repealed a statute vesting certain power in counties? Would the county be required to forego the exercise of this power even after its inclusion in the charter?

The difficulty seems to be that the Constitutional Amendment did not express clearly the intention and purposes of the framers. The requirement as to special majorities was not included merely to make the adoption of a charter more difficult. It was meant to protect the municipalities from an invasion of their home rule powers. The amendment would have expressed this purpose more clearly if, instead of requiring the special majorities on the vesting of any municipal power in the county, it had required them only if the municipalities were divested of any municipal *authority*. A court favorable to the county charter plan could have read the Amendment in the light of its evident purpose. The wording of it was such that another interpretation was possible.

D. M. POSTLEWAITE.

NEGLIGENCE

INTOXICATION — NEGLIGENCE PER SE OR EVIDENCE FOR JURY?

The plaintiff recovered a judgment for $3500 for injuries which he sustained while riding in Pyler's car, which the latter was driving. The defendant's bus collided with the car. It was found that the bus driver was negligent and that his negligence was a proximate cause of the collision, also that no joint enterprise existed between the plaintiff and Pyler. The court charged that Pyler's violation of the ordinance prohibiting driving while intoxicated would not make him negligent unless it was proved that he was so befuddled by reason of the liquor that the accident occurred as a proximate result of that intoxication.

The Appellate Court, in upholding this decision, agreed that no joint enterprise existed and therefore, as the negligence of defendant's servant was a proximate cause of the collision, the negligence of Pyler was immaterial. The court went on to say that if Pyler's negligence had been a point in issue, the fact that he was intoxicated prior to and at the time of the collision would be merely evidence of the probability that he was not using due care, and would not constitute negligence per se to which legal liability would attach in a damage suit. *Cleveland Ry. Co.* v. *Owens*, 51 Ohio App. 53 (Jan. 20, 1936).

The dictum of the Ohio Court in the principal case follows the almost unanimous opinion of the courts of this country in holding that

intoxication does not make a prima facie case of negligence. *Wise* v. *Schneider*, 88 So. 662, 205 Ala. 537 (1921); *Guhl* v. *Warroad Stock, Grain & Produce Co.*, 179 N.W. 564, 147 Minn. 44 (1920). Evidence of intoxication is admissible in proving that the defendant was negligent; *Lincoln Taxicab Co.* v. *Smith*, 150 N.Y.S. 86; 88 Misc. 9 (1914); *The Cleveland Ry. Co.* v. *Nicholson*, 11 Ohio App. 424 (1919); and it is a question for the jury to decide whether, under the circumstances, the party exercised, or was capable of exercising, ordinary care. *The Cleveland Ry. Co.* v. *Nicholson, supra; Jewel* v. *Rogers T. P.*, 175 N.W. 151, 208 Mich. 318 (1919); *Powell* v. *Berry*, 89 S.E. 753, 145 Ga. 696, L.R.A. 1917A, 306 (1916).

Professor Edgerton, in 39 Harvard L. Rev. 849 (1926), advocates an objective test for negligence rather than a subjective test. Negligence should be dependent on outward conduct rather than the presence or absence of certain mental phenomena which make up the state of mind. *The Germanic*, 196 U.S. 589, 49 L. Ed. 610, 25 Sup. Ct. 317 (1905); *Labreque* v. *Donham*, 127 N.E. 537, 236 Mass. 10 (1920). These authorities indicate that there is an objective standard, or conduct test for negligence, which seems to be used almost entirely by courts in determining whether intoxication indicates that a man is negligent or not. They are not concerned with his state of mind but with his outward acts and dangerous conduct.

On the other hand Professor Seavey, 41 Harvard L. Rev. 1 (1927), suggests the principle that "it is negligent for one to enter into a course of conduct when he knows or should know that because of his individual qualities he either should not enter upon the undertaking at all or should do so only by making special provision to guard against results expectable from its defects." And in *Wood* v. *Board of County Commissioners*, 128 Ind. 289, 27 N.E. 611 (1890), it was said that voluntary intoxication is in itself negligence. Obviously, the courts must apply the subjective test in some cases. The most prominent exceptions are that children are not required to come up to the standard of conduct of adults to be free of contributory negligence. *Quinn* v. *Ross Motor Car Co.*, 157 Wis. 543, 747 N.W. 1000 (1914); nor is a person who is mentally deficient, *Worthington* v. *Mercer*, 96 Ala. 310, 11 So. 72, 17 L.R.A. 407 (1891). Deaf and blind persons may not be required to conform entirely to the standard of conduct of the normal man but they are required to employ the use of their other senses more extensively to attempt to meet that standard. 1 Thompson on Negligence, 430; *Ill. Central R.R. Co.* v. *Buckner*, 28 Ill. 299 (1862); *Clev., Columbus, & Cincinnati R.R. Co.* v. *Terry*, 8 Ohio St. 585 (1858).

However, there is a distinct difference between physical deficiencies and intoxication. Poor eyesight and hearing cannot always be remedied but intoxication is usually a voluntary condition wherein the person intoxicated risks losing the full use of his senses. So there is not as much reason why the courts should include intoxication in the exceptions to the objective standard test. But if the intoxicated man does meet the requirements of this test and his conduct or acts are equal to what the reasonably prudent sober man would do in the circumstances, that is all that is required. WILLIAM M. DRENNEN.

WANTON MISCONDUCT DISTINGUISHED FROM NEGLIGENCE

Plaintiff collided with the rear of a truck owned by defendant. The evidence showed that the truck was parked a few feet from the side of the road and that the night was misty and rainy. Whether or not the tail light of the truck was burning was a disputed fact, but the accident occurred near a street light. It was admitted by the plaintiff that he was driving at a speed such that he could not bring his car to a stop within the assured clear distance ahead. In his amended petition plaintiff characterized the act of the defendant as "wanton, wilful, gross negligence and misconduct." The trial judge charged the jury on the issue of wanton negligence stating that if such be found defendant could not avail himself of his plea of contributory negligence.

Held: Facts must be pleaded which reveal on their face the element of wantonness and it was an error on the part of the trial judge to instruct the jury on the question of wantonness in this case. *Universal Concrete Pipe Co.* v. *Bassett*, 130 Ohio St. 567, 20 Abs. No. 18, vii, 5 Ohio Op. 214 (1936).

The distinction between a wilful act and a negligent act is rather well defined. A wilful act is one in which the party acting intends to bring about a certain result. A negligent act is one in which the party acting fails to come up to a required standard of care. *Payne* v. *Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921); *Stauffer* v. *Schlegel*, 74 Ind. App. 431, 129 N.E. 44 (1930).

The law often treats a wilful act more severely than a negligent one. Contributory negligence is no defense when the defendant has been guilty of a wilful act. *Payne* v. *Vance, supra.* Punitive damages may be secured against a wilful tortfeasor but not against a negligent one. *Simpson et al.* v. *McCaffrey*, 13 Ohio 509 (1844); in Ohio a driver of a car is liable to a gratuitous guest for a wilful injurious act but not for his negligence. Ohio G.C. Sec. 6308-6.