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Torts—Contributory Negligence of Person Attempting to Save Property in Danger

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TORTS—CONTRIBUTORY NEGLIGENCE OF PERSON ATTEMPTING TO SAVE PROPERTY IN DANGER—[Missouri].—Plaintiff brought an action for personal injuries sustained when his automobile, which had stalled on a railroad crossing and which he was trying to remove from the track at the time, was struck by a train. The court held that the plaintiff was not excused from the consequences of contributory negligence in voluntarily exposing himself to known peril for the purpose of saving property.[1]

The rule in Missouri is well established that the object in "imminent peril" must be a human being if the plaintiff is to recover; imminent peril to property is not enough.[2] This case is in line with previous Missouri decisions,[3] which draw a distinction between an attempt to save human life[3a] and cases in which the effort was to save property. In the former situation recovery is allowed as the contributory negligence is excusable, but in the latter case the person injured must suffer the consequences of his act.[4]

The Missouri view is in conflict with the *Restatement of the Law of Torts*,[5] the view there taken being that it is not contributory negligence for a plaintiff to expose himself to save lands or chattel from harm, and that such an act of the plaintiff is one that the defendant should have foreseen. A reasonably prudent man would realize that any normal individual would try to protect his own or his neighbor's possessions from injuries.[6] This view is also adhered to by the federal courts.[7]

The adjudication of the problem involved in the instant case has resulted in conflicting decisions in the contiguous area. Arkansas and Illinois adopt the liberal view, *viz.*, that an attempt to save property excuses one of contributory negligence.[8] The courts of Illinois go so far as to hold that

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1. Gwaltney v. Kansas City Southern Railroad Co., 96 S. W. (2d) 357 (Mo., 1936).
2. Eversole v. Wabash Railroad Co., 249 Mo. 523, l. c. 541, 155 S. W. 419 (1913).
3. Eversole v. Wabash Railroad Co., 249 Mo. 523, 155 S. W. 419 (1913); McManamee v. Mo. Pacific Ry. Co., 135 Mo. 440, 37 S. W. 119 (1896); Hill v. Cotton Oil Co., 202 Mo. App. 478, 214 S. W. 419 (1919); Logan v. Wabash Ry. Co., 96 Mo. App. 461, 70 S. W. 734 (1902); Hill v. Cotton Oil Co., 202 Mo. App. 478, 214 S. W. 419 (1919), dictum in case may be distinguished on bases of a duty owed by a servant.

3a. The federal courts and the *Restatement* also adopt the rule that it is not contributory negligence for a person to rescue another whose life is in danger. Henry v. Cleveland, C., C. and St. L. R. R. Co., 67 Fed. 426 (C. C., Ill., 1895): Restatement, *Torts* (1934) sec. 472.

4. Supra, note 2; Kleiber v. Railway Co., 107 Mo. 241, l. c. 247, 17 S. W. 946, 14 L. R. A. 613 (1891); Underwood v. Railway, 190 Mo. App. 407, 177 S. W. 724 (1915); Doody v. California Woolen Mills Co., 216 S. W. 531 (1919); cf. Hall v. Huber, 61 Mo. App. 384 (1895), this case can be distinguished as life was actually involved.
5. Restatement, *Torts* (1934) sec. 472.
6. *Ibid.*
7. Henry v. Cleveland, C., C. & St. L. R. R. Co., 67 Fed. 426 (C. C., Ill., 1895); See Pike v. Grand Trunk Ry. Co., 39 Fed. 255 (C. C., N. H., 1889), in this case there is dictum to the effect that if the plaintiff is injured in attempt to save property there might be a recovery.
8. Ill. Central Railroad Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819 (1907); Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32

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a plaintiff can recover where he is injured in an attempt to retrieve a customer's hat.[9] Kansas is in line with Missouri applying the stricter rule.[10] No cases have been found on this point in Oklahoma or Kentucky.[11]

The liberal view seems to be the majority view throughout the country.[12]

O. J. G.

WITNESSES—HUSBAND AND WIFE—EXTENT OF CONFIDENTIAL COMMUNICATIONS—[Missouri].—In an action to recover damages for personal injuries alleged to have been received by the plaintiff from being hit by a truck belonging to defendant, the trial court excluded testimony of the plaintiff's husband offered by defendant, in contradiction of plaintiff on the trial, and tending to show that she was contemplating making her case by perjured testimony. *Held;* That any spouse, while the relation of marriage exists, or subsequently, shall not be permitted to testify as to any admissions or statements, or confidential communications of the other spouse made to him or her; although our statutes, from time to time, have largely abolished the common law and reconstructed the rule relating to similar evidence upon modern lines. *Dickinson v. Abernathy Furniture Co.*[1]

It would seem that under the particular facts of the case the same decision would have been reached by all jurisdictions. The case is important, however, because it upholds the comprehensive Missouri rule: *That any communications between husband and wife made in the absence of third persons are incompetent and must be excluded.* In the body of the opinion the court states, "There are no restrictions imposed upon the conversation in the relationship of husband and wife, and no exceptions spring therefrom."[2] This is the Missouri rule, both under the statutory provision[3] and under case holdings.[4]

From time to time, however, Missouri courts have been forced to admit such evidence in a particular case. The original rule has always been sus-

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N. E. 285 (1892); Contra, Missouri case on exact same factual set up, Logan v. Wabash R. R. Co., 96 Mo. App. 461, 70 S. W. 734 (1902); St. Louis I. M. & S. Ry. Co. v. Morgan, 115 Ark. 529, 171 S. W. 1187 (1914); Idem, 115 Ark. 602, 174 S. W. 546 (1915).

9. Lamparter v. Wallbaum, 45 Ill. 444, 92 Am. Dec. 225 (1867).

10. Condiff v. Kansas City Ft. S. & G. R. Co., 45 Kan. 256, 25 Pac. 562 (1891).

11. Dictum in the case of Mohan Jellico Coal Co. v. Bird, 167 Ky. 697, l. c. 702, 181 S. W. 339 (1916) indicates that the strict rule would be applied if such a case arose.

12. McKay v. Alantic Coast Line R. R. Co., 160 N. C. 260, 75 S. E. 1081 (1912); Davis v. Savannah Lumber Co., 11 Ga. App. 610, 75 S. E. 986 (1912); Finnigan v. Biehl, 61 N. Y. Supp. 1116 (1899); Thompson v. Seaboard Air Liner Ry., 81 S. C. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426 (1908); Temple Electric Light Co. v. Halliburton, 136 S. W. 584 (Tex. 1911); 45 C. J. 968; 3 Cooley, *On Torts* (1932) sec. 487.

1. 96 S. W. (2d) 1086 (Mo. App., 1936).

2. 96 S. W. (2d) 1086, 1094.

3. R. S. Mo. 1929, sec. 1728.

4. Moore v. Moore, 51 Mo. 118 (1872); Berlin v. Berlin, 52 Mo. 151 (1873); Miller v. Miller, 14 Mo. App. 418 (1883); Ayers v. Ayers, 28 Mo. App. 97 (1887).

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