

TORTS—NECESSITY OF PLEADING OBLIVIOUSNESS UNDER HUMANITARIAN DOCTRINE—[Missouri].—If a man is *in* a position of peril, obliviousness need not be separably proved, and no instruction is necessary. Suppose he is merely *approaching* a position of peril. Is obliviousness then so essential to the condition of "imminent peril" that the defendant is entitled to an instruction requiring the jury to find obliviousness? The Supreme Court of Missouri, in *Perkins v. Terminal R. R. Assoc. of St. Louis*,¹ has answered this question in the negative, by refusing the defendant an instruction of this nature. The instruction given by the court authorized a verdict for the plaintiff merely upon a finding that he was *approaching* a position of "imminent peril."

Previous to this case, the law in Missouri was apparently well settled that in order to rely on the humanitarian doctrine,² when the case depended upon obliviousness, the plaintiff must establish (1) that the defendant saw or knew, or by the exercise of ordinary care could have seen or known plaintiff's peril; and (2) that defendant saw or knew, or by the exercise of ordinary care could have seen or known that plaintiff was oblivious of that peril.³ The plaintiff could never make out a case under this doctrine (unless he was in an inextricable position) without proving these two constituent elements of liability.

In the case of *Pentecost v. St. Louis Merchants' Bridge Terminal R. R. Co.*,⁴ the court sustained a demurrer to the evidence where the plaintiff was not oblivious of the approach of the train. They said that in the absence of obliviousness, the defendant was not negligent, under the humanitarian rule, even for its failure to sound the whistle. The majority opinion of the *Perkins* case says the *Pentecost* case is not in point because it involved a demurrer to the evidence, while the *Perkins* case involves the propriety of an instruction. In other words, the majority judges do not deny the necessity of obliviousness, but distinguish the two cases for technical reasons.

The requirement that the plaintiff be oblivious of his peril (or be unable to extricate himself) was adopted by the courts because they felt that the law should not go so far as to excuse a plaintiff's contributory negligence when he knew of his peril and could have escaped, but nevertheless permitted the defendant negligently to injure him.⁵ Judge Graves in *Lawn v.*

1. 102 S. W. (2d) 915 (Mo. 1937).

2. For a discussion of the humanitarian doctrine in Missouri see Gaines, *The Humanitarian Doctrine in Missouri* (1935) 20 ST. LOUIS LAW REVIEW 113, 120; Otis, *The Humanitarian Doctrine* (1912) 46 Am. Law Review 381; Clark, *Tort Liability for Negligence in Missouri* (1916) 12 Mo. Law Bull. 3, 34; note 92 A. L. R. 47; 45 C. J. Negligence (1928) 984-995, secs. 539-545.

3. State ex rel. Lusk v. Ellison, 271 Mo. 463, 196 S. W. 1088 (1917); Rashall v. Railroad, 249 Mo. 509, 155 S. W. 426 (1913); Gabal v. Railroad, 251 Mo. 257, 158 S. W. 12 (1913). While these particular cases relate to section hands, and while liability as to a section hand does not apply until he is actually seen in imminent peril and oblivion, yet the principle is the same.

4. 66 S. W. (2d) 533 (1933).

5. Kinlen v. Met. St. Ry. Co., 216 Mo. 145, 164, 115 S. W. 523 (1909); Pope v. Wabash R. R. Co., 242 Mo. 232, 239, 146 S. W. 790 (1912); Reeves v. K. C., St. Louis & Chi. R. R. Co., 251 Mo. 169, 177, 158 S. W. 2 (1913);

St. Louis, S. F. R. R. Co.,⁶ said that the plaintiff "has no right to race with death that way."

The leading case on the subject in Missouri is *Banks v. Morris & Co.*⁷ The prevailing opinion in the *Perkins* case cites the *Banks* case as authority for the proposition that obliviousness is not essential. Actually, the *Banks* case only held that it is not necessary for the plaintiff to *plead* obliviousness. It was admitted in that case⁸ that if obliviousness is the cause of the imminent peril, it is necessary for the plaintiff to *prove* his obliviousness. This holding is based on the common knowledge that a normal person is not in imminent peril, practically, so long as he can escape. If interpreted otherwise, the *Banks* case would be a precedent for a rule permitting plaintiff's recovery, whatever the cause of his peril, be it even his own sheer recklessness. The same judge who wrote the *Banks* case opinion, also wrote *Clark v. Atchison, T. & S. F. Ry. Co.*, wherein it is said: "If Clark saw the train coming or knew that it was coming, he was not in a position of peril."⁹

Judge Ellison, in his dissenting opinion in the *Perkins* case,¹⁰ upholds the defendant's contention that the instruction should have required the jury to find the respondent was oblivious; for otherwise the law would exact absolutely nothing of the plaintiff. Judge Gantt¹¹ in a separate dissenting opinion says that the plaintiff could not have been *approaching* a position of imminent peril at the time of the collision. Neither could he have been *approaching* imminent peril and *in* imminent peril at the same time. "If the instruction means anything it conveys the idea that the appellant owed him a duty while he was approaching imminent peril, and that is not the law even under the *Banks* case."

Much can be said for Judge Ellison's dissent. There are no degrees of imminent peril under the humanitarian doctrine.¹² The plaintiff is either in peril or he is not. The zone of peril may be enlarged by plaintiff's obliviousness, but that only means he is *in* a position of imminent peril sooner.

It is illogical to ask the jury to find whether the plaintiff was *approaching* imminent peril, and oblivious at the same time. The sole issue should be whether the plaintiff was *in* actual or apparent imminent peril, and the defendant knew or should have known it in time to save him.

It is submitted that the courts in this state have already gone too far with the humanitarian doctrine, and ought not to go still farther. This case extends the doctrine by holding a defendant liable merely because he

State ex rel. *St. Louis, S. F. R. R. Co. v. Reynolds*, 289 Mo. 479, 492, 233 S. W. 219 (1921); *Alexander v. St. Louis, S. F. R. R. Co.*, 289 Mo. 599, 618, 233 S. W. 44 (1921); *Butler v. United Rys. Co.*, 293 Mo. 259, 238 S. W. 1077 (1922).

6. 216 Mo. 563, 580, 116 S. W. 553 (1909).

7. 302 Mo. 254, 268, 257 S. W. 482 (1924).

8. *Ibid.*

9. 6 S. W. (2d) 954, 960 (Mo. 1928).

10. *Perkins v. Terminal R. R. Assoc. of St. Louis*, 102 S. W. (2d) 915 (Mo. 1937).

11. *Ibid.*

12. Gaines, *The Humanitarian Doctrine in Missouri* (1935) 20 ST. LOUIS LAW REVIEW 113.

ought to have seen the plaintiff *approaching* a position of imminent peril, and regardless of whether plaintiff was oblivious. If carried to the extreme, the practical effect of this ruling will be to force the trains to "stop, look and listen" for approaching autos.

A. K. S.

UNFAIR COMPETITION—RECOGNITION OF PROPERTY RIGHT IN IDEAS AND METHODS—[Federal].—The plaintiff had originated the advertising plan "Bank Night," and had expended money and effort in its promotion, deriving profit by licensing its use.¹ The defendant was engaged in licensing a similar scheme. The plaintiff sued to restrain defendant from unfair competition in appropriating its alleged property right in the system. The bill was dismissed on the grounds that to sustain the bill would result in a monopoly and that plaintiff's property right in the system was lost when disclosed to the public.²

The courts have found the extent of protection to be accorded this type of business scheme an extremely perplexing problem.³ While recognition of property rights in economically valuable ideas and methods has frequently been sought, courts have been reluctant to extend such recognition.⁴ The early common law was in conflict as to property in purely intellectual creations.⁵ However a "reduction to practice"⁶ of an idea is apparently

1. The plaintiff licensed or vended the plan to commercial establishments, especially motion picture theatres. The plan involved the award of a prize at stated periods to the patron or person whose name was drawn from a receptacle in which the names or serial numbers of all patrons or registered persons were contained. The lower court's dismissal of the bill on the ground that the plan was a gambling transaction was held erroneous on this appeal. This comment is not concerned with the legality of the system. See comment, 22 WASHINGTON U. LAW QUARTERLY 126 (1936).

2. *Affiliated Enterprises, Inc., v. Truber et al.*, 86 F. (2d) 958 (C. C. A. 1, 1936). The plaintiff also alleged infringement of its copyrights on its instructions and publications. The allegations of infringement were held insufficient.

3. *Handler, Unfair Competition* (1936) 21 Iowa L. Rev. 175, 190; note 47 Harv. L. Rev. 1419 (1934).

4. *Globe Wernick Co. v. Fred Macey Co.*, 119 Fed. 696 (C. C. A. 6, 1902) (system of sectional bookcases); *Einstadt Mfg. Co. v. J. M. Fisher Co.*, 232 Fed. 957 (D. C. D. R. I., 1916), *aff'd* 241 Fed. 241 (C. C. A. 1, 1917) (bracelet to be built by purchase of individual links); *Harvey Hubbell, Inc., v. General Electric Co.*, 262 Fed. 155 (D. C. S. D. N. Y., 1919) (interchangeable electric sockets); *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed. 401 (C. C. W. D. Mich., 1908) (manufacturing methods).

5. Compare Lord Mansfield's holding in *Millar v. Taylor*, 4 Burr. 2303, 2311, 98 Eng. Rep. 201, 253 (1769) with Lord Brougham's opinion in *Jeffery v. Boosey*, 4 H. L. Cas. 814, 965, 10 Eng. Rep. 681, 740 (1854). See also Rogers, A Chapter in the History of Literary Property (1911) 5 Ill. L. Rev. 550.

6. A "reduction to practice" involves the employing of the abstraction in a definite concrete form as a source of profit in business. Note, 47 Harv. L. Rev. 1419 (1934); note, 42 Harv. L. Rev. 253 (1929).