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Doctrine of Discovered Peril

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The Indiana legislature has in substance adopted the Uniform Conditional Sales Law.[3] Specific provision is made for recording conditional sales contracts, and it is further provided that the reservation of title to goods affixed to realty, conditionally sold, is void as against subsequent purchasers and mortgagees without notice even though such goods might be removed without injury to the freehold, *unless* the contract is properly recorded as provided by law. It follows that where the conditional seller of goods subsequently affixed to a freehold fails to record his contract, he has virtually no rights whatsoever as against subsequent purchasers and mortgagees. The importance to the conditional seller of properly recording his contract is, then, readily apparent. Unfortunately, owing to the recent enactment of this law, few if any cases have yet arisen in Indiana which are clearly in point.

Taking as a hypothetical case a situation in which a furnace is installed by a conditional seller, and further assuming the bankruptcy of the buyer and foreclosure by a subsequent real mortgagee, it is inescapable that the conditional seller's reservation of title under an unrecorded contract would be invalid as against a subsequent mortgagee, and that he in no way could replevy the furnace, even though its removal would occasion little or no injury to the freehold. If, however, the conditional seller would have filed at the county courthouse a copy of his conditional sales agreement, in accordance with the statute, he probably would be permitted to repossess the furnace, provided its removal would not involve material injury to the freehold. Of course, as a matter of practical application, if the conditional seller were to physically retake his property before the real mortgagee could effectively enjoin him from so doing, it is doubtful whether the latter could recover from the former in a court action, irrespective of whether the agreement was recorded or not.

David S. Landis

THE DOCTRINE OF DISCOVERED PERIL.—At the beginning of the nineteenth century, the rule that a plaintiff in an action based on negligence is barred from recovery by his own negligence first found clear expression.[1] Early decisions (1798-1810) accepted this rule only where the plaintiff's negligence was later in point of time than the defendant's.[2] After 1810 the decisions in the courts of the King's Bench and Common Pleas paid no attention to the timing of the parties respective acts of negligence.

A new element then sifted into the decisions: the doctrine "of last clear chance." This rule—'tho not the phrase, is usually traced to the celebrated case of *Davies v. Mann*.[3] The decision holds that the negligence of the plaintiff in leaving his donkey on the highway so fettered

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3 Burns' Indiana Statutes Annotated, Title 58, Sect. 806.

1 8 Holdsworth, History of English Law, 459.

2 *Cruden v. Fentham*, 2 Esp. 865 (K. B. 1798), *Clay v. Wood*, 5 Esp. 44, (K. B. 1803), *Butterfield v. Forrester*, 11 East 60, (K. B. 1809) ; *Flower v. Adam*, 2 Taunt. 314.

3 Davies v. Mann, 10 M & W 546, (Ex. 1842).

as to prevent it from getting out of the way of the carriage of the defendant who negligently drove against it did not preclude recovery.... Parke, B. stated:

> "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to avoid mischief or danger to another."

A reading of the case shows that the court in no way intended to lay down the broad concept which has been accredited to it.

This doctrine of "last clear chance" abrogated the accepted rule of contributory negligence. The courts failed to realize that the rule is a limitation which inheres in the defense of contributory negligence itself —rather than one which avoids the effect of contributory negligence. The theory developed a new phase of proximate causation. Under it plaintiff can recover because his negligence is but a condition or remote cause of his injury while the defendant's negligence is the sole proximate cause.... Many courts have labeled this doctrine: "The last wrongdoer doctrine." The phrase is an apt one. New York, Oregon, Ohio and New Hampshire refer to it as the "Doctrine of Discovered Peril." Two landmark cases[4] announce the rule in my home jurisdiction of New York.

In the Woloszynowoski case, a young boy went upon the tracks of the defendant New York Central railroad, and stood there in the path of an approaching train. The boy was obviously negligent for he came on the tracks after the crossing-gate was lowered. From the evidence, he was seen first by the brakeman and fireman aboard the locomotive. They shouted a warning to the engineer who applied the brakes at once—but not soon enough: the boy was struck and killed. His parents maintained an action on the theory that in such an emergency the brakeman and fireman should have themselves jumped to the brake and stopped the train without losing the precious second to warn the engineer. Justice Cardozo dismissed the complaint stating that the incident would not waken into a cause of action: "unless there is brought home to the defendant to be charged with the liability, a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences." He suggested that such knowledge may be established by circumstantial evidence.

In the Scrogi case the plaintiff's truck stalled upon a railroad crossing maintained by the defendant. While Scrogi attempted to abandon his truck an oncoming train hit and killed him instantly. The court in an often cited opinion stated:

"The doctrine of "discovered peril"—sometimes known as: "subsequent negligence," permits a recovery by a plaintiff who, by his own lack of care, may have placed himself or his property in position of danger, provided there is proof of the knowledge of the plaintiff's peril by the defendant in time to avoid the injury occasioned, and a failure

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4 *Woloszynowoski v. New York Central R. R. Co.*, 254 N. Y. 206, (1930). 172 N. E. 471.

5 *Sprogi v. New York Central R. R. Co.*, 247 App. Div. 95, 286 N. Y. Supp. 215. (1936).

oy the defendant to use reasonable care to avoid such happening. It is not sufficient to establish that the defendant ought to have discovered, or, *should* have discovered the perilous situation by ordinary care."

The last two sentences distinguish the New York rule from numerous jurisdictions which construe a fictitious notice to the defendant if a reasonable man *would* have seen the peril of the plaintiff under similar circumstances. The Restatement of Torts also applies the rule of constructive notice. Section 479 states:

> "A plaintiff who has negligently subjected himself to risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm:
> (a) plaintiff is unable to avoid it by the exercise of reasonable care and vigilance, and,
> (b) defendant:
> (i) realizes the helpless peril.
> (ii) knows of the plaintiff's situation, and has reason to realize the peril involved.
> (iii) would have discovered the plaintiff's situation had he exercised vigilance.
> (c) thereafter is negligent in failing to utilize with reasonable care and diligence his then existing ability to avoid harming the plaintiff.

Please note section "b-111." New York State refuses to accept this portion of the Restatement. It must be conclusively proven that the defendant *actually* knew the situation the plaintiff was in, and, further, realized the situation to be perilous. If the defendant can prove what amounts to be anything less than willful injury under the circumstances, the plaintiff can not recover. The rule is not generally accepted in other jurisdictions. In spite of adverse criticism, New York holds tenaciously to the doctrine. The fact that Cardozo accepted it may be a strong influence. Only one case departs from it and develops a different theory. In *Wright v. Union Ry. Co.*,[7] the plaintiff intestate was killed by a street car operated by the defendant. The defendant was sitting at a place in the roadway where there was no cross-walk or any apparent reason for his presence. The court dismissed the complaint stating:

> "The negligence of a person who places himself in a position of peril and the negligence of one failing to see him may be described as "concurrent negligence." The doctrine of discovered peril makes one liable only for the willful negligence he performs, or because of failure or unwillingness to endeavor to avoid an accident where it might be avoided."

This new doctrine of "concurrent negligence" is seldom cited in the New York decisions.

Our general rule is nicely summed up in a recent law review:[8]

> "Under ordinary circumstances the plaintiff would be barred from recovery by his own negligence. Under this doctrine he may recover if certain facts are present. It must appear that the defendant knows the peril of the plaintiff. It must appear that the

6 Restatement of Torts: S 479.

7 229 N. Y. S. 162, 224 App. Div. 55.

8 Edward C. Jones: 15 S. Cal. L. R. 83.

plaintiff can not escape from this peril. Finally, it must be shown that the defendant had opportunity to avoid the accident had he acted with ordinary care, but he failed to so conduct himself and proximately caused the plaintiff's injury."

ILLUSTRATIONS OF THE RULE

One who negligently leaves a domestic animal on a highway may recover from one who, seeing it, does not use proper care to avoid running over it.[9]

If a vessel fails to exhibit proper lights and takes the improper side of the channel, there is no defense in favor of one, who having warning, fails to use proper care to avoid doing an injury.[10]

If a locomotive engineer sees persons or property on the tracks, 'tho unlawfully there, he must use ordinary care to avoid a collision.[11]

Where a pedestrian steps from behind an elevated pillar directly into the path of a south-bound truck, when the traffic lights are in favor of the north-south-bound traffic, and is thrown into the path of and run-over by a north-bound truck, the latter's owner cannot be liable under the doctrine.[12]

Where a boy jumps in front of a truck, and is thrown so that only his arm is caught under the truck, and the driver—aware of the situation, starts the truck and drives it over the boy's body killing him, the jury may find the truck-owner liable.[13]

The only other phase of the doctrine not previously mentioned here was well stated in *Paranese v. Union R. R.*[14]

"A plaintiff who sees the plaintiff in a perilous state may assume he will be careful and escape until something unusual about the situation indicates the contrary."

Hence, we have seen the doctrine of "Discovered Peril" in New York State. I have attempted to show it is a minority rule differing and distinct from the Restatement, clear in the cases—but criticized.

William B. Lawless

OIL AND GAS ROYALTIES.—Oil and natural gas from beneath the surface of the earth are usually regarded as minerals. In the case of *Kelly v. Ohio Oil Co.*,[1] the court identified oil, as follows: "Petroleum oil is a mineral and while it is in the earth it forms a part of realty, and when it reaches a well, and is produced on the surface, it becomes personal property, and belongs to the owner of the well." Because of their migratory and pugnacious nature, gas and oil are not property in the sense that materials in place are property, but, owing to their fluid character, they are subject to rules different from those applicable to other minerals, and are treated somewhat after the analogy of underground water. The Indiana court has held[2] that they are a part of land

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9 See fn. 3.

10 *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75.

11 *Bragg v. Central Ry. Co.*, 228 N. Y. 54, 126 N. E. 253. (1920).

12 *Dino v. Eastern Glass Co.*, 213 App. Div. 75, 246 N. Y. S. 306.

13 *Maranto v .Welzelberg*, 241 App. Div. 420, 272 N. Y. S. 710.

14 261 N. Y. 233, 185 N. E. 84 (1933).

1 57 Ohio St. 317, 49 N. E. 399, (1897).