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The Doctrine of "The Last Clear Chance"

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the entire recovery program of the administration under the N. R. A. (which is surely price fixing on a broader scale than is here attempted) is directly involved. That the Supreme Court should attempt to overthrow the entire recovery platform by an adverse ruling seems highly improbable. Whether it be due to public opinion or because the Court will willingly throw off its cloak of conservatism in the face of this national crisis, it is the writer's opinion that the Supreme Court will sustain these acts.

Changed conditions and circumstances require new remedies. A rule once sound under certain conditions may prove inadequate under different surroundings. If such were the attitude of the Court towards present emergency legislation, little difficulty would be had in rejecting old standards and seemingly binding authority to the contrary,[37] and upholding a statute when the conditions so require it. It should not be necessary to conclude whether or not the milk industry is so "affected with a public interest" as to justify price regulation, as that phrase has been employed in the past. If it is such an industry, no problem arises. If it cannot be placed within that category, that fact should not prove an unsurmountable barrier. Rather, the Court should take the position that it is dealing with an old problem under different circumstances, and as such should be treated in the light of prevailing conditions.

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THE DOCTRINE OF "THE LAST CLEAR CHANCE."

The old common law built up a system of tort liability based primarily on fault. Having achieved such a system, based upon this broad foundation, it limited liability to situations where only one of the parties was at fault, and denied recovery where the fault was mutual.[1] This limitation became known as the doctrine of contributory negligence, for when the injury complained of was the result of the fault of both parties, the defendant could set up as a complete bar to the plaintiff's recovery, the plaintiff's own contributing negligence. Today our courts still adhere to this doctrine. It is applied in our common law courts to preclude any recovery,[2] although a few

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Agricultural Adjustment Act, passed by Congress on May 12, 1933, is constitutional and that the regulations and licenses promulgated and issued thereunder are reasonable and valid" (citing People v. Nebbia, *supra* note 8).

[37] Fairmont Creamery Co. v. Minn., 274 U. S. 1, 47 Sup. Ct. 506 (1929). This decision is "to be read in the light of surrounding circumstances." (Pound, *Ch.J.*, in People v. Nebbia, *supra* note 8.)

[1] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 167; Note (1922) 32 COL. L. REV. 493.

[2] Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233.

jurisdictions and our admiralty courts apply the doctrine to reduce the amount of recovery.[3] The application of this general doctrine gave rise to many harsh and apparently unjust results. A distaste for these travesties of justice, in turn, gave rise to judicial exceptions and limitations upon the recognized rule. Through these exceptions the plaintiff, despite his own negligence, was allowed to recover where the defendant's conduct was "wanton and willful" [4] or wherever the doctrine of "the last clear chance" was found to be applicable. This article will deal with a consideration of the second exception.

The doctrine of "the last clear chance" was first enunciated by an English court in the year 1842 in the case of *Davies* v. *Mann*.[5] Since that time it has become well established in practically every jurisdiction.[6] Some courts regard the doctrine as an exception to the theory of contributory negligence,[7] while the general view taken

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[3] 45 CORPUS JURIS 1036, §§595, 596, 597, 598, 599.

[4] Note (1932) 32 COL. L. REV. 493, 500: "The rule is well settled that contributory negligence constitutes no defense to an action founded upon the defendant's 'reckless conduct.'" Citing: Alabama Power Co. v. Brown, 205 Ala. 167, 87 So. 608 (1920); Lund v. Osborne, 200 Ill. App. 457 (1916); Ames v. Armour & Co., 257 Ill. App. 449 (1930); Arken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238 (1903); Phaelen v. Roe, 101 Misc. 424, 168 N. Y. Supp. 139 (Sup. Ct. 1917); Payne v. Vance, 103 Ohio 59, 133 N. E. 85 (1921); Graham v. Columbia Ry. Gas & El. Co., 102 S. C. 468, 86 S. E. 952 (1915); Bain v. Northwestern R. R. Co., 120 S. C. 370, 113 S. E. 277 (1922); Carlson v. Johnke, 234 N. W. 25 (S. Dak. 1931); Stagner v. Craig, 159 Tenn. 511, 19 S. W. (2d) 234 (1929); Fort Worth El. Co. v. Russell, 28 S. W. (2d) 320 (Tex. Civ. App. 1930); Austin v. Chicago, M. & St. P. Ry. Co., 143 Wis. 477, 128 N. W. 265 (1910).

[5] 10 M. & W. 546 (Plaintiff fettered the forefeet of an ass belonging to him and turned the beast into a public highway to graze. It was grazing on the off side of the road when defendant's wagon, traveling at a "smart pace," ran against and killed it. The Court held that the defendant was liable if by the exercise of reasonable care he could have avoided the accident but failed to do so. Nothing is said in the report of the case as to whether or not the defendant saw the ass.).

[6] The doctrine has been applied in the following jurisdictions: Federal Courts, Courts of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Philippines, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, England, Canada, Australia.

It is to be noted that later cases in Illinois and New Jersey repudiate the doctrine. Carson, P., S. & Co. v. Chicago Rys. Co., 309 Ill. 346, 141 N. E. 172 (1923); Brennan v. Public Service Ry. Co., 106 N. J. L. 464, 148 Atl. 775 (1930).

[7] Schaff v. Copass, 262 S. W. 234, 239, Tex. Civ. App. (1924). The Court said: "The doctrine is founded upon consideration of public policy deduced from principles of humanity, and the motives which ought to activate all rightly disposed members of society in their conduct toward fellow human beings. The humanitarian principles invoked are those which impose a moral duty upon everyone to avoid injuring another unnecessarily." Otis, *The Humanitarian*

is that it does not destroy, supplant or constitute an exception to this doctrine, but is merely a qualification thereof.[8] Regardless of whatever view is taken, it must be admitted that it deprives the defendant of the defense of contributory negligence in a vast number of cases—and rightly so, too.

A general statement of the doctrine, as stated by the courts, is that the contributory negligence of the plaintiff will not defeat recovery if the defendant, by the exercise of ordinary care, might have avoided the accident.[9] This very general statement is subject to the qualification that the negligence on the part of the plaintiff must be the remote cause of the accident and not the concurrent or proximate cause.[10] The reason for this is quite obvious. If the courts were to say that despite the fact that the plaintiff's negligence continued actively up to the very moment of the accident and contributed directly to the injury, and that despite the fact that the plaintiff himself might have avoided the accident by the use of reasonable care, nevertheless he may still recover from the defendant, it would entirely abrogate the doctrine of contributory negligence. This would also impose upon the defendant the duty of employing, at all times, that

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Doctrine (1912) 46 AMER. L. REV. 381; Goodrich, *Iowa Application of the Last Clear Chance Doctrine* (1919) 5 IOWA L. BULL. 36; Green, *Contributory Negligence and Proximate Cause* (1927) 6 N. C. L. REV. 3.

[8] Bourett v. Chicago, etc., R. Co., 152 Iowa 579, 121 N. W. 380, 383 (1909), where the Court said: "The rule constitutes no exception to the general doctrine of contributory negligence and does not permit one to recover in spite of contributory negligence, but merely operates to relieve the negligence of the plaintiff, which would otherwise be regarded as contributory, from its character as such. This is accomplished by characterizing the negligence of the defendant and the accident as the sole cause of the injury, and the plaintiff's antecedent negligence as a condition or remote cause. If then the antecedent negligence of the plaintiff be found merely a condition or remote cause, it cannot be contributory since it is well established that negligence to be contributory must be one of the proximate causes"; BURDICK, TORTS (4th ed. 1926) 525: "The criticism that is often made that the doctrine of last clear chance in effect abrogates the doctrine of contributory negligence, does not seem well founded"; Note (1901) 55 L. R. A. 418.

[9] Brooks v. Buffalo & N. F. R. Co., 25 Barb. 600 (N. Y. 1854) (Contributory negligence of the person injured will not prevent recovery, where such negligence was known to the party causing the injury and the injury could have been avoided by the use of ordinary and reasonable care).

[10] Pennsylvania R. Co. v. Swartzel, 17 F. (2d) 869, 870 (C. C. A. 7th, 1927): "The doctrine of 'last clear chance' did not grow out of the establishment or creation of any new responsibility fixed by law upon wrongdoers but it grew out of the fact that the law holds liable for injuries those who are responsible for the proximate cause of the injury, and the courts, searching for the proximate cause, find that in those cases where *A*, when he discovers *B* in a place of danger, must, regardless of all other consideration, himself use that which will be, under the circumstances, ordinary care to prevent injury to *B*. How *B* got into the position of danger is unimportant, because the proximate cause which justifies a recovery is *A's* failure to use ordinary care after the discovery"; Velthusen v. Union Ry. Co. of N. Y. C., 152 App. Div. 121, 136 N. Y. Supp. 622 (1st Dept. 1912) (The last clear chance doctrine does not apply unless the character of the accident is such that it can fairly be said that the negligence of the injured person was not its proximate cause).

extreme degree of care which ordinary prudent men employ only in time of extreme or exceptional peril. This the courts refuse to do. They limit the plaintiff's recovery to situations where the defendant alone has the opportunity of avoiding the injury. As expressed by some courts, the person who has the last clear chance of avoiding an accident is considered, in law, solely responsible for that accident, notwithstanding the negligence of the plaintiff.[11] The negligence of the latter must, therefore, create a condition and not become a proximate cause of the injury. As, for example, the doctrine might apply "if the plaintiff is standing on the track or sitting in a vehicle parked upon the track," [12] but will not apply if he is continuing across in front of the defendant's vehicle. In order that this condition might exist, it is obvious that the plaintiff's negligence must have expended itself, must have culminated, must have become passive before the breach of duty on the defendant's part. If, notwithstanding the latter's breach, the plaintiff's negligence continues active up to the very instant of the accident, it is clear that the negligence of the parties is concurrent, and, therefore, that a necessary prerequisite of the doctrine is lacking, or that the application of the doctrine will put the plaintiff himself in the position of having had, but for his own negligence, the last clear chance of avoiding the accident, thereby making the doctrine operative against him.

This point of proximate cause was very clearly brought out in a case decided by the New York Court of Appeals in 1933.[13] In that case the plaintiff's intestate, a helper on a truck moving north on one of the defendant's street railway tracks, jumped off and ran between the tracks, on the left side of the truck. His purpose in doing this was to examine the operation of the left rear wheel of the truck which continued moving at the rate of about ten miles per hour. While running along in this manner the deceased was struck and killed by one of the defendant's trolley cars, which approached on the southbound track. At no time was the deceased more than a few feet in front of the rear end of the truck so that a step would have placed him out of danger. He could have easily seen the approaching car, and, no doubt, the motorman must have seen him. In this action to recover for his death the Court held that the doctrine of "the last clear chance" was inapplicable. One of the reasons for this holding was that the plaintiff had failed to show that the defendant's negligence was the sole proximate cause of the injury, or that his negligence was subsequent to that of the deceased, but, rather, that the evidence showed that the deceased's own negligence, his

[11] French v. Grand Trunk R. Co., 76 Vt. 441, 447, 58 Atl. 722 (1904): "Where a traveller has reached a point where he cannot help himself and vigilance on his part will not avert the injury, this negligence in reaching that position becomes the condition and not the proximate cause of the injury and will not preclude a recovery"; 45 CORPUS JURIS 989, §540.

[12] EDGAR, OUTLINE OF THE LAW OF TORTS (2d ed. 1933) 139, §158.

[13] Panarese v. Union Ry. Co., 261 N. Y. 233, 185 N. E. 84 (1933).

failure to discover his own peril and step aside to avoid the accident, continued up to the very moment of the collision and was concurrent with that of the defendant and a proximate cause of the injury.

Another important prerequisite brought out by this case, which must be present before the doctrine of "the last clear chance" will apply, is knowledge on the part of the defendant of the present peril of the plaintiff. There can be no recovery where the plaintiff exposes himself or his property to danger, and the defendant, exercising reasonable and ordinary care, could not become aware of the peril in time to avoid the accident.[14] Nor, in those jurisdictions where recovery is limited to cases where there has been actual knowledge on the part of the defendant, can there be any recovery if the peril was not actually discovered in time to make an effort to avert the accident.[15]

The various jurisdictions are not in harmony on the question of whether or not the defendant must actually see the peril in which the plaintiff has placed himself. Some jurisdictions require actual knowledge,[16] while others are satisfied with imputed knowledge.[17] This theory of imputed knowledge is based on the thin and equivocal reasoning that the defendant, by the use of reasonable and ordinary

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[14] *Infra* notes 16 and 17.

[15] *Infra* note 16.

[16] Pennsylvania R. Co. v. Swartzel, *supra* note 10; Young v. Woodward Iron Co., 216 Ala. 330, 113 So. 223 (1927); Santa Fe, etc., R. Co. v. Ford, 10 Ariz. 201, 85 Pac. 1072 (1906); St. Louis, Southwestern R. Co. v. Cochran, 77 Ark. 398, 91 S. W. 747 (1906); Stark v. Pacific Elec. Co., 172 Cal. 277, 156 Pac. 51 (1916); Owens v. Wilmington & P. Tr. Co., 117 Atl. 454 (Super. Ct. Del. 1921); Western, etc., R. Co. v. Ferguson, 113 Ga. 708, 39 S. E. 306 (1901); Pilmer v. Boise Tr. Co., Ltd., 14 Idaho 327, 94 Pac. 432 (1908); Engle v. Cleveland, etc., R. Co., 197 Ind. 263, 149 N. E. 643 (1925); Williams v. Mason City & Ft. D. Ry. Co., 205 Iowa 446, 214 N. W. 692 (1927); Anderson v. Minneapolis, etc., R. Co., 103 Minn. 224, 114 N. W. 1123 (1908); Bragg v. Central N. E. Ry. Co., 228 N. Y. 54, 126 N. E. 253 (1920); Woloszynowski v. New York Cent. R. Co., 254 N. Y. 206, 172 N. E. 471 (1930); Panarese v. Union Ry. Co., *supra* note 13; Luebbering v. Whitaker, 101 Ohio St. 292, 128 N. E. 76 (1920); Shuck v. Davis, 110 Okla. 196, 237 Pac. 95 (1925); Morser v. Southern Pac. Co., 110 Ore. 9, 222 Pac. 736 (1924); Miller v. Sioux Falls Tr. Syst., 44 S. D. 405, 184 N. W. 233 (1921); Todd v. Cincinnati, etc., Ry. Co., 135 Tenn. 92, 185 S. W. 62 (1916); Missouri, etc., R. Co. v. Haltom, 95 Tex. 112, 65 S. W. 625 (1901).

[17] Freeman v. Schultz, 81 Colo. 535, 256 Pac. 631 (1927); Sacks v. Connecticut Co., 109 Conn. 221, 146 Atl. 494 (1929); Atherton v. Topeka Ry. Co., 107 Kan. 6, 190 Pac. 430 (1920); Ross v. Louisville Taxicab, etc., Co., 202 Ky. 828, 261 S. W. 590 (1924); Lampkin v. McCormick, 105 La. 418, 29 So. 952 (1901); Dyer v. Cumberland City Power & Light Co., 120 Me. 411, 115 Atl. 194 (1921); State v. Washington, etc., R. Co., 149 Md. 443, 131 Atl. 822 (1926); Halzle v. Hargraves, 233 Mich. 234, 206 N. W. 356 (1925); Fuller v. Illinois Cent. R. Co., 100 Miss. 705, 56 So. 783 (1911); Dougherty v. Omaha, etc., Ry. Co., 113 Neb. 356, 203 N. W. 538 (1925); Jenkins v. Southern R. Co., 196 N. C. 466, 146 S. E. 83 (1929); Roy v. United Elec. Rys. Co., 32 Utah 276, 90 Pac. 402 (1907); Trow v. Vermont R. Co., 24 Vt. 487 (1852); Meanley v. Petersburg, etc., R. Co., 133 Va. 173, 112 S. E. 800 (1922); McKinney v. Port Townsend, etc., Ry. Co., 91 Wash. 387, 158 Pac. 107 (1916); Buchanan v. Norfolk, etc., R. Co., 102 W. Va. 426, 135 S. E. 384 (1926); Springett v. Ball, 4 F. & F. 472 (1865).

care, ought to have known of the plaintiff's peril in time to avoid the threatened harm. Plainly, this is an unwarranted extension of the doctrine of "the last clear chance," for the doctrine is based primarily on the conduct of the defendant after he becomes aware of the plaintiff's peril. To our minds this doctrine of imputed knowledge places an unfair burden on the defendant. It requires him to keep a lookout at all times for any negligent acts of the plaintiff which will place him in a position of danger and dispenses with the need of an ordinary lookout on the plaintiff's part. It pardons the plaintiff's failure to see the approach of the defendant, but fails to pardon the defendant's failure to see the plaintiff. It excuses the plaintiff's negligence at one point but fails to excuse the defendant's at the same point. It becomes a very flagrant violation to the almost universally accepted doctrine of contributory negligence and paves the way for the acceptance of the doctrine of comparative negligence. It allows the plaintiff to recover for the results of his own wrong and penalizes the defendant for the commission of the same wrong. Plainly, this doctrine of imputed knowledge places upon the shoulders of the defendant a duty not equally borne by the plaintiff.

As already stated, the jurisdictions are not in harmony upon this point and seem evenly divided. An actual count of the courts of the United States, however, indicates that a bare majority of them require actual knowledge. This is also the rule followed by the federal courts.[18]

For quite some time there seemed to be some confusion as to whether or not the courts of New York required actual knowledge or were satisfied with imputed knowledge. In fact, Corpus Juris[19] lists New York as one of the states which require imputed knowledge only. To support this it cites two Appellate Division cases, and one former Supreme Court case.[20] But a close examination of these cases shows that in one the Court's apparent approval of imputed knowledge is *obiter dictum*,[21] and the other two cases seem to extend the doctrine to the omission of a duty, the performance of which would have disclosed the danger, if such omission amounts to gross negligence or an intentional mischief.[22] The confusion arose from the fact that some of the earlier cases seemed to limit that application of the doctrine of "the last clear chance" to cases of the omission of due care on the defendant's part after discovering the plaintiff's

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[18] Pennsylvania R. Co. v. Swartzel, *supra* note 10; Wheelock v. Clay, 13 F. (2d) 972 (C. C. A. 8th, 1926); Kinney v. Chicago, Great Western R. Co., 17 F. (2d) 708 (C. C. A. 8th, 1927).

[19] 45 CORPUS JURIS 984.

[20] Green v. Erie R. Co., 11 Hun 333 (N. Y. 1877); Weitzman v. Nassau Electric R. Co., 33 App. Div. 585, 53 N. Y. Supp. 905 (2d Dept. 1898); Mapes v. Union R. Co., 56 App. Div. 508, 67 N. Y. Supp. 358 (2d Dept. 1900).

[21] Weitzman v. Nassau Elec. R. Co., *supra* note 20.

[22] Green v. Erie R. Co.; Mapes v. Union R. Co., both *supra* note 20.

peril,[23] while others stated the doctrine in terms broad enough to cover any omission of duty on the defendant's part intervening after the plaintiff's negligence.[24] But, in later years, the Court has in no uncertain terms declared that the defendant must actually see the plaintiff's peril.[25] In the case mentioned above, the Court said: "The doctrine of 'the last clear chance' is predicated upon the knowledge of the *peril* being brought home as an actual fact to the person charged with the subsequent negligence. It is not sufficient to prove that the defendant ought to have discovered or should have discovered the deceased's perilous situation by the exercise of reasonable and ordinary care. It is what the defendant did or failed to do after acquiring knowledge of the peril that constitutes the breach of duty." [26]

The peril when discovered, or discoverable, which will impose upon the defendant the duty of exercising care to avoid the injury, must be an actual one, or one from which injury is apt to result.[27] Knowledge that one is in a position which might become perilous is not enough. If there is nothing in the situation which would indicate to a reasonable person that the party injured either could not or would not avail himself of the opportunity of escape, there can be no recovery. But where the threatened injury is so imminent and apparent that a reasonable person would infer that harm will result unless something is done to change the conduct or positions of the parties, then the doctrine is applicable. This part of the rule is so clear and reasonable that it requires neither explanation nor defense. We all recognize it by our everyday conduct. For example, when we are driving a car we naturally suppose that the people who are crossing the street at the intersection ahead of us have noticed our approach and will cross before our arrival or stop and let us go by. But if we should see one of these pedestrians fall and see that he is unable to extricate himself from his perilous position, or if we should see one in our path who is undoubtedly unaware of our approach, we ourselves then use whatever care is necessary to avoid the injury. Countless other examples could be added, but this will suffice to illustrate

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[23] Sweeney v. New York Steam Co., 117 N. Y. 642, 22 N. E. 1131 (1889); Brooks v. Buffalo & N. F. R. Co., 25 Barb. 600 (N. Y. 1854).

[24] Auston v. N. J. S. B. Co., 43 N. Y. 75 (1870); Satterly v. Hallock, 5 Hun 178 (N. Y. 1875).

[25] Bragg v. Central New Eng. Ry. Co., *supra* note 16 (Where one at fault or without fault finds another in peril by his own or without his own fault, he must use such active means as his ability permits to prevent injury); Woloszynowski v. N. Y. Cent. R. Co., *supra* note 16 (Doctrine of last clear chance does not apply unless defendant knew injured party was in peril, requiring reasonable effort to counteract the peril); Frazier v. Reinman, 256 N. Y. 626, 177 N. E. 168 (1932) (Last clear chance doctrine had no application where defendant had no notice of plaintiff's presence or danger in time to avert the accident); Panarese v. Union Ry. Co., *supra* note 13; Storr v. New York Cent. R. Co., 261 N. Y. 348, 185 N. E. 407 (1933).

[26] Panarese v. Union Ry. Co., *supra* note 13, at 236.

[27] Iowa Cent. R. Co. v. Walker, 203 Fed. 685 (C. C. A. 8th, 1913).

the wisdom or common sense of the rule. Thus, in the trolley-car case,[28] the Court would not say that the peril of the deceased was brought home to the motorman, but said, rather, that the motorman, as a reasonable person, would expect that the man running toward him would stop, let the truck go by, and then step behind it out of all danger.

We now come to the question of the degree of care the defendant must use after he discovers or, as some jurisdictions hold, should have discovered, the plaintiff's peril. The courts are unanimous in their opinion that there can be no recovery if he, the defendant, did what an ordinary prudent person would have done under similar circumstances. The defendant is never required to use all the means in his power, for he would then be required to use the highest degree of care and prudence in a moment of peril, and the court neither expects nor requires this from any man. Nor is the defendant's own impression of what is best under the circumstances a true measure of the care necessary. Nor is the court permitted to go back and review the situation in retrospect and decide that the outcome would have been better if the defendant had done something else or refrained from doing something, and then hold the defendant liable for his failure to so act. In making his choice the defendant need not use the best judgment. It is sufficient if he acts as a reasonable man would act under the circumstances.

The doctrine of "the last clear chance" gives rise to another point of contention upon which the jurisdictions are not in accord. Assuming that the plaintiff is negligent and that the defendant's negligence lies, not in any subsequent act to that of the plaintiff's, but in his own previous negligence, either in the equipment of mechanical safeguards or in the management of the machine, so that he was unable to avoid the injury, will the plaintiff be allowed to recover? It has been held, in a minority of jurisdictions, that the doctrine does apply and a recovery will be allowed,[29] while it is denied by the majority "where the pre-existing cause is not susceptible of being removed after the discovery of the danger and before the injury is done." [30] It is quite apparent that the latter or the majority

[28] Panarese v. Union R. Co., *supra* note 13.

[29] Neary v. Northern Pac. R. Co., 41 Mont. 48, 110 So. 226 (1926); Perry v. Rochester R. Co., 7 App. Div. 595, 40 N. Y. Supp. 132 (4th Dept. 1896), *aff'd*, 154 N. Y. 330 mem., 49 N. E. 1101; Thompson v. Salt Lake Rapid Tr. Co., 16 Utah 281, 52 Pac. 92 (1898); British Columbia Elec. R. Co., Ltd. v. Loach, 1 A. C. 719, 23 Dom. L. R. 4 (1916) (A person crossing a grade crossing without looking for approaching car was hit and killed. Car was running at excessive speed. Could have stopped in time if brake was in proper order. Railway company held liable).

[30] Atchison, etc., R. Co. v. Taylor, 196 Fed. 878 (C. C. A. 8th, 1912); Pennsylvania R. Co. v. Bell Concrete, etc., Co., Inc., 153 Md. 19, 137 Atl. 503 (1927); Gaben v. Quincy O. & K. R. Co., 206 Mo. App. 5, 226 S. W. 131 (1920); Johnson v. Director Gen. of R. R.'s, 81 N. H. 289, 125 Atl. 147 (1924); Johnson v. Grand Trunk, Western R. R., 246 Mich. 52, 224 N. W. 448 (1929). See also 32 COL. L. REV. 499.

opinion is the true application of the doctrine of "the last clear chance," while the minority rule only stretches and distorts the doctrine to cover a bad situation, for, as we have stated before, the doctrine is predicated on the defendant's action after he discovers the peril and not upon his previous negligence.

We now come to the last difficulty in the application of the doctrine. Let us assume that the plaintiff is negligent and his negligence has placed him in a perilous position. Let us further assume that, through the exercise of ordinary care, he could extricate himself from this position, but, being unaware of the peril, he fails to do so. Should he be allowed to recover? The majority opinion holds that a recovery may be had in such a case,[31] although there is authority to the contrary.[32] The rule that seems to us to be the most logical and fair is that laid down by the courts in the state of Connecticut.[33] There the Court holds that if the plaintiff remains passive and does nothing material to change the situation of exposure, a recovery will be permitted. But if the plaintiff, after exposing himself to the peril, remains active in producing the conditions under which he received the injury until it is too late for the defendant to avoid the accident, no recovery will be allowed. Under the first set of conditions, if the defendant sees the plaintiff, he will know that the plaintiff is unaware of his own peril. But, under the second set, this knowledge is very problematical and uncertain, for an ordinary person would naturally surmise that one who continues active is aware of his own position and will not continue to pitch himself headlong in the way of danger. A close study of the New York case outlined above will show an indication on the part of the New York court to approve of this Washington rule, for in that case the deceased undoubtedly remained unaware of his own peril up to the very moment of the accident, but his conduct was active, and so recovery was denied. The Court said: "How could any jury tell, from the evidence in this case, when the motorman, or at what place the motorman, discovered the peril of

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[31] Seaboard Air Line R. Co. v. Laney, 199 Ala. 654, 75 So. 15 (1917); Darling v. Pac. Elec. R. Co., 197 Cal. 702, 242 Pac. 703 (1925); Colorado Springs, etc., R. Co. v. Merrill, 27 Colo. App. 382, 149 Pac. 843 (1915); Standard Oil Co. v. McDaniel, 280 Fed. 993 (D. C. App. 1922); Southern R. Co. v. Wahl, 196 Ind. 581, 149 N. E. 72 (1925); Bourrett v. Chicago, etc., R. Co., *supra* note 8; Tempfer v. Joplin & P. R. Co., 89 Kan. 374, 131 Pac. 592 (1913); Black v. New York, etc., R. Co., 197 Mass. 448, 79 N. E. 797 (1906); Banks v. Morris, 302 Mo. 254, 257 S. W. 482 (1924); Cavanaugh v. Boston, etc., R. Co., 76 N. H. 68, 79 Atl. 694 (1911); Acton v. Fargo, etc., R. Co., 20 N. D. 434, 129 N. W. 225 (1910); Atchison, etc., R. Co. v. Baker, 21 Okla. 51, 95 Pac. 433 (1908); St. Louis, Southwestern R. Co. v. Cochran, 62 Tex. Civ. App. 465, 131 S. W. 1130 (1910); Chesapeake, etc., R. Co. v. Corbin, 110 Va. 700, 67 S. E. 179 (1910); Locke v. Puget Sound, etc., R. Co., 100 Wash. 432, 171 Pac. 242 (1918).

[32] Castile v. O'Keefe, 138 La. 439, 70 So. 481 (1916); Harrison v. Louisiana, Western R. Co., 132 La. 761, 61 So. 782 (1913); Drown v. Northern Ohio Tr. Co., 76 Ohio St. 234, 81 N. E. 326 (1907).

[33] Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301 (1912).

Panarese? He was running towards the car, between the up-and-down railroad tracks, alongside of a truck and only a few feet from the rear of it. If he had stopped for an instant the truck would have passed him and he could have stepped behind it out of all danger. The motorman would naturally suppose that the man running in the street toward him would do this thing. He would have no reason to suppose that another would deliberately commit suicide and run into his car without avoiding it or getting out of the way when it was possible for him to do so." [34]

To review, therefore, the necessary elements of the doctrine of "the last clear chance" we find from the case in question and an examination of the authorities that four elements must at all times be present before the doctrine is applicable: First, both parties must have been negligent; second, that the defendant failed to use ordinary care to avoid the accident; third, that his failure to use reasonable care was the proximate cause of the injury; fourth, that the knowledge of the plaintiff's peril, either actual or imputed, was brought home to the defendant. Many of the courts hold that imputed knowledge is sufficient, while the federal courts, the New York courts, and the majority of jurisdictions hold that actual knowledge is essential.

HAROLD V. DIXON.

VALIDITY OF TRUSTS INTER VIVOS OF PERSONAL PROPERTY.

Do the laws of the situs of the property or the domicile of the settlor govern the validity of a trust *inter vivos* of personal property? The Courts have persistently avoided a definite decision on that question.

In a recent case [1] the question was squarely presented to the Court. After discussing cases pro and con, the Court, in the writer's opinion, avoided the issue and decided the case on other grounds. The Canadian Trustee in bankruptcy of John K. L. Ross, a resident of Canada, as plaintiff, instituted an action against the trustee and beneficiaries under a trust agreement created by the bankrupt, John K. L. Ross. The action sought to set aside the trust agreement as void *ab initio*. In 1902, in Quebec, John K. L. Ross entered into an antenuptial agreement with his intended wife, wherein each agreed to keep their separate estates and provided for a settlement of $125,000. by the husband upon the wife and children. Under the laws of Quebec [2] the parties are prohibited from thereafter modify-

[34] Panarese v. Union R. Co., *supra* note 13, at 237.

[1] Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65 (1933).

[2] CIVIL CODE OF QUEBEC, art. 1265. "After marriage, the marriage covenants contained in the contract cannot be altered * * * nor can the consorts in any other manner confer benefits *inter vivos* upon each other * * *."