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TORTS-LAST CLEAR CHANCE DOCTRINE-POSITION OF PERIL

TORTS—LAST CLEAR CHANCE DOCTRINE—POSITION OF PERIL.—The trial court refused to give an instruction to the effect that "if the jury believed that the decedent, by her own negligence, had placed herself in a position of peril, and the defendant saw and realized her condition in time to avoid the accident by the exercise of ordinary care, but failed to do so, the defendant was solely responsible for her death." *Held,* that the instruction was rightly refused. *Sadler v. Benson* (Cal. App. 1930) 293 Pac. 126.

There are surprisingly few cases involving the last clear chance doctrine in which an attempt is made to define a "position of peril." This court defines it as a position from which, exercising ordinary care, the plaintiff could not extricate herself. In accord with this position are *Muir v. Fleming,* 116 Kan. 551, 227 Pac. 536; *McManus v. Seaboard Air Line Ry.,* 174 N. C. 735, 94 S.E. 455. Some courts would add "or is oblivious to her peril," *Palmer v. Tschudy,* 191 Cal. 696, 218 Pac. 36; *McIntyre v. N. P. Ry. Co.,* 56 Mont. 43, 180 Pac. 971; "or apparently will not avail herself of an opportunity to escape," *Fine v. Connecticut Co.,* 92 Conn. 626, 103 Atl. 901; this later phrase is often restricted by applying it to a plaintiff who was not aware of a possible escape, *Ilardi v. Cent. Cal. Traction Co.,* 36 Cal. App. 488, 172 Pac. 763. Whatever definition be given, it is apparent that, in legal contemplation, the position is one involving something more than a bare possibility of injury. *State ex rel. Vulgamott v. Trimble,* 300 Mo. 92, 253 S.W. 1014. And yet it is extremely likely that the average juror's conception of a "position of peril" would be just that—one in which there is a possibility that injury will occur. It seems clear that the phrase asked by the plaintiff in the instant case does not, by itself, properly indicate the situation in which the plaintiff must be found in order to make the defendant liable under the doctrine.