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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

INDIVIDUAL CONTRACTS AND COLLECTIVE BARGAINING AGREEMENTS

Collective bargaining has developed greatly in the last few years under the impetus of such statutes as the National Labor Relations Act (N. L. R. A.).¹ The increase in the number of collective agreements has brought to the fore the problem of the effect of individual contracts on them. This problem has been before the courts fairly often in recent years. In 1937 the Supreme Court decided the *Jones & Laughlin Co.* case² and by way of dicta dealt with this problem.

1. 49 STAT. 449 (1935), 29 U. S. C. §§ 151-166 (1940).

2. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615 (1937).

"The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on what ever terms' the employer 'may by unilateral action determine.'"³

From a review of the cases, it seems that many an employer read the opinion in the *Jones & Laughlin Co.* case and thought that the Supreme Court had affirmed the constitutionality of the N. L. R. A. in one breath and in the next pronounced its death knell by providing a simple method of circumventing the provisions of the act. The dicta of that case led to the development of such plans as the Balleisen formula and the contracts devised under it⁴ which were involved in the *National Licorice Co.* case and others⁵. Only now has the rosy haze of the dicta of that case finally been completely cleared away by the same court in the *J. I. Case Co.* case⁶ to expose the employer once again to the harsh light of reality—that he is going to have to bargain collectively with his employees provided enough of them desire so to bargain.

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the N. L. R. A. looking to collective bargaining, nor to exclude the contracting employees from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement."⁷

The term "individual contract" used here is to be distinguished from the "contract of hiring" and is used in antithesis to "collective bargaining agreement."⁸ A

3. Note 2 *supra*, at 45, 57 Sup. Ct. at 628 (1937).

4. L. L. Balleisen was Industrial Secretary of the Brooklyn Chamber of Commerce and worked out a contract which was to be executed between the employer and the employee individually. Signers of these contracts "relinquished the right to strike, the right to demand a closed shop or signed agreement with any union. The contracts also contained provisions for arbitration as to rate of wages and the number of regular hours of employment per week by an arbitrator designated by and mutually acceptable to petitioner (employer) and the committee (composed of employees chosen by the employer), but provided that 'the question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation.'" *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 355, 60 Sup. Ct. 569, 573 (1940).

5. *N. L. R. B. v. American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2d, 1939); *N. L. R. B. v. Hopwood Retinning Co.*, 98 F. (2d) 197 (C. C. A. 2d, 1938); *Matter of Atlas & Burlop Co.*, 1 N. L. R. B. 292; *Matter of Louis F. Cassoff*, 43 N. L. R. B. 1193; *Matter of David E. Kennedy, Inc.*, 6 N. L. R. B. 699; *Matter of Eastern Footwear Corp.*, 8 N. L. R. B. 1245; *Matter of Centre Brass Works, Inc.*, 10 N. L. R. B. 1060; *Matter of National Meter Co.*, 11 N. L. R. B. 320.

6. *J. I. Case Co. v. N. L. R. B.*, 64 Sup. Ct. 576 (U. S. 1944). (There were individual contracts in force and the company attempted to use them first to prevent a union election and then, when the union was chosen in an N. L. R. B. election, refused to bargain about any subject covered by those contracts until they expired.)

7. *Id.* at 580 (1944).

8. COMMONS AND ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* (4th ed. 1936)

collective bargaining agreement or an individual contract sets out the terms of employment, wages, hours, conditions of work, *etc.* A contract of hiring merely determines who is to work under those terms and is necessary to establish finally the relationship of employee and employer under either collective or individual contracts.

The individual contract has had a long and often inglorious history in the field of labor relations. The older version of the yellow-dog contract is only too well known. But we need concern ourselves only with the type of individual contracts which have appeared since April 12, 1937, the date of the decision in the *Jones & Laughlin Co.* case. It is to be noted that the contracts in the *J. I. Case Co.* case were first used in 1937 and it is to be presumed after the *Jones & Laughlin Co.* decision.

Two major types of individual contracts have been made.⁹ First, those which on their faces are contrary to the policy of the N. L. R. A., as the Balleisen contracts declared unfair labor relations in *National Licorice Co.* case, which take from the employee all the rights which the act tries to preserve to him—the right to bargain collectively and secure conditions of employment through joint action.¹⁰ Second, those lawful on their faces, as in the *J. I. Case Co.* case, which do not take from the worker any of the rights of union membership or collective bargaining.¹¹ The contracts in that case merely set out terms and conditions of employment and made no mention of unions or rights of collective bargaining.

Clearly negotiation of individual contracts of the first type is an unfair labor practice.¹² And the *J. I. Case Co.* case shows that contracts of the second type have only a limited field of existence before they, too, become the basis of a finding of unfair labor practices.

To determine whether individual contracts of the second type constitute an unfair labor practice, it is necessary to consider them (1.) as of the time of their negotiation and (2.) as of the time when a majority of the employees demand a collective agreement, individual contracts being in force at the time. Individual contracts may be negotiated and not constitute an unfair labor practice where the duty to bargain collectively has not arisen¹³ or where the duty to bargain collectively

9. In a few cases, *In Matter of A. M. Greene*, 49 N. L. R. B. 146 (1943) and *In Matter of Field Packing Co.*, 48 N. L. R. B. 850 (1943), employers have negotiated an additional type of contract which attempted to make the employee an independent contractor. But the Board has refused to recognize any such change in relationship.

10. Note 5, *supra*.

11. *N. L. R. B. v. Adel Clay Co.*, 134 F. (2d) 342 (C. C. A. 8th, 1943).

12. Ward, *The Mechanics of Collective Bargaining* (1940) 53 HARV. L. REV. 754, 787; Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 FORD. L. REV. 14, 27.

13. *Mooreville Cotton Mill*, 2 N. L. R. B. 952 (1932); *Wallace Mfg. Inc.*, 2 N. L. R. B. 1081 (1937); *Titan Metal Mfg. Co.*, 3 N. L. R. B. 577 (1938); *Republic Creosoting Co.*, 19 N. L. R. B. No. 38 (1940); *Fox-Coffy Edge Millinery Co.*, 20 N. L. R. B. No. 66 (1940); *Lauf v. Shinner & Co.*, 303 U. S. 322, 58 Sup. Ct. 578 (1938); *Fur Workers Union (C. I. O.) v. Fur Workers Union (A. F. of L.) & H. Zerklin & Sons, Inc.*, 105 F. (2d) 1 (App. D. C. 1939).

has been terminated or suspended.¹⁴ This last exception to the ban against individual contracts is one of only limited duration usually.¹⁵ Obviously, the negotiations of such contracts cannot be through an employer dominated union or committee,¹⁶ to forestall collective bargaining,¹⁷ or otherwise the result of unfair labor practices without themselves becoming unfair labor practices.

After individual contracts have been negotiated, the time may come, as in the *J. I. Case Co.* case when a majority of the employees desire to bargain collectively. Then the private interest of the employer in the contracts is in conflict with the public interest, as embodied in the N. L. R. A., in having a collective agreement negotiated. The private right must give way. Those contracts cannot be used as impediments to collective bargaining or as a limitation on the terms of the collective agreement.¹⁸ When they are so used, the unfair labor practice is not the contracts, but the manner in which they are utilized by the employer for their coercive effect over his employees.¹⁹

There are many other instances in modern law where the interests of society in a certain enterprise have become so paramount as to preclude negotiation or enforcement of private contracts contrary to public policy. Public utilities have been regulated by both state and federal governments and the courts have upheld the power of the regulatory authority to cancel private contracts contrary to public interest.²⁰ As the Supreme Court said in *Union Goods Co. v. Georgia Public Service*

14. Jeffery D. Witt Insulator Co., 1 N. L. R. B. 618 (1936); Chicago Apparatus Co., 12 N. L. R. B. 1002 (1939); Chesapeake Mfg. Co., 12 N. L. R. B. 832 (1939); N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 59 Sup. Ct. 508 (1939); N. L. R. B. v. Columbia Enameling Co., 306 U. S. 292, 59 Sup. Ct. 501 (1939).

15. Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 FORD. L. REV. 14, 22, 23.

16. National Licorice Co. v. N. L. R. B., 309 U. S. 350, 364, 60 Sup. Ct. 569, 577 (1940); In Matter of National Linen Service Corp., 48 N. L. R. B. 171 (1943).

17. In the Matter of Stolle Corp., 13 N. L. R. B. 370 (1939); N. L. R. B. v. Adel Clay Prod. Co., 134 F. (2d) 342 (C. C. A. 8th, 1943); In the Matter of Central Dispensary & Emergency Hospital, 50 N. L. R. B. 393 (1943); In the Matter of Schierbroch Motors, 15 N. L. R. B. 1109 (1939).

18. Rice, Jr., *The Legal Significance of Labor Contracts Under the National Labor Relations Act* (1939) 37 MICH. L. REV. 693, 700; *Id.* at 700, n. 32.

19. 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940).

20. *State v. Marin Municipal Water Dist.*, 111 P. (2d) 651 (Cal. 1941). (The water district was compelled to pay for relocating water mains which relocation was contrary to the provisions of its franchise); *Producers' Transp. Co. v. Railroad Comm. of Cal.*, 251 U. S. 228, 40 Sup. Ct. 131 (1920). (Contracts for shipment of oil made by pipe line before order of the regulatory commission do not prevent regulation); *American Brake Shoe & F. Co. v. Pittsburgh Ry. Co.*, 270 Fed. 812 (W. D. Pa., 1918). (There was a contract between the railway company and borough for the payment of license fees by the railway company. The court held that the Public Service Corp. had the power to declare the contracts invalid); *Miller v. Southern Bell Telephone & Telegraph Co.*, 279 Fed. 806 (C. C. A. 4th, 1922). (Increase in telephone rates not invalid as impairing the obligation of contracts between the telephone company and its customers); *Mississippi River Fuel Corp. v. Federal Power Commission*, 121 F. (2d) 159 (C. C. A. 8th, 1941). (Contracts of a corporation engaged in the transportation and sale of natural gas are subject to regulation in public interest).

Corp.:²¹

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

The police power of the states has been greatly extended in recent years to regulate in the public interest not only concerning health, morals and safety, but also economic needs.²² In such regulation private contract rights have been curtailed, but the courts have held it is not unconstitutional abridgement of contract to destroy the right to sue to recover on building and loan shares,²³ to refuse to allow stipulations in notes waiving all exemptions,²⁴ to change exemptions in bankruptcy proceedings in favor of an unemployment compensation commission,²⁵ or to refuse to allow a private employment service to deduct above a certain percentage from salaries.²⁶ Private contracts cannot contravene the provisions of the Fair Labor Standards Act²⁷ by making provisions for hourly wages or overtime less favorable to the employee than provided for by the statute.²⁸

The conclusions thus far reached are that there exists only a limited field for the lawful negotiation of individual contracts and that such contracts cannot be used to prevent or limit collective bargaining. The problem which now presents itself is the effect of such contracts on collective agreements and the rights of employees and employers under them. Up to this point individual contracts made before the collective agreement only have been considered. But it will be well now to consider incidently individual contracts, not contracts of hiring, made after the negotiation of the collective agreement. This problem is touched on by way of dicta in the *J. I. Case Co.* case. The reasons will appear later why there should be no difference in the legal effect of individual contracts whether made before or after the collective agreement.

Collective bargaining agreements have not been easily dressed in the rigid trappings of the law, though the courts have struggled hard to so attire them.²⁹ The common law concepts of contract envision an agreement made between two opposing parties. The collective bargaining agreement is actually made among three or four parties—employee, union, employer and sometimes, trade association of employers—though it is usually signed by just two parties.³⁰ An employee, though

21. *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 39 Sup. Ct. 118 (1919), 9 A. L. R. 1420, 1423 (1920).

22. *Cf. Veix v. Sixth Ward Building & Loan Ass'n of Newark, N. J.*, 310 U. S. 32, 60 Sup. Ct. 792 (1940).

23. *Ibid.*

24. *Sherwin-Williams Co. v. Morris*, 25 Tenn. App. 272, 156 S. W. (2d) 350 (1941).

25. *In re Auto Electric Repair & Parts Co.*, 41 F. Supp. 3 (W. D. Ky., 1941).

26. *Olsen v. Nebraska*, 313 U. S. 236, 61 Sup. Ct. 862 (1941).

27. 29 U. S. C. A. § 201 (1942).

28. *Overnight Motor Transp. Co. Inc. v. Missel*, 316 U. S. 572, 62 Sup. Ct. 1216 (1942).

29. (1941) 50 YALE L. J. 695.

30. Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229,

not a party to the collective agreement, has often found occasion to sue on it. Three principal theories have been developed by the courts for their modern practice of allowing an employee to sue on such an agreement:³¹ (1.) usage and custom,³² (2.) agency,³³ and (3.) third party beneficiary.³⁴ These theories have been much criticized³⁵ and under none of them would there be legal objections to the individual contract taking precedence over the terms of the collective agreement.³⁶ But if this should be allowed, the collective agreement would be doomed for it would be no stronger than the weakest members of the union, usable only in periods of prosperity.³⁷

The results of this legal formalism would be opposed to the interests of society as set down in the N. L. R. A. and other modern labor statutes.³⁸ Collective bargaining agreements reduce industrial strife, and the hatred and loss of productivity which it entails.³⁹ They bring to the individual worker higher wages, better hours and working conditions than he could have obtained for himself, so raising the standard of living of the worker and the standard of health and living of society as a whole. Collective agreements bring stability and security into employment relations because of the length of the terms for which they run. The well being of society demands the preservation and extension of collective bargaining. If this cannot be done under the old legal formulas, and there have been cases in which it has not been done,⁴⁰ then these theories must be left behind in order that the

31. *Id.* at 236.

32. *Illinois Central Ry. v. Moore*, 112 F. (2d) 959 (C. C. A. 5th, 1940).

33. *Mueller v. Chicago & Northwestern Ry.*, 194 Minn. 83, 259 N. W. 798 (1935).

34. *Yazoo & M. V. R. R. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931).

35. Witmer, *Collective Labor Agreements in the Courts* (1938) 48 YALE L. REV. 195, 227; Hamilton, *Individual Rights Arising From Collective Labor Contracts* (1938) 3 MO. L. REV. 252, 273.

36. (1942) 56 HARV. L. REV. 294, 295; Witmer, *supra* note 35 at 235.

37. TAYLOR, *LABOR PROBLEMS & LABOR LAW* (1938) 183.

38. 29 U. S. C. A. § 151 (1942); 1 N. Y. LAWS (Thompson, 1939) §§ 700-716; CAL. LABOR CODE (Deering, 1937) § 923.

39. *H. Blum & Co. v. London*, 23 Ohio App. 426, 437, 155 N. E. 154, 157 (1926).

40. *Sublett v. Henry's Turk & Taylor's Lunch*, 123 P. (2d) 844 (Cal. App. 1942) (Individual contract requiring "kick back" of part of wages due under collective agreement held valid and employee had waived collective agreement); *Huston v. Washington Wood & Coal Co.*, 4 Wash. (2d) 449, 103 P. (2d) 1095 (1940) (Collective agreement made after employee started working providing for higher wages than paid him. Employee was a union member. Cashied checks stating, "Endorsement of this check is acknowledgment of payment in full." No complaint made to union or employee, and now employee sues for the difference between amount of wages set by union agreement and the amount paid him. *Held*: Collective contract not abrogate prior individual agreement. "A member of the contracting union, or a non-member of the contracting union, could not be divested, without his consent, of the right to continue to work under a different contract with his employer."); *Langmade v. Olean Brewing Co.*, 137 App. Div. 355, 121 N. Y. Supp. 388 (4th Dep't 1910) (Plaintiff started to work for defendant at fifteen dollars a week. Union made an agreement with the defendant for teamsters to

courts may deal adequately with the problems and needs of modern industrial society.⁴¹ The *J. I. Case Co.* case is a sign post on the road which must be taken.

The *J. I. Case Co.* case, after setting out the practice in some countries of giving collective agreements the force of government regulations, then proceeds to deal with a collective agreement under our law as if it had the same force.

"An employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms."⁴²

This would not be true if it were an ordinary contract, for certainly the third party has the right to waive provisions made for his benefit.⁴³ The court supports this statement by saying that the worker cannot waive provisions of the contract:

'Any more than a shipper can contract away the benefits of filed tariffs, the insurer the benefits of standard provisions, or the utility customer the benefit of legally established rates.'⁴⁴

Strange things to say of a contract which not too many years ago was not even enforceable in a court.⁴⁵

The collective bargaining agreement is recognized by the court as something beyond an ordinary contract. But just what is it? Is it "something more than a contract, something like a statute"?⁴⁶ Is it a schedule of employment conditions incorporated in the statute and so entitled to force of law as another writer suggests?⁴⁷ Or do "these employment conditions contained in collective agreements entail a regulatory or 'normative' effect upon the individual employment con-

receive fifteen dollars a week for nine hours and time and a half for over-time. Plaintiff joined the union and demanded to be paid according to the contract. He sues for overtime wages not paid. Plaintiff signed vouchers saying "paid in full." *Held*: A union contract could be read into an agreement between employee and employer, but the union contract would not prevent an independent contract dis-regarding the union contract); *Yazoo v. M. V. Ry. v. Webb*, 64 F. (2d) 902 (C. C. A. 5th, 1933) (Negro porter suing under an agreement made between the railroad and a white union which contained provisions relating to Negro and white employees, providing that a person performing certain duties—which plaintiff did—should be classed as brakeman or flagman and be paid accordingly. During government operation and up to 1925, the plaintiff was paid brakeman's wages. In 1925 his wages were reduced to those of a porter, still performing the duties of brakeman as well as porter. He protested, but signed checks saying payment in full. *Held*: Agreement was a rule for the industry (custom & usage) but terms not broad enough to cover plaintiff and signing check was accord and satisfaction). *But see* *Yazoo & M. V. R. R. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931).

41. (1941) 50 YALE L. J. 695, 700.

42. *J. I. Case Co. v. N. L. R. B.*, 64 Sup. Ct. 576, 579 (U. S. 1944).

43. Witmer, *Collective Labor Agreements in the Courts* (1938) 48 YALE L. J. 195, 235.

44. *J. I. Case Co. v. N. L. R. B.*, 64 Sup. Ct. 576, 579 (U. S. 1944),

45. *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N. W. 753 (1933).

46. Rice, *The Legal Significance of Labor Contracts Under the National Labor Relations Act* (1939) 37 MICH. LAW REV. 693, 695.

47. Lenhoff, *The Present Status of Collective Contracts in the American Legal System* (1941) 39 MICH. L. REV. 1109, 1137.

tract⁴⁸ This last view seems to be the one which best summarizes the treatment by liberal judges.⁴⁹ It also seems to make such agreements enforceable, but flexible enough to allow for industrial growth and change.

The collective agreement is composed of two parts: (1.) a legal contract between the union and the employer or perhaps his association, establishing rights and duties between them; and (2.) a standard of terms of employment binding on all employees in the bargaining unit.⁵⁰ This normative effect is the result of the provisions of the N. L. R. A.⁵¹ whereby a majority of the employees of the unit chose a bargaining agent which is the exclusive one for the unit and whose achievements in negotiations with the employer apply equally to all employees.

This theoretical background of the collective bargaining agreement makes fairly simple the solution of the problem of rights under individual contracts where collective agreements exist. Any individual contract made before the collective agreement is superseded because of the latter's contract effect and its normative terms.⁵² The employer should have no right to assert the provisions of the individual contract against the collective agreement.⁵³ Nor should the employee be allowed to rely on the individual contract against the collective agreement, certainly not as to wages, hours or conditions and tenure of employment.⁵⁴ If the employee is a member of the union, this would be because of majority rule in the union; if he is not a union member, because the normative terms have been established which the N. L. R. A. provides shall control all employment.

Individual contracts made after the collective agreement cannot change its terms to the detriment of the employees.⁵⁵ The normative terms that have been

48. Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 FORD L. REV. 14, 35; (1941) 50 YALE L. J. 695, 700; (1942) 56 HARV. L. REV. 294, 297.

49. *J. I. Case Co. v. N. L. R. B.*, 64 Sup. Ct. 576 (1944); *McNeill v. Hocker*, 21 N. Y. S. (2d) 432 (Dep't 1940); *Reichert v. Quendozzi*, 6 N. Y. S. (2d) 284 (Dep't 1938).

50. Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 FORD L. REV. 14, 26.

51. 49 STAT. 453 (1935), 29 U. S. C. A. § 159 (1942).

52. Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 FORD L. REV. 14, 26.

53. This is clearly recognized by the courts where the individual contract is the result of unfair labor practices. *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 365, 60 Sup. Ct. 569, 577 (1940).

54. Some doubt exists as to this where the terms of the individual bargain are more favorable to the employee than the collective agreement.

55. *McNeill v. Hacker*, 21 N. Y. S. (2d) 432 (1940) (Defendant signed a written contract with the union and later made agreements with the plaintiff employees to pay less than the contract wages. Plaintiffs sue for the difference between the sum stipulated in the contract and the amount paid. *Held*: Collective agreement could not be modified to the detriment of the employees by individual contracts); *Reichert v. Quindazzi*, 6 N. Y. S. (2d) 284 (1938) (Defendant modified wage scale by agreement with employees. They sue for difference in pay for a five weeks period. *Held*: Consent of the union was necessary for any modification of the terms of employment set by the union agreement).

established will control conditions of employment until such terms expire or are changed by the parties to the original agreement or their successors. There as yet seem to be no cases where individual contracts have been more favorable to the employee than the collective agreement. The better policy would be not to allow such favorable changes either. A different policy would tend to weaken the normative terms, lead to discrimination and weakening of collective strength—all things opposed to the policy of the N. L. R. A.

Collective bargaining agreements control each year a larger and larger number of employee-employer relationships. The individual contract is left only a limited field which is being continually narrowed by the extension of collective bargaining and the development of legal concepts capable of dealing with and strengthening collective agreements. The individual contract is a hang over from the days of a small producer's economy and has little place in a mass-production monopoly economy.

M. MARING

EFFECT OF A COMPARATIVE NEGLIGENCE STATUTE ON THE HUMANITARIAN DOCTRINE

Negligence concepts have been undergoing an evolutionary development for the past hundred years in an attempt to establish some legal principle that will allow an injured plaintiff to recover, yet make him responsible for his own deeds. The first deviation from strict liability for a negligent defendant was announced in *Butterfield v. Forrester*¹ when the court held that a contributorily negligent plaintiff could not recover from the negligent defendant. Thus, cognizance was taken of the fact that the plaintiff should be held accountable for his own acts. The common law would not take better care of a plaintiff than he took of himself. The harshness of this concept appeared in situations where in comparing the conduct of each party, the defendant was more responsible. Partial alleviation was made in *Davies v. Mann*² when the court enunciated the exception later to be known as the "last clear chance" doctrine, whereby a contributorily negligent plaintiff could obtain complete recovery from a defendant if it could be shown that the negligent defendant had the last clear chance to avoid the accident, for after all, the defendant in this situation was more responsible.

At first most of the courts experienced difficulty in rationalizing this newest development in the light of past theories. A semi-fiction was resorted to and the last clear chance doctrine was justified on the basis that the defendant's negligence was the proximate cause of the accident, while the plaintiff's negligence was the remote cause.³ The fallacy of this reasoning is apparent, for fundamental to the doctrine

1. 11 East 60 (K. B. 1809).

2. 10 M. & W. 546 (Ex. 1842) .

3. *Chunn v. City and Suburban Ry. of Washington*, 207 U. S. 302, 309, 28 Sup. Ct. 63, 65 (1907) ("Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed

is the fact that the plaintiff himself was negligent. The plaintiff's negligence was one of the proximate causes—a cause *sine qua non*—the accident would not have happened had not the plaintiff been negligent.⁴ The fallacy is still more readily discernible in those cases where a third party is also injured. Here, the plaintiff and the defendant are answerable to the third party, for each is the proximate cause of the injury.⁵

This rationalization has clouded the horizon, preventing the application of clear-cut concepts. Rather than attempt to explain last clear chance on proximate cause grounds, it should be accepted and recognized as the answer to a social demand for the amelioration of the harsh doctrine of contributory negligence.⁶ Legal principles do not remain static but the courts constantly adjust them to meet social notions of fairness of the time and place. It is this aspect of the common law that makes it self-perpetuating. This adjusting process was the genesis of the defense of contributory negligence and its counteracting doctrine, last clear chance.

In application of the last clear chance doctrine the majority of the courts recognize three general classifications:⁷ (1.) The plaintiff, through his own negligence, has placed himself in a position of danger from which he cannot extricate himself now that the danger has become imminent. The defendant discovers this in time to avoid the accident, yet negligently fails to do so. (2.) The plaintiff, through his own negligence is physically helpless as in (1) above. The defendant does not discover the plaintiff, but in the exercise of due care he could have discovered the peril of the plaintiff in time to avoid the accident. It is essential in this situation that the defendant owe a duty to discover. (3.) The plaintiff is in a

herself in a position exposed to danger, and it was discovered by the defendant in time to avoid the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury.”); *Pennsylvania R. R. v. Swartzel*, 17 F. (2d) 869 (C. C. A. 7th, 1927); *Nehring v. The Connecticut Company*, 86 Conn. 109, 84 Atl. 301 (1912); *McCleary, The Basis of the Humanitarian Doctrine Re-examined* (1940) 5 Mo. L. REV. 56; James, *Last Clear Chance: A Traditional Doctrine* (1938) 47 YALE L. J. 704; *McIntyre, The Rationale of Last Clear Chance* (1940) 53 HARV. L. REV. 1225 (The result of explaining “last clear chance” on “proximate cause” grounds “... prevented a clear realization of the underlying reason for the escape from the harshness of the contributory negligence bar, i.e., that in last clear chance cases the defendant's negligence was relatively greater than the plaintiff's.”)

4. *Hinkle v. Minneapolis, A. & C. R. R.*, 162 Minn. 112, 202 N. W. 340 (1925) (an absurd treatment of proximate cause where it is said that “willful and wanton” negligence on the part of the defendant is the proximate cause, but that where both are negligent, neither is the proximate cause).

5. *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436 (1907); *Austin Electric R. R. v. Faust*, 63 Tex. Civ. App. 91, 133 S. W. 449 (1910); cf. *Nashua Iron & Steel Co. v. Worcester & N. R. R.*, 62 N. H. 159 (1882) (The defendant who had the last chance was required to indemnify the other defendant).

6. *Cavanaugh v. Boston & M. R. R.*, 76 N. H. 68, 72, 79 Atl. 694, 696 (1911) (“... the real foundation for the rule is merely its fundamental justice and reasonableness.”); PROSSER, *TORTS* (1941) 410 (“The doctrine has been called a transitional one, a way station on the road to apportionment of damages.”)

7. Note (1934) 92 A. L. R. 47.

position of peril but he is not physically helpless, and if he becomes aware of his peril at any moment before the accident he can extricate himself. The defendant sees the plaintiff, realizes his mental obliviousness to his danger, yet fails to avoid the accident.

Some courts apply the doctrine of last clear chance only in situations (1) and (3)—where the defendant has actually discovered the peril of the plaintiff. This is often referred to as the "discovered peril" doctrine.⁸ There is no uniformity among the federal courts on this point and a few states, not accepting the last chance doctrine at all, get substantially the same results on a finding that the negligence of the defendant was willful or wanton.⁹ Contributory negligence has never been available as a defense to one whose conduct causing the injury partakes of such indifference to obvious consequences.

Missouri has adopted these categories but has gone one step further and has allowed a mentally oblivious plaintiff to recover from a mentally oblivious defendant where that defendant "should have discovered" the obliviousness of the plaintiff. This is the true humanitarian set of facts although Missouri courts include all four situations as being within the doctrine.

After the adoption of the last clear chance and humanitarian doctrines the courts were still confronted with seemingly unsurmountable difficulties; these doctrines were not a "cure all." Nothing could be done for the contributorily negligent plaintiff against a negligent defendant in those situations where the plaintiff could not show that the defendant had the last clear chance. The doctrine of *Butterfield v. Forrester* still denied recovery.

"For a season the common law courts permitted apportionment of the damages. Unfortunately this practice received no formulated sanction in the reports and so failed to establish itself."¹⁰ Then came *Davies v. Mann* and the courts returned to contributory negligence as a complete bar to recovery, modifying it with the last chance doctrine. Recognition of a need for a further alleviation of the strict law caused courts through manipulations of proximate cause to allow the contributorily negligent plaintiff recovery if his negligence was slight when compared with that of the defendant. There is much to be said in favor of the view that contributory negligence should not deprive the plaintiff of any recovery whatever,

8. *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889 (1896); *Union Traction Co. of Indiana v. Vatchet*, 191 Ind. 324, 132 N. E. 591 (1921); *Eagle v. Cumberland, C. C. & St. L. Ry.*, 197 Ind. 263, 149 N. E. 643 (1925); *Dunlap v. Chicago, R. I., & P. Ry.*, 87 Kan. 197, 123 Pac. 754 (1912); *Provo v. Spokane, P. & S. Ry.*, 87 Ore., 467, 170 Pac. 522 (1918).

9. *Walldren Express & Van Co. v. Krug*, 291 Ill. 472, 126 N. E. 97 (1920); *Atchison, T. & S. F. R. R. v. Baker*, 79 Kan. 183, 98 Pac. 804 (1908); *Ziman v. Whitney*, 110 Conn. 108, 147 Atl. 370 (1929); *Mihelich v. Butte Electric Ry.*, 85 Mont. 604, 281 Pac. 540 (1929); Note (1934) 92 A. L. R. 47, 138.

10. McIntyre, *The Rationale of Last Clear Chance* (1940). 53 HARV. L. REV. 1225, 1229. At 1240 the author calls attention to the fact that the courts of Scotland applied comparative negligence principles but the last clear chance was engrafted upon it by a series of reversals of the Scottish Court of Session by the English House of Lord which was following *Davies v. Mann*.

where his negligence appears to have been of a lesser degree than that of the defendant, and under the civil law the principle obtains that, if both are negligent, both must share the responsibility.¹¹ The courts that first allowed the plaintiff to recover if his negligence was slight compared with that of the defendant¹² later repudiated this doctrine,¹³ influenced largely by their feeling that this was too great a deviation from the old well-established common law principles and by the fact that it placed too great a burden on the jury in determining degrees of negligence.¹⁴ In other instances, however, it is stated that difficulty of determination is no excuse for the court's ignoring it, so why should negligence actions be the exception? As to the apprehensions that this doctrine of comparative negligence would place too great a burden on the jury, the courts failed to take cognizance of the fact that most juries in negligence cases probably do compare degrees of negligence and arrive at their determination of damages accordingly.

When judge-made law failed to meet the need for further extension or amelioration of existing legal principles the legislatures gave the courts the means wherewith to mete out more equitable solutions. Several states in this country, several of the provinces in Canada, and the Congress of the United States have enacted statutes authorizing comparative negligence actions.¹⁵ An example of such legislation in this country is the Federal Employers' Liability Act¹⁶ which was enacted to eliminate certain common law defenses in cases concerning interstate carriers; namely, the defenses of assumption of risk, including the risks from fellow servants, and contributory negligence. This note attempts to deal with the problem of contributory negligence under this act by showing the impact of a comparative negligence statute on last chance and the humanitarian doctrines.

*Mooney v. Terminal Ry. Ass'n of St. Louis*¹⁷ presents a case under the Federal Employers' Liability Act in which an action was brought by the widow of the deceased who died as a result of injuries sustained in the course of his employment.

11. 45 C. J., NEGLIGENCE § 595 at 1037.

12. *Id.* at 1036; Notes (1938) 114 A. L. R. 830.

13. *City of Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79 (1903); *Cicero & P. St. Ry. v. Meisner*, 160 Ill. 320, 43 N. E. 823 (1895); 45 C. J., NEGLIGENCE § 595 at 1037; Note (1938) 114 A. L. R. 830.

14. *Wittstruck v. Lee*, 62 S. D. 290, 252 N. W. 874 (1934) (Comparison of negligence is unsound, there being no yardstick with which to measure the relative fault of the parties).

15. ALBERTA REV. STAT. (1942) c. 116 at 1339; BRIT. COL. STAT. (1936) c. 52 at 693; NOVA SCOTIA STAT. (1926) c. 3 at 5; ONT. STAT. (1937) c. 115 at 1479; MISS. CODE ANN. (1942) §§ 1454 *et seq.*; NEB. COMP. STAT. (1929) § 20-1151; WIS. STAT. (1937) § 331.045; For a discussion of the effect of the Wisconsin act see Campbell, *Wisconsin's Comparative Negligence Law* (1932) 7 WIS. L. REV. 222; Whelan, *Comparative Negligence* (1938) WIS. L. REV. 465; Campbell, *Ten Years of Comparative Negligence* (1941) WIS. L. REV. 290; see also Mole and Wilson, *A Study of Comparative Negligence* (1932) 17 CORN. L. Q. 333, 604 (a comprehensive study of the history of comparative negligence and application of various statutes).

16. 35 STAT. 65 (1908), 45 U. S. C. §§ 51 *et seq.* (1940).

17. 176 S. W. (2d) 605 (Mo. 1944).

A flying switch movement was involved in which a boxcar was to be shunted from track *A* to parallel track *B*. The engine was to run backwards, check speed to facilitate uncoupling the boxcar, then accelerate in order to clear the switch before the boxcar reached it, the engine continuing on track *A*, the boxcar going onto track *B*. Deceased was to walk ahead beside track *B* and place a chock block under the car when it came to a stop. Deceased knew of the movements of the car and engine yet walked into the path of the engine on track *A*. The engineer testified that he looked in the direction the engine was moving but did not see Mooney. The foreman at the switch saw Mooney in peril and gave the emergency stop signal but the engineer did not see it in time to avert the accident.

Plaintiff framed her petition in the language of the humanitarian doctrine, relying on the existence of a custom requiring engineers to keep a lookout for switchmen who might be on the tracks, with the contention that failure to keep a lookout was negligence, establishing liability of the defendant. The defendant filed a general denial, contending "sole" negligence on the part of the plaintiff. Instructions were framed in the language of the humanitarian doctrine but the defendant did not ask for instructions on diminution of damages as permitted under the Employers' Liability Act where contributory negligence has been proved.¹⁸ Judgment was for the plaintiff and defendant appealed, alleging error in giving the humanitarian instruction. The defendant's contention was that this action was under a federal statute so the state court must apply negligence concepts as recognized by the federal courts, that the federal courts do not recognize the humanitarian doctrine as applied in Missouri but apply only the last clear chance doctrine. Whether a trial court on its own instruction, in the absence of a request by the defendant, should inform the jury that contributory negligence would diminish the damages under the act was not raised by the defendant.¹⁹

The Missouri Supreme Court held that the cause was and could be properly submitted on the Missouri humanitarian doctrine, but reversed and remanded it on other grounds. Later a rehearing was granted on the court's own motion but with the same result.²⁰

Section 51 of the act makes the interstate carrier liable for any negligence which

18. By relying on a defense of "sole" negligence the defendant did not deprive itself of the right to submit the question of contributory negligence to the jury and such an instruction, if properly framed, would not have been inconsistent with the defense of "sole" negligence. *Cf. Schroeder v. Rawlings*, 348 Mo. 824, 828, 155 S. W. (2d) 189, 191 (1941).

19. *Raferty v. Pittsburgh & W. V. Ry.*, 284 Pa. 555, 131 Atl. 470 (1925) ("The trial court not only failed to charge as to defendant's negligence, but also as to deceased's contributory negligence, and there was evidence from which it could have been found. . . . As the federal rule of comparative negligence differs from our rule, the court should charge on it. Failure to do so is reversible error."); *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461 (1915) ("Where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be carefully instructed concerning the rule of comparative negligence established by the federal statute.")

20. For sake of clarity, the parties will be referred to as plaintiff and defendant.

causes injury to any employee.²¹ Section 53 provides that contributory negligence of the employee shall not bar recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.²² It is to be noted that the carrier is liable for its negligence regardless of other factors contributing to the accident. The defense of contributory negligence has been completely eliminated and is pleaded only to diminish damages—it is never a bar to recovery. In this respect it is unlike the other type of comparative negligence legislation which deprives a plaintiff of any recovery if his negligence was greater than the negligence of the defendant.

In entering the field of liability of interstate carriers for negligent acts toward their employees congress established a system of regulated rights and liabilities but left certain gaps in that system. While it was enunciated that the employer should answer for his negligence and that contributory negligence would not bar recovery, no attempt was made to define "negligence" or "contributory negligence," nor was any indication given as to where such definitions should be found. The solution is found with the realization that the intent of congress was to establish a uniform law throughout the United States in actions brought by the employees against the employer-carrier. Numerous cases have dealt with this issue and have declared the principle that in order to establish uniformity it is essential that the courts of the several states adopt principles of negligence and definitions as enunciated in the federal courts.²³

"...the act establishes a rule which was intended to operate uniformly throughout all the states, as respects interstate commerce, and in that field it is both paramount and exclusive. The Federal courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant and that in passing the act Congress intended that it should be construed in the light of the decisions of the Federal Courts."²⁴

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and

21. The paramount question is: was the carrier negligent and was that negligence one of the proximate causes of the accident? *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54, 63 Sup. Ct. 444 (1943); *Mech v. Terminal Ry. Ass'n of St. Louis*, 322 Mo. 937, 18 S. W. (2d) 510 (1929) (Only when the plaintiff's negligence is the sole cause is the defendant excused.)

22. For a concise statement of matters to be determined by a jury in an action under this act see *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461 (1915).

23. *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, 38 Sup. Ct. 192 (1913); *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635 (1914); *Central Vermont Ry. v. White*, 238 U. S. 507, 35 Sup. Ct. 865 (1915); *Southern Ry. v. Gray*, 241 U. S. 333, 36 Sup. Ct. 558 (1916); *New Orleans & Northeastern R. R. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535 (1918); *Toledo, St. L. & W. R. R. v. Allen*, 276 U. S. 165, 48 Sup. Ct. 215 (1928); *Chesapeake & Ohio Ry. v. Kuhn*, 284 U. S. 44, 52 Sup. Ct. 45 (1931); *Martin v. Wabash R. R.*, 325 Mo. 1107, 30 S. W. (2d) 735 (1930); *McAdow v. Kansas City Western Ry.*, 192 Mo. App. 540, 164 S. W. 188 (1916); Note (1934) 89 A. L. R. 693.

24. *McLain v. Chicago G. W. R. R.*, 140 Minn. 35, 167 N. W. 349 (1918).

all state laws upon that subject were superseded. . . . The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts. . . . The kind or amount of evidence required to establish it is not subject to the control of the several states."²⁵

"The Act of Congress under which the plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded State laws upon that subject. (citing cases) This case is governed by that Act and the principles of common law as applied in the courts of the United States."²⁶

In *Williams v. Pryor*²⁷ the Missouri court declined to recognize the federal doctrine of assumption of risk in an action brought under the act. Upon *certiorari*, the Supreme Court of the United States²⁸ reversed the case with the assertion that the doctrine of assumption of risk as announced by the federal courts must be applied in all actions under the act. In the light of the weight of these decisions it is evident that the "gap" left by congress is to be filled by the application of principles of common law as interpreted and applied by the federal courts. Every question of substantive law which arises in an action under the Federal Employers' Liability Act must be determined in this manner.

It was the contention of the defendant that the principal case was submitted solely on the humanitarian doctrine and that federal courts recognize no such doctrine, applying only the last chance doctrine, and that the state court is bound to follow the substantive law as declared by the federal courts. But there is no uniformity even among the federal courts as to the scope of last chance. Most do, but some do not limit last chance recovery to discovered peril situations. But far more important, this contention is based on the further assumption that the act establishing comparative negligence left untouched last chance situations—in other words, that last chance doctrines, whereby a contributorily negligent plaintiff may recover all or nothing, continue unchanged by the adoption of the much broader comparative negligence doctrine where in every other situation a contributorily negligent plaintiff may recover something from a negligent defendant who is a cause of the injuries.

In the true humanitarian set of facts, going beyond accepted last chance situations, the plaintiff is mentally oblivious, his negligence continues up to the time of the accident; the defendant is also mentally oblivious and because of a duty owed to the plaintiff, is therefore negligent.²⁹ "Humanitarian negligence" merely describes negligence in a particular situation. In Missouri, under this doctrine, the

25. *Chicago, Milwaukee, & St. Paul Ry. v. Coogan*, 271 U. S. 472, 474, 46 Sup. Ct. 564, 565 (1926).

26. *Toledo, St. Louis & Western R. R. v. Allen*, 276 U. S. 165, 48 Sup. Ct. 215 (1927).

27. 272 Mo. 613, 200 S. W. 53 (1917).

28. *Pryor v. Williams*, 254 U. S. 43, 41 Sup. Ct. 36 (1920).

29. *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924) (The principle is that if the defendant has a duty to look out, he has notice—either actual or constructive.)

plaintiff can recover. In the federal courts, in a common law action, the plaintiff cannot recover. But the instant case is brought under a statute and the only requisite to the maintenance of an action is a negligent defendant. One exists in this case. He was negligent for being oblivious when he had a duty to look out—or having looked, failed to see. Negligence is recognized as such in all courts regardless of the “catch phrases” used to describe it, that is, whether “primary negligence” or “humanitarian negligence.” Anyone will agree that failure to keep a look out, when the ordinary man would foresee a risk of harm to some, is negligence. Few courts, however, allow recovery in the ordinary negligence action upon humanitarian facts for they feel that one party is just as negligent as the other. *But each is negligent.*³⁰ The carrier is negligent and under this act is liable to the employee.

Contrary to the usual negligence situation in Missouri a plaintiff does not better his chances of recovery under the act by pleading the humanitarian doctrine. In fact, he restricts his field of action appreciably. In a humanitarian set of facts there may be three separate acts of negligence: 1. The “antecedent negligence” of the plaintiff such as operating with defective lights or defective brakes, or at an excessive speed. If there were no further acts of negligence in the crisis this would be called “primary negligence,” the negligence coming before the plaintiff is in a position of imminent peril. 2. The contributory negligence of the plaintiff. Under common law principles this was a complete bar to recovery unless later negligence of the defendant could be shown in the following situation. 3. Negligent conduct by the defendant in the crisis or “humanitarian negligence,” that is, where the plaintiff’s position of peril is imminent due to his own negligence. The defendant’s negligence here is quite different from that described as antecedent negligence in situation 1.

Since humanitarian negligence does not seize upon the situation until the peril of the plaintiff becomes imminent the plaintiff who submits a case to the jury under a humanitarian instruction must rely on proving negligence in the crisis. Under a comparative negligence statute the defendant is entitled to ask that the damages be reduced in proportion to the amount of contributory negligence chargeable to the plaintiff. If, however, the plaintiff had not relied solely on showing negligence in the crisis, the jury could consider all other acts of negligence of the defendant in its final determination of the proportionate negligence of the defendant and by thus considering antecedent negligence, could apportion a greater percentage of the total negligence to the defendant. In an action under a comparative negligence statute, therefore, the plaintiff should frame his petition and instruction on primary negligence principles for he cannot be defeated by a showing of contributory negligence and at the same time he can submit evidence of all the defendant’s negligent acts to the jury. The field of negligent acts under comparative negligence becomes a broad one; humanitarian negligence is just one small corner of that field, giving very limited protection to a contributorily negligent plaintiff.

30. *Union Pacific R. R. v. Hadley*, 246 U. S. 330, 38 Sup. Ct. 318 (1918) (Even if deceased was negligent to the last it would empty the statute of its meaning to say that his death did not result in part from the negligence of the carrier.)

However, a difference of opinion exists in jurisdictions having comparative negligence statutes as to whether those statutes have completely displaced the defense of last clear chance. Considering the purpose of the Federal Employers' Liability Act one might be inclined to believe that the doctrine of last clear chance remains. The purpose of the act was to aid the employee in recovering from the negligent employer-carrier despite his own negligence. Prior to the act the negligent plaintiff could get full recovery from the negligent carrier that had the last clear chance. That being the case, and assuming that the purpose of the act was to give additional aid to the employee in his action against his employer, it might be contended that it would defeat one of the primary purposes of the act by depriving the employee of a previously existing doctrine that afforded him full recovery. If comparative negligence were resorted to solely, the carrier with the last clear chance would benefit by way of reduced damages by showing contributory negligence of the employee—a benefit not available at common law. But quite unfavorable to the employee is an action under this act where the fact situation is such that the employee had the last clear chance to avoid the consequences of the employer's negligence for the action fails altogether and the employee recovers nothing.³¹ This in effect was the contention of the defendant in the principal case.

On the other hand, following "proximate cause" reasoning as previously discussed, even though the defendant does have the last clear chance it still remains that without the prior negligence of the plaintiff the accident never would have occurred and under a comparative negligence statute the jury should compare the "last chance" negligence of the defendant with the negligence of the plaintiff which was a definite proximate cause and arrive at some determination as to apportionment of damages. Adopting this principle, therefore, it seems logical to predict that with a fuller acceptance and application of comparative negligence principles the doctrine of last clear chance will be completely eliminated from our negligence concepts, for in the total picture more is gained to injured employees than is lost. It is true that formerly where the employer had the last chance the employee's recovery was not diminished by his own negligence, except as a jury took cognizance on its own account. But in situations where last chance does not apply the act is a boon to the employee. The issue is now not "all or nothing" but the negligences are compared and damages awarded accordingly. Only on such analysis may uniformity in state and federal courts be achieved.

The Canadian courts that operate under comparative negligence statutes have almost unanimously held that the doctrine of *Davies v. Mann* still prevails and that apportionment of damages is not to be allowed where one party had a last

31. Cf. *Pere Marquette Ry. v. Haskins*, 62 F. (2d) 806 (C. C. A. 6th, 1933) (In an action under the Federal Employers' Liability Act the court did not use "last chance" language but stated that assuming the carrier was negligent, the plaintiff was fully informed and his negligence was the sole proximate cause of the injury); *Great Northern Ry. v. Wiles*, 240 U. S. 444, 448, 36 Sup. Ct. 406, 408 (1916) (The deceased had a duty to perform after the train became uncoupled and failure to act was the proximate cause of his resulting death.)

clear chance to avoid the accident.³² These courts do not allow an action under the comparative negligence statutes unless the negligent acts are concurrent and continuing to the time of the accident.³³ Where the negligent acts are in sequence the one with the last chance is held to be the cause by his "ultimate negligence." As a consequence, all cases in which contributory negligence is pleaded must fall into two categories: (a) concurring negligence, in which case the comparative negligence statute applies, and (b) successive negligence, in which case the last clear chance principles apply.

This view has been severely criticized on several occasions by those who feel that last clear chance has no place in actions under these statutes. The contention is that the statutes were designed to eliminate more completely from the common law the very defect at which the doctrine of last clear chance was aimed.³⁴ If the statute proves more effective in this respect then there should be no further need for last chance principles. "...we should probably welcome a compromise doctrine which permitted a negligent plaintiff to recover part of his actual damage but denied his recovery of the balance because of his negligence. And we should probably expect such a compromise to obviate the necessity of retaining as part of our law the doctrine permitting a negligent plaintiff in certain situations to recover complete damages."³⁵

It may be that in the future the courts will look more frequently to comparison of the negligent acts, due to activation by legislation similar to the Federal Employers' Liability Act and the several state comparative negligence statutes now on the books, or due to their own initiative in recognizing the inadequacies of present existing principles. The process will of necessity be a gradual one and may culminate in complete denunciation of last clear chance principles. "This superimposition of comparative negligence upon a portion of the last clear chance field, while ostensibly retaining that doctrine unimpaired, may furnish the thin edge of the wedge that will split last clear chance wide open"³⁶ and we suggest the same possibility to the humanitarian doctrine.

If the court in the principal case had accepted the defendant's contention that

32. Cases reviewed: *Weir, Davies v. Mann and Contributory Negligence Statutes* (1931) 9 CAN. B. REV. 470; MacDonald, *The Negligence Action and the Legislature* (1935) 13 CAN. B. REV. 535.

33. *Walker v. Forbes*, 27 O. W. N. 459, 56 Ont. L. R. 532 (H. C. Div. Ont., 1925); *Farber v. Toronto Transp. Co.*, 27 O. W. N. 464, 56 O. R. 537 (1925); *Dent v. Usher*, 36 O. W. N. 356, 64 Ont. L. R. 323 (Ont. trial court, 1929).

For a detailed discussion of the Canadian statutes and decisions under them see GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936); *Weir*, *supra* note 32, MacDonald, *supra* note 32.

34. GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936) 131.

35. *Id.* at 127.

36. McIntyre, *The Rationale of Last Clear Chance* (1940) 53 HARV. L. REV. 1225, 1240. The author also expresses the opinion that under a comparative negligence statute, where contributory negligence is no longer a bar, the courts will be more bold to find that both are negligent.

last clear chance principles have not been abrogated by the act, the apparent purpose of congress would be defeated. Last chance notions are based on a theory of total recovery by a contributorily negligent plaintiff or none. Congress in providing for comparative negligence apparently intended that a contributorily negligent plaintiff recover in any situation but the total damages recovered would be reduced by the extent of his own negligence. Even the Missouri humanitarian doctrine would narrow the purpose of congress in establishing comparative negligence since the humanitarian doctrine never applies where in the crisis through the exercise of due care the defendant could not have avoided the injury. Antecedent negligence (excessive speed, defective lights) is not to be considered in a case based on the humanitarian doctrine but under comparative negligence, antecedent negligence would still be a very live issue in the case even though further negligence in the crisis could not be established, a fact necessary for a true humanitarian theory in Missouri.

Considering the purpose of comparative negligence as an equitable basis for adjusting losses, the court in the principal case reached a most desirable result both on legal analysis and on social purpose. We suggest, however, that it is not desirable to plead and instruct on the humanitarian doctrine under this act for although it need not be prejudicial to the defendant, as in the instant case, confusion is apt to follow due to settled concepts associated with that doctrine. It would be much less confusing to plead and submit all actions under the act on primary negligence principles, thus avoiding the issues of this case; but if this is not done, the proper treatment of each case can be obtained by scrupulously adhering to the basic principles of comparative negligence.

T. H. PARRISH

ADMINISTRATION OF DECEDENTS' ESTATES—PERSONAL REPRESENTATIVE'S
PAYMENT OF CLAIMS NOT DULY ALLOWED

I

In absence of statute courts of probate have no authority to establish claims at the instance of creditors. Instead, it is the duty of the personal representative to pay those claims which he believes just,¹ and later on the settlement of his account he will be allowed credit for proper disbursements. The executor or administrator in making such voluntary payments assumes the risk of being able to prove at the later time that a valid indebtedness actually existed. By allowing and paying a claim he does not bind the estate if objection is later made and the payment is disallowed in the hearing on his account.² When the representative voluntarily pays a claim without the approval of the heirs or legatees, he assumes full responsibility for its validity, and if it is not allowed on his accounting he must personally make up the deficiency.³ In absence of voluntary payment, the

1. *Pike v. Thorp*, 44 Conn. 450 (1877).

2. *Shepard v. Young*, 74 Mass. 152 (1857).

3. *Frost v. Grigaliunos*, 270 Mass. 455, 170 N. E. 384 (1930) (applying this ruling in the case of last illness expenses).

creditor's remedy is to prosecute the personal representative in a court of common law or equity, and in that suit establish proof of the alleged obligation owing to him from the estate. Of course, the representative is protected when he satisfies the judgment rendered against him. This older system of establishing claims still prevails in some jurisdictions.⁴

However, in most states legislation has provided some method for the establishment of disputed claims before the probate courts. When that tribunal moves to allow or disallow a claim, either directly, or by way of approval of the findings of a commissioner or the consent of the personal representative with reference to it, this, though it may not be regarded as a judgment in the strict interpretation of the word,⁵ stands as an adjudication of the matter. It is binding on the claimant, personal representative, and others interested in the estate, except as against a direct attack by appeal, bill in equity, or statutory proceeding for the vacation of improper allowance against the decedent's estate.⁶ When a claim has been presented in proper form⁷ and approved by a judge of the probate court having jurisdiction over the parties, the estate, and the subject matter in dispute, the controversy is then *res judicata*, and the personal representative is protected against liability for payment of the claim.⁸

Where the procedure for the establishment of claims in the probate court is

4. *Isaacs v. Stevens*, 13 Conn. 499 (1840); *Levering v. Levering*, 46 Md. 413, 2 Atl. 1 (1885) (stating that the orphans' court can pass on claims against the estate, but its determination of them is not final. If the claim is disallowed the claimant is not precluded from seeking his remedy in a court of law or equity; if it is allowed, the representative may refuse to pay it. Thus, an order of the orphans' court is not conclusive with respect to the litigating parties; its original jurisdiction is only *prima facie*.); *Hall v. Meriden Trust Co.*, 103 Conn. 226, 130 Atl. 157 (1925) (it appears that courts of probate and superior courts acting on appeals from them ordinarily have no jurisdiction to adjudicate the validity of claims presented against the estate. However, such courts do possess certain incidental powers where the exercise of such become necessary in the discharge of duties imposed upon them. Among these is the limited authority to determine in particular cases whether a claim presented constitutes a valid charge on the estate.); *Houck v. Houck*, 112 Md. 122, 76 Atl. 581 (1910); *Schuka v. Bagocius*, 3 N. E. (2d) 215 (Mass. 1936); (the probate court has no jurisdiction in equity to establish the indebtedness of the estate to a creditor); *ATKINSON, WILLS* (1937) 660; *NEWHALL, SETTLEMENT OF ESTATES* (3d ed. 1937) 353.

5. *Robbett v. Connolly*, 153 Iowa 697, 133 N. W. 1060 (1912); *Whitecloud Milling and Elevator Co. v. Thomson*, 264 Mo. 595, 175 S. W. 897 (1915).

6. *Chapoton v. Prentis*, 144 Mich. 283, 107 N. W. 879 (1906); *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34 (1910); *Owsley v. Central Trust Co. of New York*, 196 Fed. 412 (S. D. N. Y. 1912); *Walter v. Null*, 233 Mo. 104, 134 S. W. 993 (1911).

7. *See Rossieur v. Zimmer*, 249 Mo. 175, 155 S. W. 24 (1913). Usually, notice of the claim filed in the probate court need not be in a particular style so long as it furnishes the necessary information. *Roth v. Ravich*, 111 Conn. 649, 151 Atl. 179 (1930), 74 A. L. R. 364, 368 (1931); Note (1931) 74 A. L. R. 368; *In re Morton's Estate*, 7 N. Y. Misc. 343, 28 N. Y. Supp. 82 (Surr. Ct. 1894). However, most statutes require that it be filed in writing and verified by affidavit. These provisions are mandatory for the plaintiff to establish his claim. *Nevin-Frank Co. v. Hubert*, 67 Mont. 50, 214 Pac. 959 (1923).

8. *Merrill v. Regan*, 117 Me. 182, 103 Atl. 155 (1918).

available to the creditor and the personal representative, the various jurisdictions have treated its use in different ways. In many states the statutes give the representative the authority to pass on the justice of claims without formal judgment or proceedings in court,⁹ and his allowance of such a demand will effect it as a valid obligation of the estate, subject frequently to the right of any person having an interest in the estate adverse to the allowance of the claim to contest or dispute it.¹⁰ However, under most statutes the executor or administrator is not authorized or required to pay a claim until it has been properly presented and allowed or established before a competent court.¹¹ Under some statutes, along with the necessity of proper allowance of the claim by the personal representative is the additional stipulation that he shall not pay the claim until expressly ordered by the court to do so.¹² Other statutes make essential the use of the probate court procedure, providing that even after presentation to and allowance of a claim by the personal representative, the approval of the probate court is necessary to its due allowance and payment without formal judgment.¹³

9. ARK. DIG. OF STAT. (1937) §§ 107-111; CONN. REV. STAT. (1930) § 4918; GA. CODE (1933) c. 113, §§ 1505-1507; 2 WOERNER, AMERICAN LAW OF ADMINISTRATION (1923) § 390 states that Pa., R. I., S. C., N. C., Tenn., and Del., follow this same view. See *Kinnan v. Wight*, 39 N. J. Eq. 501 (1885); *Bray v. Darby*, 82 Ohio St. 47, 91 N. E. 861 (1910). See *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780 (1895) (but when a claim is presented to a personal representative, and there is silence on his part, this does not constitute an agreement that the claim is just nor a promise to pay it.)

10. *Reeves v. Fuqua*, 184 S. W. 682 (Tex. 1916) (heirs and distributees may contest the allowance of the claims of creditors); *In re Dorland*, 100 N. Y. Misc. 236, 166 N. Y. Supp. 616 (Surr. Ct. 1917). (here there was objection by the residuary legatees to allowance, approval and payment of a claim allowed by one executor and later rejected by the co-executor); *In re Blue's Estate*, 67 Ohio App. 37, 32 N. E. (2d) 499 (1939). The contest concerned allowance of the representative's claim in *McDermott v. McDermott*, 116 N. W. 122, 138 Iowa 351 (1908). One creditor may contest the claims of other creditors if the assets are insufficient to pay the claims of all. *In re Erny's Estate*, 337 Pa. 542, 12 A. (2d) 333 (1940).

11. *Smith v. White's Estate*, 108 Vt. 473, 188 Atl. 901 (1937); *In re Maas' Estate*, 38 N. Y. S. (2d) 261 (Surr. Ct. 1942) (held, that the representative has no authority to pay his own personal claim without prior proof to the court); *In re Fuller's Estate*, 124 Neb. 591, 247 N. W. 415 (1933) (held, an executor is not removable on the ground of failure to pay a claim not adjudicated and allowed); 34 C. J. S., EXECUTORS AND ADMINISTRATORS § 340.

12. 3 MICH. COMP. LAWS (1929) §§ 15701-15702; PUB. LAWS OF VT. (1933) § 2930; WIS. STAT. (1937) § 313.17. *In re Lehmann's Estate*, 183 Wis. 21, 197 N. W. 350 (1924); *Probate Court of District of Fair Haven v. Indemnity Ins. Co. of North America*, 106 Vt. 207, 171 Atl. 336 (1934). *In re Fernandez's Estate*, 119 Cal. 698, 51 Pac. 851 (1898) (payment cannot be enforced without the decree of the probate court, but failure to have this will not defeat the administrator's right to credit for a disbursement made without a court order).

13. MO. REV. STAT. (1939) §§ 185-86; MICH. REV. STAT. (1929) § 15685; MINN. PROBATE CODE (1935) § 101; NEB. COMP. STAT. (1929) §§ 30-609; WIS. REV. STAT. (1937) §§ 313.03-.05; TEX. STAT. (Vernon, 1936) art. 3534; FLA. STAT. (1941) § 733.18; S. D. CODE (1939) § 35.1410; ILL. REV. STAT. (1941) c. 3, § 344; IOWA CODE (1939) §§ 11834, 11957; CAL. CODES (Chase, 1939) c. 12, § 711.

II

Numerous problems arise under the statutes requiring allowance of the claim by the probate court. First, there may be a complete failure to make presentation of the claim in any form to the court for its consideration, or, on the other hand, nonfulfillment of the allowance requirement may result from the claim's being presented to the court in an improper or unauthorized form, absence of proper verification and affidavit, neglect to comply with rules stipulating that the claim be filed with the clerk of the court in a specified manner or within a designated time period, and other failures to act in accordance with the various statutory regulations. These vary from state to state.

Ordinarily, when a claimant fails to present his demand to the personal representative and to the court for allowance, as the statute may set forth, he has lost his right to have the claim satisfied from the funds of the estate.¹⁴ However, he often has available also the alternative action of establishing his demand by suit in a court of common law or equity.¹⁵

When, instead of following the statute, the representative does not call for compliance with the provisions stipulating court allowance but makes payment from his own assets or those of the estate on the presentation and proof of the demand to him alone, the problem of his right to receive credit for these unauthorized payments is presented. The situation with which this comment is concerned is that arising on his final settlement where the personal representative has available proofs displaying as lawful debts of the decedent those claims which he has paid without court allowance where that is required.

At least one legislature has definitely settled the question by expressly negating the alternative course of allowing the personal representative credit on a later presentation of the proof of the validity of the demand.¹⁶ Under this statute it seems

3 Woerner, *loc. cit. supra* note 9, § 390 also lists Utah, Wash., Idaho, Mont., Nev. and La. See *In re Baker's Estate*, 226 Iowa 1040, 285 N. W. 641 (1939) (the claim may be allowed by the clerk of the court having probate jurisdiction, upon the written approval of the administrator); *Dent v. A. Harris & Co.* 255 S. W. 221 (Tex. 1923); *Home Insurance Co. v. Wickham*, 281 Mo. 300, 219 S. W. 961 (1920); Note (1938) 3 Mo. L. Rev. 66.

14. See *Ramseyer v. Datson*, 120 Fla. 414, 162 So. 904 (1935); *In re Duffield's Estate*, 258 Ill. App. 78 (1931); *Harrison Machine Works v. Aufderheide*, 222 Mo. App. 474, 280 S. W. 711 (1926) (held, the administratrix of an estate could not dispense with the filing of the claim against the estate by agreement with the creditor).

15. Mo. REV. STAT. (1939) § 188; *Wahl v. Murphy*, 99 S. W. (2d) 32 (Mo. 1936) declaring: "Demands against the decedent's estate may be established or allowed either by giving statutory notice to the administrator and thereafter presenting demand to the probate court for allowance, or by bringing action in a court of record having jurisdiction of the demand, making the administrator a party defendant, recovering judgment thereon against the estate, and exhibiting a copy of the judgment to the probate court for classification." But see IND. STAT. ANN. (Burns, 1933) § 6-1001 which states that no action shall be brought by complaint and summons against an executor or administrator of the estate for recovery of any claim against the decedent.

16. Mo. REV. STAT. (1939) § 221. *Id.* at § 230 was altered in 1889 so as to omit the italicized clause: "Upon every settlement, the executor or administrator

clear that no credit can be allowed for any item paid which has not taken the prescribed course through the probate court.

Where a statute provided that no representative should be allowed credit in his account for any demand discharged by him unless he produced the claim passed by the orphans court, or proved otherwise as directed, one court stated:

"The objects of these provisions are twofold: to secure the estates of deceased persons from unjust and unfounded claims by requiring them to be supported by vouchers and proofs, and also to protect the executor from liability where he honestly pays a claim which has been approved and passed by the court."¹⁷

In the absence of such express statutory provision some jurisdictions in dealing with this situation hold that if the personal representative pays a claim without due authority before it is allowed by the court, such action is at his peril.¹⁸ This is especially true where it is doubtful whether any claim will be paid in full. By this prior payment the personal representative takes the risk of proving the claim and getting it allowed the same as any creditor.¹⁹ However, if the estate is solvent and the validity of the debt be undisputed, or the representative has available and offers sufficient proof establishing the debt at the time of accounting, he will be reimbursed in these jurisdictions for any amount paid even without authority.²⁰ The Supreme Court of Utah in *In re Hansen's Estate*²¹ stated:

"If on the settlement of the account of an administrator it appears that the debts against the deceased have been paid without the affidavit and allowance prescribed by statute, and it shall be proven by competent evidence

shall show that every claim for disbursements shall have been allowed by the court, according to the law, or shall produce such proof of the demand as would enable the claimant to recover in a suit at law." With the elimination of this part, Missouri law of ancient origin was changed, and the legislature very emphatically expressed its intent to make allowance by the court an essential prerequisite to the payment of ordinary demands against an estate before the personal representative could be reimbursed for such an expenditure. Nothing less than allowance of the claim by the court can avail the executor or administrator.

17. *Bowie v. Ghiselin*, 30 Md. 553 (1869). But here the passing of the claim by the orphans' court was not conclusive on the executor.

18. *In re Free's Estate*, 327 Pa. 362, 194 Atl. 492 (1937) (the executor was dealing with a fund claimed as a trust.) *In re Kellas' Estate*, 38 N. Y. S. (2d) 197 (Surr. Ct. 1942); *Ditton v. Hart*, 175 Ind. 585, 93 N. E. 119 (1911); *In re Hansen's Estate*, 55 Utah 23, 184 Pac. 197 (1919); see *In re Mailhebau's Estate*, 218 Cal. 202, 22 P. (2d) 514 (1933); *Blum v. Fox*, 173 Md. 527, 197 Atl. 117 (1938).

19. *Millard v. Harris*, 119 Ill. 185, 10 N. E. 387 (1887); *Roberts v. Rogers*, 28 Miss. 152 (1854); *In re Machado's Estate*, 186 Cal. 246, 199 Pac. 505 (1921); *In re Jennings's Estate*, 74 Mont. 449, 241 Pac. 648 (1925); see *In re Stewart's Estate*, 145 Ore. 460, 28 P. (2d) 642, 91 A. L. R. 818, 829 (1934); *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388 (1895); *Scott v. Taylor*, 294 S. W. 227 (Tex. 1927).

20. *In re Fernandez's Estate*, *supra* note 12; *Ames v. Jackson*, 115 Mass. 508 (1874); *Adair v. Brimmer*, 74 N. Y. 539 (1874); *In re Wonn*, 80 Iowa 750, 45 N. W. 1063 (1890) (held that improperly filed claims paid by the administrator not in itself sufficient grounds for disallowing credit).

21. *Ibid.*

to the satisfaction of the court that such debts were justly due, and were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent, it shall be the duty of the said court to allow the said sum so paid in the settlement of said account."

This would seem to indicate that the legislative provisions regarding presentation and allowance are merely for the protection of the representative to which he may resort on occasion.²² By such an interpretation of the statute a speedy and less cumbersome means of satisfying those presenting small or undisputable claims against the estate is provided.²³ Both the parties to the suit, claimant and personal representative, and the court are relieved from unnecessary proceedings.²⁴

On the other hand, a substantial number of jurisdictions have held the statutory requirements to be imperative legal regulations not to be waived on any circumstance. Thus, an executor or administrator, even though he pays a claim perfectly just and valid in all respects, and one presented to him within the nonclaim period²⁵ in proper form, will not be allowed credit in his settlement if the claim has never been properly allowed by the probate court. The heir, probate court, or other creditors if the estate be insolvent, may raise objections to any item on the final accounting upon the sole ground that the claim was not allowed by the probate

22. *Tally v. Champion*, 191 Ky. 114, 229 S. W. 90 (1921); *Kinnan v. Wight*, *supra* note 9, *Trammel v. Blackburn*, 116 Tex. 388, 292 S. W. 169 (1927); *In re Hurley's Will*, 193 Wis. 20, 213 N. W. 639 (1927) (held, executor was improperly denied credit for the interest which he paid on a mortgage on the real estate though no claims were filed for the disbursement. It is the executor's duty to protect the property of the estate by paying valid liens).

23. In a few states where the legislative provisions requiring presentation and allowance by the probate court prior to any payment are strictly construed the inconvenience of presentation and allowance of claims is somewhat alleviated in the case of small estates by a provision in the PROBATE CODE for summary proceedings. When it is established that an estate will cover no more than funeral expenses, expenses of the last illness, costs of administration, debts having preference by the laws of the United States, taxes, and other debts duly proved, the administrator may by order of the court pay and present his account with application for settlement of allowance thereof. Thereon the court may act and close the administration. *Dampier v. St. Paul Trust Co.*, 46 Minn. 526, 49 N. W. 286 (1891).

24. *ATKINSON, WILLS op. cit. supra* note 4.

25. The Nonclaim Statutes are special laws of time limitation on the presentation of demands against the estate for the benefit of heirs or legatees and the personal representative against the creditors. Typical wording of these provisions is: all claims against the decedent's estate which are not presented to the executor or administrator within a stipulated time period "shall be forever barred". CAL. PROB. CODE (Chase, 1939) § 707; ILL. REV. STAT. (1941) c. 3, § 356; MO. REV. STAT. (1939) § 186; note (1938) 36 MICH. L. REV. 973. While some courts allow the personal representative to waive the Statute of Limitations as a bar to claims, the Nonclaim Statutes are uniformly held imperative and mandatory and cannot be waived or tolled by him under any circumstances. *State ex rel. Scherber v. Probate Court of Hennepin County*, 145 Minn. 344, 177 N. W. 354, 11 A. L. R. 242, 246, noted in (1920) 4 MINN. L. REV. 536, (1920) 30 YALE L. J. 97; *Bristow v. First Trust Co.*, 140 Kan. 711, 38 P. (2d) 108 (1934).

court before it was paid out of the funds of the estate or the private funds of the personal representative.²⁶

"Persons interested in estates may not know whether claims are correct, and have the right to require the proof provided for by law, and not merely to depend upon the administrator or executor being satisfied that they are justly due."²⁷

A consideration of the statutes as they appear in the statute books²⁸ reveals that the difference in these two points of view arises not so much from the wording of the legislative provisions themselves, as from the construction which judicial decisions have imputed to them. When there exists no specific provision on the subject such as is in the Missouri statute, but the statute sets forth that failure of presentation to and allowance by both the representative and the probate court will result in the claim's being forever barred, some courts in the face of this mandatory language have interpreted the two express requirements not as absolutely binding procedure, but instead as a ruling to guide the personal representative in his handling of estate funds. For his failure to follow the prescribed controls in these jurisdictions he bears the burden of proving that all contested claims were properly paid,²⁹ but if no injury results to the estate these courts will not punish him by deprivation of money out of his pocket.

To justify this liberal interpretation in the face of a statute which reads "... that no claim for money, or any part thereof, shall be paid until it has been approved by the county judge or established by the judgment of a court of competent jurisdiction," one court reasoned that the legislature by failing to declare what would otherwise follow if this were not done had not bound the courts by a manifest legislative intent, but had left them free to act as right and justice, "... the foundation of all law," would demand.³⁰

The courts taking the strict view will not let the equity of the situation override the apparent intent of the legislative bodies in passing this kind of a law, and

26. *Thompson v. Thompson*, 217 S. W. 863 (Mo. App. 1920); *Boyd's Estate v. Thomas*, 162 Minn. 63, 202 N. W. 60 (1925); *Huebner v. Susseman*, 38 Neb. 78, 56 N. W. 697 (1893); *see Ordway & Husted v. Phelps*, 45 Iowa 279 (1876); *Clark v. Davis*, 32 Mich. 153 (1875); *Bunnell v. Post*, 26 Minn. 376 (1879) (the claim was a valid one properly allowable by commissioners, but it was never presented to or allowed by them. Executor paid the just obligation of the estate out of funds not belonging to the estate. Held: no allowance for such payment on the settlement of accounts); *Converse & Co. v. Sorely*, 39 Tex. 515 (1873) (court held the payment of a claim by administrator without authentication void, but nothing was presented to show the claim paid was just and due).

27. *Parker v. Leighton*, 131 Md. 407, 419, 102 Atl. 55 (1917).

28. See note 13 *supra*, with statutes cited from Mich., Minn., Neb., Wis., Tex., Fla., S. D., Ill., Iowa, and Cal.

29. *Wysong v. Nealis*, *supra* note 19; *Scott v. Taylor*, *supra* note 19; *Hall v. Hall*, 59 S. W. 203 (Tenn. 1900); *COMP. LAWS OF NORTH DAKOTA* (1913) § 8738; *ILL. REV. STAT.* (1941) c. 3, § 355 providing: "If an executor, administrator, guardian, or conservator pays a claim before it is allowed, the court may require him to establish the validity and classification of the claim before he is credited therewith."

30. *Trammell v. Blackburn*, *supra* note 22.

they construe the provision as meaning exactly what the words of it say: "A claim not presented to the probate court for allowance is forever barred." This declaration has been interpreted to mean that an administrator or executor may not pay any claim or receive credit therefor in his account unless the court within the time specified by statute has acted thereon. No exception to this plain reasoning is recognized.³¹

At first glance the strict ruling may appear to be unjust to the representative who has paid a claim in good faith. By it he is deprived of an opportunity to show that the claim was a valid obligation of the estate; thus he is denied credit for the disbursement and at the same time the heir receives that portion of the property to which according to the principles of justice it seems he should not be entitled. Had the simple procedural step of allowance by the probate court not been omitted by the claimant and acquiesced in by the personal representative the estate would be reduced by the payment of a proved debt owing from the assets of the deceased. Therefore, it would seem that the beneficiaries should have no right to this amount as against the executor or administrator. Under this rule the mere misstep of the representative in handling the claim presented to him not only denies him his right to reimbursement for a good faith expenditure on the behalf of the estate, but also, in effect, adds to the assets which are distributed to the beneficiaries.

However, there are certain pitfalls in the liberal interpretation which tend to recommend the strict view holding mandatory the statutory requirements of presentation and allowance. Since the assets of the estate are within the control of the personal representative and withheld from the heirs or devisees until affairs are settled, stipulations that proof of the claims be presented to the probate court and not left to the representative are designed to protect the beneficiaries of the estate. The desire of the legislatures enacting the procedure for court allowance is to remove these dealings from the realm of the representative's personal discretion to the control and supervision of the public tribunal. When affairs of the state are complicated and the administration covers a period of years there is particular reason for observing the strict rule. In such a circumstance it might be possible for the representative at the time of accounting to present questionable or even fraudulent "proof" of the validity of a claim which he had previously paid without the sanction of court allowance, and the heirs because of the passage of time would be handicapped in securing evidence to dispute such an expenditure. Acting on such a case the probate court would generally accredit the personal representative with this amount paid out if the law permitted. One can readily see the tendency of the court to give credit for a claim paid out by the representative when on the same proofs the claim might be disallowed if the representative were not out of pocket. The legal questions may be the same, but the equities may affect the decision. The strict construction of the provisions for presentation and

31. State *ex rel.* Scherber v. Probate Court of Hennepin County, *supra* note 25; *In re Stewart's Estate*, *supra* note 19, credit was allowed for the prior payment of a claim made with the knowledge of the heir.

allowance is aimed to eliminate such a result and furnish adequate protection to beneficiaries of the estate.

Thus, there is reason why the statutory requirements for court allowance should not only give the creditors a remedy in the probate court, but also should be so interpreted as to make the outlined procedure binding on the representative as well as the creditor. The legislature has provided a definite procedure. Neither the ignorance of the personal representative as to the law, nor his good faith in failure to observe it, nor even his showing that the claim would have been allowed by the court prior to its payment should permit departure from the legislative declaration of policy.

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