Fla. 321 (1878) (plaintiff fell into a ditch).

54. *Jacksonville Street Ry. Co. v. Chappell*, 21 Fla. 174 (1885); *Jacksonville Street Ry. Co. v. Chappell*, 22 Fla. 616 (1886).

55. *Jacksonville Street Ry. Co. v. Chappell* (1885), 21 Fla. at 183-85.

statute, which permitted certain legal actions to continue after one's death, in holding that Chappell's action for personal injury did not survive under the statute. The statute provided that "Hereafter all actions for personal injuries shall die with the person, to wit: assault and batteries, slander, false imprisonment and malicious prosecution, all other actions shall and may be maintained in the name of the representative of the deceased." The court read the types of claims after "to wit" to not include Chappell's case.[56]

The supreme court also confronted a personal injury to a pedestrian on railroad tracks. Much as in the livestock area, the legislature had already perceived the potential for this kind of injury and, in 1874, required railroads to erect signs and ring bells at crossings and to not exceed a speed of four miles per hour in cities.[57] The crossing cases were particularly well suited to the defense of "contributory negligence." This rule provided that any negligence—or absence of "ordinary care"—by the plaintiff eliminated the liability of the railroad, even if the railroad also acted without "ordinary care." A particularly dramatic use of contributory negligence was *Louisville & Nashville R.R. Co. v. Yniestra,* in which Moses G. Yniestra, walking along the company's tracks in Pensacola, was killed. This was the only appeal in Florida between 1845 and 1886 involving a claim for negligent personal injury by someone who had no contractual relationship with the defendant or when the defendant was not a unit of government.[58]

Yneistra was walking along track through the company's switchyard early in the morning when it was mostly dark. The track was laid on one of Pensacola's public streets. Yneistra had walked through the switchyard on his way to and from work for about three years. In a backing maneuver, the train, allegedly ringing its

56. *Jacksonville Street Ry. Co. v. Chappell* (1886), 22 Fla. at 625, 627. The court did not decide whether a case by the representative of a deceased passenger based on the contract of carriage could survive. It only held that a claim of negligence alone could not. The railroad had argued that "all actions" in the statute meant all actions, and that the list after "to wit" was simply an illustration of the actions barred, not a restriction. Of course, this rendered the reference to "all other actions" meaningless. The supreme court apparently agreed; *Jacksonville Street Ry. Co. v. Chappell,* Florida Supreme Court Folder 0767, Florida State Archives.

57. *Revised Statutes of the State of Florida,* s. 2264.

58. *Louisville & Nashville R.R. Co. v. Yniestra,* 21 Fla. 700 (1886).

bell and traveling at about three to four miles per hour, ran over Yneistra. Earlier, workers on the train had seen Yneistra on the track, but there was no light on the back of the train nor was there any lookout. The only witnesses to the killing were company employees.[59] Judge W. Douglas King instructed an Escambia County jury on a full range of negligence issues. Was the engine property equipped? Was the engine run with due care? Did Yneistra have "plenty of warning"? If the jury believed the railroad was liable, it should award such damages as the deceased's life was worth to his wife. The jury found no contributory negligence and awarded $25,000 to Yneistra's widow, who was left to care for ten children.[60]

The supreme court agreed with the lower court ruling that the company was negligent in not seeing Yniestra walking near the rear of the train. Yet, citing New York and Pennsylvania law, it concluded that recovery depended on whether the accident was entirely the fault of the company.[61] It held that Yniestra was contributorily negligent because he knew of the property's use as a switching yard, even though the railroad track on which he was killed was part of a public street. In essence, the justices accepted the railroad's argument that Yneistra did not need to walk on the track, even though it was located on a public road, and consequently rejected the argument that Yneistra had a right to walk on the road and track and that, as a result, he was not negligent.[62] Chief Justice Raney, who wrote the opinion, admitted his unease about the prospect of a negligent railroad having no liability for killing a person:

> [T]he operation of the principle of contributory negligence is unjust and inequitable. By the law, as it unquestionably stands, no matter how negligently or with what amount of care trains are run, if a person injured by one of them has failed to exercise care on his part, he cannot recover. As it happens in nearly every instance of collision, if not all, that the person on the track is alone

59. Ibid., 21 Fla. at 723.
60. *Yniestra v. Louisville & Nashville R.R. Co.*, File 1884-7818, Escambia County Clerk's Office, Pensacola, Fla.; *Yneistra v. Louisville & Nashville R.R. Co.*, Florida Supreme Court Folder 0809, Florida State Archives.
61. *Louisville & Nashville R.R. Co. v. Yneistra*, 21 Fla. at 729.
62. *Yneistra v. Louisville & Nashville R.R. Co.*, Florida Supreme Court Folder 0809.

> injured or killed, the train receiving no damage, there is no present incentive of personal safety on the train hands to use caution, nor a fear of being compelled to make pecuniary compensation when they can rely upon being absolved from their admitted negligence by some careless act of the plaintiff.

Raney endorsed a rule of comparative negligence, which would apportion damages based on the relative fault of the parties, but he thought it was up to the legislature to change the law.[63]

Chappell and *Yniestra* were the most important personal injury appeals in Florida between 1845 and 1886. The supreme court did not decide any employee injury cases during this time, although such claims became an increasingly important variety of appeal in other states.[64] Because Chappell and Yniestra both lost their appeals, the only personal injury verdict in favor of an accidentally injured plaintiff upheld by the supreme court between 1845 and 1886 involved a claim against Jacksonville (a place notorious for its poor roads) for a man's fall into a ditch.[65] Altogether, the use of negligence to obtain recovery for personal injuries in Florida before 1886 was extremely rare. None of the normal sources of such cases in other states—railroad injuries to passengers, railroad collisions with pedestrians, or injuries to railroad workers—generated many appeals.

Despite the predominance of property cases and the infrequency of personal injury claims between 1865 and 1886, Florida was clearly on the path to a modern conceptualization of accident law. Following a national trend, the supreme court tried to enshrine negligence as the doctrine that would determine liability when there was no prior relationship between the injured and injurer, most notably in the livestock and pedestrian cases. The court relied heavily on the decisions of other states and on legal writers, freely importing doctrine in concluding that negligence was the best way to address the problems created by economic development. Further, it was no accident that almost all of the

63. *Louisville & Nashville R.R. Co. v. Yneistra*, 21 Fla. at 730, 737-38.
64. An indication that injuries happened, however, is *Peninsula Railroad v. Gary*, 22 Fla. 356 (1886), in which the court discussed the ability of railroad company employees to bind the railroad to agreements entered into with physicians for medical services to railroad workers.
65. *Jacksonville v. Lawson*, 16 Fla. 321 (1878).

court's personal or property damage cases involved some modern device such as a railroad or telegraph, or took place in one of Florida's few urban settings. The legislature was also an important factor in shaping accident law. It realized that a technological watershed had been reached by the mid-1880s, yet it was much less willing than the supreme court to view negligence as the proper means of assessing responsibility for personal and property injuries, particularly in the absence of a contract or some public duty. It adopted a spate of laws that touched on liability issues, especially for railroads. Many of these statutes specifically rejected the law as developed by the supreme court and gave greater protection to the injured. In 1887, the legislature overruled the contributory negligence doctrine of *Yniestra* and adopted the apportionment approach of comparative negligence. It criminalized drunkenness, failure to deliver goods, and gross negligence by railroad employees. It abolished the fellow servant rule. It permitted actions by the victims of persons killed by the negligence of others to survive their death, effectively rejecting the *Chappell* decision. Further, in 1887 and 1889, the legislature imposed a fencing requirement on railroads and higher than ordinary negligence standards for the killing of livestock. This was a manifest rejection of the court's decision in *Geiger*. Finally, a regulatory body to oversee railroad rate and service issues, the Railroad Commission, was established in 1887.[66]

Nineteenth-century Florida's experience with accidents and their consequences is not just a subject for lawyers or legal historians. The history reveals broad and important characteristics of the state's political and economic life. From the beginning, accidents were linked to problems of technology and urbanization. From the 1850s through the 1880s, the legislature and the supreme court tried to fashion rules that would allocate risk according to the evolving values of the decision makers. Florida's experience with accident law was unique. Its slow economic development pre-

66. *Revised Statutes of the State of Florida*, ss. 2271-76, 2280-84, 2342-44, 2346, 2692-95. The 1887 legislature also passed the first Jim Crow railroad car law; ibid., s. 2268. The legislature had adopted a number of safety statutes in 1874, for example concerning crossings and prohibiting locking the doors of passenger cars; *Digest of the Laws of the State of Florida*, 286-89. A discussion of the contest over the railroad commission is found in William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge, La., 1999), 110-12.

vented the large numbers of cases that were common in other states. There were few supreme court accident decisions before the mid-1880s that were not based on a contractual relationship between the injured and injurer. And property damage cases, not personal injury cases, dominated litigation into the mid-1880s. Also important is that the legislature preferred strict liability in some factual contexts and specific liability standards in others that tended to increase burdens on injurers, especially railroads. It modified or rejected key supreme court rulings in order to protect persons and property other than railroads. In contrast, the supreme court embraced the negligence standard, with its requirement of fault. When given the opportunity, the court imposed a full spectrum of negligence rules and defenses from other states, even giving those rules a level of constitutional significance in *Geiger*. By the late 1880s, Florida possessed a robust body of statutory and court-created rules for accidental property and personal injury. Above all, the rules showed that industrial progress had real costs and that Florida's lawmakers sometimes disagreed about who should bear those costs. In fact, the question of an appropriate allocation of burdens for accidental injury has proved to be so intractable—and inherently political—that it continued to generate disagreement into the twentieth century and beyond.