THE REMARRIED WIDOW'S POWER OF ALIENATION UNDER THE PROBATE CODE

Indiana's so-called Widow Remarrying Statute has, after 102 troubled years, been laid to rest by the new Probate Code,[1] but the situation which it regulated holds out a promise, nevertheless, that its troublesome spirit yet persists. Briefly, that situation arose when a widow with children who had received property by virtue of her first marriage chose to marry again.[2] The regulation exerted by the Statute on such property was twofold: (1) she was prohibited from alienating the property during such subsequent marriage, and (2), if she should die during the subsequent marriage, it was provided that the property should descend to her children of the first marriage.[3] In 1879 the Statute was changed to permit alienation of such land if the children were over 21 years of age and joined in the conveyance or if there were no children by the first marriage.[4]

The problem left by repeal of the Statute will be encountered when a widow, who remarried before the Code went into effect, tries now to alienate or devise property received from her first marriage. Did the old Act give the children an interest which, once created, could not be destroyed by repeal of the Statute? The extent of the children's interest is not readily apparent,[5] but since any interest they have must be in diminu-

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1. IND. ANN. STAT., §6-2318 (Burns 1933). "Burns, Sec. 6-2318 is abrogated." IND. ANN. STAT., §6201 Commission Comment (Burns Repl. 1953).

2. *I.e.*, property received by descent. "The restriction upon the power of a widow to alienate real estate held in virtue of a previous marriage, when there is a child or children or their descendants alive by such marriage, is contained in the statute of descents, and does not in our opinion, apply to real estate taken by her under the sections of the act regulating the settlement of decedents' estates. . . ." Odell v. Reynolds, 156 Ind. 253, 254, 59 N.E. 846, 847 (1900).

"It is contended on behalf of appellants that, the land being devised to the widow, in lieu of her interest in her husband's estate, she took the one-half of the land so devised to her by virtue of her previous marriage with Allen. . . . We cannot concur with this theory. The widow holds, by virtue of a marriage, the title to such land as descends to, and is vested in, her by operation of law." Allen v. Bland, 134 Ind. 78, 79, 33 N.E. 774, 774 (1892).

3. IND. ANN. STAT., §6-2318 (Burns 1933).

4. Ind. Acts 1879 (Spec. Sess.), c. 44. The General Assembly undertook to amend the Statute one year after its passage, Ind. Acts 1853, c. 38, but evidently the efficacy of the amended Act, if any, was limited. Teeter v. Clayton, 71 Ind. 237 (1871).

"The counsel for appellee argue that section 18 was amended by the Act of March 4th, 1853. Acts 1853, p. 55. This is one of the amendments that were held to be void until the decision of this court in the case of *The Greencastle Southern Turnpike Co.* v. *The State*, 28 Ind. 382 [1867], and was repealed by the Act of March 9th, 1867, Acts 1867, p. 204." *Id.* at 239.

5. On various occasions Indiana courts have described the interest of the children of the former marriage as ". . . their interest in expectancy . . ." Maynard v. Waidlich, 156 Ind. 562, 567, 60 N.E. 348, 350 (1900), or it has been said that ". . . the children had no existing interest . . ." Pence v. Long, 38 Ind. App. 63, 76, 77 N.E. 961, 965 (1905), on the one hand and that they were ". . . the owners of the fee . . ." on the other, Fugate v. Payne, 130 Ind. 281, 282, 29 N.E. 922, 923 (1891).

tion of the mother's estate, a definition of it should help describe that of the children.

It is clear that the widow is at least initially invested with a fee since the statute creates no interest in the children until after she remarries. Once remarried, however, she could not alien in any way: by warranty deed, mortgage, or will.[6] Courts, on occasion, were severe in effecting the restraint even to the extent of defeating its purpose.[7]

Indeed, a random sampling of the cases might give the impression that this restraint reduced the widow's interest to a mere life estate. For example, the Indiana Supreme Court has referred to a remarried widow's interest in such property as "her life estate therein,"[8] has permitted her to lease the property for her life,[9] and has alluded to the Statute of Gloucester of 1278 which regulated a widow's dower.[10] Closer analysis, however, dispels the initial impression left by this sampling, for in the first case, although the court denied the alienability of "her life estate therein," it did not limit her interest to such, while in the second, alienability of a life estate was predicated upon the fact that she had more

6. A widow's warranty deed issued during her second coverture was void, Kemery v. Zeigler, 176 Ind. 660, 96 N.E. 950 (1911), while her quit claim deed (which, though the jury found no fraud, was attended by suspicious circumstances) issued after her divorce was good, Kemery v. Zeigler, 184 Ind. 144, 109 N.E. 774 (1915).

The court, moreover, has treated a remarried widow's attempts to mortgage as a circumvention and void. Aetna Life Insurance Co. v. Buck, 108 Ind. 174, 9 N.E. 153 (1886); Vinnedge v. Shaffer, 35 Ind. 341 (1871); Polley v. Pogue, 38 Ind. App. 678, 78 N.E. 1051 (1906). And the proposition that the mortgagee of the fee might, upon foreclosure, take an estate for the widow's life has similarly been denied. Bowers v. Van Winkle, 41 Ind. 432 (1872). However, foreclosure proceedings might cut off all the persons properly made parties thereto, even though the mortgage was void. Maynard v. Waidlich, 156 Ind. 562, 60 N.E. 348 (1900), *overruling* McCullough v. Davis, 108 Ind. 299, 9 N.E. 276 (1886). See note 23 *infra* and accompanying text.

Similarly, a remarried widow has not been allowed to alien by will. Davis v. Thompson, 179 Ind. 539, 101 N.E. 1012 (1911). "It has been well settled in this State that such widow cannot so alienate such land; and it makes no difference whether she undertook to do so by deed, mortgage, or will." *Id.* at 541, 101 N.E. at 1013.

7. In one case the remarried widow's conveyance was held to be void even though the entire consideration was appropriated to the benefit of the only child of the first marriage. The court said, "[t]his section of the law of descents has often been the subject of consideration by this court, and it has been uniformly held, so far as we are advised, that any deed, or mortgage executed in contravention of the provisions of said section was absolutely null and void, and conveyed no title, interest or estate, in or to the real estate held 'in virtue of any previous marriage,' to the grantee or mortgagee." Connecticut Mutual Life Insurance Co. v. Athon, 78 Ind. 10, 16 (1881).

8. Vinnedge v. Shaffer, 35 Ind. 341, 343 (1871).

9. Forgy v. Davenport, 146 Ind. 399, 45 N.E. 592 (1896).

10. Blackleach v. Harvey, 14 Ind. 564 (1860). "The Statute of Gloucester prohibited the alienation, by the widow, of the estate assigned to her as dower; but it was held that an alienation for life simply, being no more than her interest, as it worked no wrong to her heirs, was not within the statute. See Book 2, Blacks. Comm., Shars. Ed., p. 137, and note 26." *Id.* at 566.

than a life estate.[11] A statute relating to the dower interest is obviously appropriate only in a genealogical sense.

An early opinion stated that the Act merely directed the descent of the land and did not limit the widow's estate;[12] this position was subsequently supported by the idea that a son on coming of age could not ratify a sale attempted by his mother before his majority because he had no interest during her life but only by descent at her death.[13] Feeling that the children had no interest during their mother's life, this court must have thought that she had a fee. That this was true is further indicated by the fact that should she outlive her second husband property from her first marriage would descend to all her heirs generally.[14] Furthermore, the statute which gives a widow one third of her husband's property provides that she shall take it in fee simple.[15] The court has said that the Widow Remarrying Statute does not reduce this interest.[16]

If she has a fee, it must be admitted that the statutory restraint does restrict it somewhat, but as to creditors the courts have confined this limitation to the narrowest possible grounds. It was held that execution on a remarried widow's land was prohibited only when both the indebtedness was incurred and the judgment on it obtained during the second marriage.[17] When these conditions were not met, property from the

11. In Vinnedge v. Shaffer, 35 Ind. 341 (1871), where a mortgage of the fee had been attempted the court held that ". . . any alienation of the property, whether for life or in fee, absolutely or contingently . . ." was prohibited. *Id.* at 343. But in 1896 the court was presented with a case that actually involved an alienation of an estate for the widow's life, and they said (see note 9 *supra*) that, "[t]he single object of the section, as above indicated, can be fully accomplished by restraining or suspending the power of alienation *of the fee* during the second or subsequent marriage. To accomplish that object it is wholly unnecessary to interfere with the power to lease for a term of years or for the life of the owner." Forgy v. Davenport, 146 Ind. 399, 407, 45 N.E. 592, 594 (1896) (emphasis added).

12. Jackson v. Finch, 27 Ind. 316 (1866). "Section 18 . . . is a rule of descent and not a limitation of the estate of the widow in the lands of her deceased husband." *Id.* at 320.

13. Horlacher v. Brafford, 141 Ind. 528, 40 N.E. 1078 (1895). "Appellee had no ownership or interest whatever in the land attempted to be sold by his mother, at the time she sold it. There was, therefore, no sale of his property which he could ratify on becoming of age. He afterwards did become the owner of the land on the death of his mother and by descent from her." *Id.* at 531, 40 N.E. at 1079. This determination controlled in Pond v. Wood, 32 Ind. App. 28, 32-33, 69 N.E. 172, 174 (1903).

14. *See* Teeter v. Clayton, 71 Ind. 237, 238 (1880).

15. IND. ANN. STAT., §6-2313 (Burns 1933).

16. In one case, Forgy v. Davenport, 146 Ind. 399, 45 N.E. 592 (1896), it was held that because she took a fee simple a widow might alien an estate for her life, as the statute restrained only alienation of "such real estate" as she held by virtue of her former marriage. It seems apparent that the court premised that the widow still held the fee simple even though remarried.

17. Although a debt would ordinarily not become a lien on land until reduced to judgment, where the indebtedness was incurred before the widow's remarriage and even though judgment was not obtained until after she remarried, execution was permitted on

widow's first marriage was actually levied upon, and the taking was justified only by the fact that the debt for which it was seized was incurred before the restraint took effect.[18] Though limited, the fee is in the widow; admitting this is to admit that the children, whatever interest they might have, do not have a remainder.

Nevertheless the cases strictly enforcing the restraint on their mother's power to alienate do suggest some interest in the children.[19] After the 1879 Amendment, permitting the widow to convey if joined by the children of her first marriage,[20] the court, although it spoke of the children owning the fee, treated the children's conveyance as mere acquiescence in their mother's alienation of the property.[21] Later, however, the court came to look upon that conveyance as an "executory contract for the transfer of future interests. . . ."[22] Although they have less than a remainder, the fact that their interest is alienable indicates that it is more than a bare expectancy.

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her land. Herring v. Keniepp, 183 Ind. 91, 107 N.E. 76 (1914); the decision to the contrary in Smith v. Beard, 73 Ind. 159 (1880) was called "erroneous." Herring v. Keniepp, *supra* at 97, 107 N.E. at 78.

For debts incurred during the second marriage, though, judgment could not be obtained during the second marriage, Haskett v. Hazel, 83 Ind. 534 (1882); Schlemmer v. Rossler, 59 Ind. 327 (1877); this was so even if the widow had died during the second marriage. Davis v. Kelly, 132 Ind. 309, 31 N.E. 942 (1892). *But cf.* Wright v. Wright, 97 Ind. 444 (1884), where the statute of limitations had run on the widow's right to recover her property sold on execution.

Moreover, for a judgment obtained in a suit against the children after the widow's death during her second marriage levy was permitted on the land because it had "descended to her heirs and is liable to be sold for her debts." Philpot v. Webb, 20 Ind. 509, 510 (1865).

18. Herring v. Keniepp, 183 Ind. 91, 107 N.E. 76 (1914), and see note 17 *supra*.

19. See note 6 *supra*.

20. See p. 615 *supra*.

21. Fugate v. Payne, 130 Ind. 281, 29 N.E. 922 (1891). During her second marriage the mother was joined by her second husband and one child of her former marriage in conveyance to the other child, who subsequently sold the property. The court said at 282, 29 N.E. at 923, "[h]er children, the owners of the fee, fully acquiesced in the conveyance, and it would be unjust to permit her to deprive her grantee of the property she sold him, and for which she received full payment."

22. McAdams v. Bailey, 169 Ind. 518, 527, 82 N.E. 1057, 1061 (1907).

But cf. Avery v. Atkins, 74 Ind. 283 (1881), which, though it was tried after the 1879 Amendment, involved transactions taking place in 1864. In that year the remarried widow undertook to sell her share of her former husband's land by warranty deed for $4,000; her only child by the former marriage later in the same year came of age and executed a quitclaim deed for five dollars. The court affirmed a decision for the daughter in a suit to recover possession. See note 32 *infra*.

Though the case of Avery v. Atkins, *supra*, was not noted in the decision in McAdams v. Bailey, 169 Ind. 518, 82 N.E. 1057 (1907), it seems distinguishable. While the *McAdams* holding denied that consideration less than full value would raise a presumption of fraud in a conveyance of a contingent interest, as opposed to an attempted conveyance of an expectant interest, *id.* at 529-533, 82 N.E. at 1061-1064, it did not attach special significance to the form of the deed. In the *McAdams* case the warranty deed by the adult child of the former marriage read, " 'the interest hereby conveyed by said Zachariah T. Lincoln is the equal, undivided one-third part of two-thirds of the same, and any other interest

The cases holding that the children are not cut off by mortgage foreclosure proceedings unless they are made parties further indicate that they have some interest separate from their mother's.[23] A bare expectancy would be automatically cut off when the mother's interest was terminated. The same general result is found in a quiet title action by the mother's grantee. In such an action the court, while admitting that rights not currently in existence might not be concluded, held that the children were cut off by failure to attack their mother's deed.[24]

Though the children's interest seems more than a bare expectancy, it will be recalled that it must still be less than a remainder because of the fee in the mother. Such an elimination seems to bracket it in the area which one decision describes as a possibility coupled with an interest, that is, an executory interest.[25] It vests in possession only upon the

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which might accrue to said Zachariah T. Lincoln, after the death of said Elizabeth, his mother, in consequence of her second marriage with said Weidenhammer. . . .'" *Id.* at 520, 82 N.E. at 1058. In regard to this the court said, "[a]s the fee was in Elizabeth to the one-third of the real estate which she inherited from her first husband, it does not admit of question that a mere quit claim deed by her son, not purporting to convey any particular interest, would have been ineffectual to convey his possible future interest therein. A deed of such an interest to a stranger would have been invalid at common law, as calculated to provoke maintenance and other contentions." *Id.* at 521, 82 N.E. at 1059.

23. Maynard v. Waidlich, 156 Ind. 562, 60 N.E. 348 (1900). "The general rule," the court here said, "is that a judgment is conclusive against the parties to the same, and those claiming under them, as to all matters that were or might have been litigated in the action under the issues." *Id.* at 570, 60 N.E. at 351.

It was necessary, of course, that the children be properly made parties to the suit. But they might be cut off by a default judgment or, in the case of a minor, by a judgment against his guardian *ad litem.* Craighead v. Dalton, 105 Ind. 72, 4 N.E. 425 (1885). "The rule is a salutary one; it tends to repress litigation, gives confidence in public records, secures respect for judgments and decrees, and invests sheriff's sales with strength and certainty that do much to promote the interests of the debtor and the creditor." *Id.* at 73, 4 N.E. at 426.

24. Hawkins v. Taylor, 128 Ind. 431, 27 N.E. 1117 (1891). *But cf.* Irey v. Mater, 134 Ind. 238, 33 N.E. 1018 (1892). The persons and property involved in this action were before the Indiana Supreme Court on three separate occasions. In the first instance the court held that while the remarried widow's deed was void it gave color of title and made it possible for her to be barred by the statute of limitations. Irey v. Markey, 132 Ind. 546, 32 N.E. 309 (1892). Next it was said, however, that the statute did not run against the children because they acquired no cause of action until their mother's death. It should be noted that there were no mortgage foreclosure proceedings as in the principal case. Irey v. Mater, 134 Ind. 238, 33 N.E. 1018 (1892). Finally, though, by the time the mother died she was once more a widow so that the children had nothing to receive by descent from her. Simon v. Rathfen, 184 Ind. 94, 110 N.E. 679 (1915).

But cf. Pence v. Long, 38 Ind. App. 63, 77 N.E. 961 (1905), where, in contrast to the proposition that all matters which might have been litigated were concluded, see note 23 *supra,* the court said that only issuable facts pleaded were res judicata. In this case, however, the quiet title action was an incident of the mother's suit to partition against her children who were made defendants only as owners of the balance of the tract to be divided and not because of any claim to their mother's share. The mother averred no adverse claim and won her decree by default so that, as the court ruled, the title was never put in issue.

25. McAdams v. Bailey, 169 Ind. 518, 528-529, 82 N.E. 1057, 1061 (1907).

condition that the mother dies during her second or subsequent marriage. Such an interest is not only consistent with a fee simple estate held by another but is frequently found thus.[26] An executory interest, moreover, like all future interests, is fully alienable. And, finally, the decisions affirming the children's right to attack their mother's deed in order to protect their own interest during her life tend to support an existing interest in the children.[27]

It yet remains to be determined whether or not the children's interest, thus described, was or could have been destroyed by the Probate Code. It will be recalled that the Widow Remarrying Statute had two distinct functions: restraining alienation and directing descent of the property if the remarried widow died during her subsequent marriage.[28] The children's executory interest was created solely by the second portion of the Act which directs the descent of the land by describing the contingency upon which the right to possession will vest, that is, their mother's death during a second marriage. The restraint merely strengthens the possibility of the contingency becoming a reality controlling only the widow's actions during subsequent marriages and actually giving no property interest to the children. Its destruction, therefore, takes no property interest from them.

This restraint is actuated by the mother's voluntary act, and there is no pretense or suggestion of permanence, for its strictures may be avoided when she survives or divorces her new spouse. Besides the ancient refrain that restraints are not to be favored, social policy and good sense fairly clamor not only for the end of this antiquated limitation, for that has been accomplished by the new Probate Code, but for no further effectuation of its function by an unfeeling construction. A sham conveyance in contemplation of a second marriage[29] and a collusive divorce, which was quickly followed by conveyance to a dummy and remariage, have been thrust upon the State Supreme Court and approved by it because of this restraint.[30] If such fruits of chicane and duplicity were forceful arguments for the drafters of the new Code,[31] they should be equally

26. TIFFANY, LAW OF REAL PROPERTY, §365 (3d ed. 1939).

27. See note 24 *supra* and accompanying text.

28. See p. 615 *supra*.

29. Nesbitt v. Trindle, 64 Ind. 183 (1878). "Restrictions upon the right of the owner to alienate his land are not," the court observed, "to be favored." *Id.* at 188.

30. Cook v. Claybaugh, 130 Ind. 133, 29 N.E. 483 (1891).

31. The Probate Code Study Commission has said in regard to the abrogation of the Widow Remarrying Statute:

> Another objection to this statute is that it is wholly ineffective and can be easily nullified by resort to legal trickery. A widow may in contemplation of marriage, deed the property to a dummy without consideration and immediately after the remarriage have it reconveyed to her and then hold the same free

persuasive in insisting that this restriction be dissolved. To this disrespectful circumvention of the law must be added the alternative which is the considerable hardship produced when innocent grantees are forced to return the land for which they have paid good consideration.[32]

Finally, a thought on the purpose of the Statute might be persuasive. If the intent of the drafters of the original Act was ever to protect widows as well as the children,[33] it was certainly changed by the 1879 Amendment, which restricted the operation of the restraint to situations where there were children by the first marriage and even relaxed that upon the consent of the children if they had come of age.[34] It seems clear that since

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from any restriction against alienation thereof. (Nesbitt v. Trindle, 64 Ind. 183). See the case of Cook v. Claybaugh (1891) 130 Ind. 133, 29 N.E. 483, for an obvious circumvention. [See note 10 *supra* and accompanying text.]

The Commission feels that this statute is wholly ineffective, encourages trickery and fraud and should have no place in our Probate Code. Any husband desiring to protect his wife and children can now do so by will and other effective means within the code. We are unable to find a similar statute in any other state at the present time and believe that most of such statutes have long since been abolished. IND. ANN. STAT., §6201 Commission Comment (Burns Repl. 1953).

32. *E.g.*, see Connecticut Mutual Life Insurance Co. v. Athon, 78 Ind. 10 (1881). The remarried widow had sold her share of her former husband's property during a subsequent marriage and had appropriated the proceeds to the benefit of the only child of the former marriage. When she was made a party defendant to a subsequent proceeding in foreclosure of a mortgage, she asked that her title to the one third be quieted and that she receive rents. The Indiana Supreme Court affirmed a holding for her and remarked, "[t]he ethics of the parties to this case are not properly before us; but the law of the case, as it seems to us, is with the appellee." *Id.* at 18.

See also Avery v. Atkins, 74 Ind. 283 (1881), where the remarried widow sold property received in virtue of her first marriage for $4000, and her daughter, the plaintiff, in the same year and on coming of age executed a quitclaim deed of her interest for five dollars. Though the case was tried after the 1879 Amendment, it should be noted that the transactions occurred in 1864. Upon her mother's death during her second marriage, the plaintiff received $1300, the unexpended portion of the purchase money; the court affirmed a decision for plaintiff in a suit to recover possession.

See also Pond v. Wood, 32 Ind. App. 28, 69 N.E. 172 (1903), where a remarried widow exchanged her property received by virtue of a former marriage for property of her second husband; this was accomplished by a conveyance to a third person and receipt of the other's property in exchange. Upon the death of the remarried widow, her children by the former marriage took the property she had received from her second husband, and the court affirmed a decision quieting the children's title to the property which their mother had given to her second husband. The court said, "[t]he facts, which are not disputed, make a case of peculiar hardship upon appellant, but we do not see how any relief can be given him in this action." *Id.* at 32, 69 N.E. at 174. Again they said, "[t]he case may seem one of peculiar hardship, but the law itself is just and equitable." *Id.* at 33, 69 N.E. at 174.

33. In Vinnedge v. Shaffer, 35 Ind. 341 (1871), the court observed, "[t]he object of the statute seems to be two fold, first, to protect a woman who has thus received real estate by virtue of a former marriage from improvident and injudicious alienations thereof during a second or subsequent marriage, and second, to preserve the property for the children of the marriage in virtue of which she received it, where there are such children in case of her death during such second or subsequent marriage." *Id.* at 342-343.

34. See note 4 *supra* and accompanying text.

its amendment the only aim of the Widow Remarrying Statute has been to protect the children of the former marriage, and its effectiveness in this capacity can be seriously questioned. The Act seems to overlook altogether the possibility—and a fairly strong one if the cases are a criterion—that a widow might ally herself with an improvident spouse. And, if her children are minors, she has no recourse to the property from her first marriage, a potentially valuable asset, to make provision for them. Added to this is the prospect that in such an eventuality either she or the guardian might be compelled to dispose of the children's two thirds share of their father's property for their provision simply to preserve for them the uncertain right of descent in their mother's one third.

To argue that the children should not be afforded further benefit from the restraint provision is not necessarily to propose that their right of descent under the old statute is, or ought to be, similarly ended. It will be seen, however, that what is left is insubstantial at best and susceptible of being handily defeated by any inter vivos conveyance.

THE EFFECT OF THE PALSGRAF DOCTRINE IN INDIANA

The development of negligence as a basis for tort liability epitomizes the growth of socio-economic policies. Originally, the common law action of trespass to the person imposed absolute liability for all damage directly caused by a defendant's behavior.[1] Everyone owed an absolute duty not to harm the person or property of another. If an injury occurred, there was a breach of duty, and liability was imposed. However, judges realized that to promote private enterprise liability then imposed for pure accident would have to be tempered.[2] Accordingly, courts began to require some fault on a defendant's part before holding him liable for a plaintiff's

1. ". . . [I]t should be noted that this ancient concept of trespass had reference to any contact achieved as the consequence of one's conduct against the interest of another, no matter under what circumstances it occurred, as long as the defendant's causative conduct was his voluntary act." Gregory, *Trespass To Negligence To Absolute Liability*, 37 VA. L. REV. 359, 362 (1951). Professor Gregory indicates that there was no right of action for nontrespassory acts; *e.g.*, when one left a timber on the highway which caused a traveler to trip and be injured, no cause of action accrued. Then, trespass on the case was developed to provide a remedy for such injuries. Although this gave a remedy where there previously was none, plaintiffs had to show some fault on the defendant's part to recover; they had merely to show injury to prevail in a trespass action.

2. ". . . [M]any of our judges believed that the development of this young country under a system of private enterprise would be hindered and delayed as long as the element of chance exposed enterprisers to liability for the consequences of pure accident, without fault of some sort. And this point of view became manifest in several state court decisions a little more than a century ago." *Id.* at 365.