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Negligence -- Automobiles -- Duty of Guest

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elements,[11] without them the marriage is voidable,[12] unless it is ratified by consummation.[13]

The cases preponderate in favor of annulment of marriages contracted in jest.[14] Social policy dictates that a contract of such importance to the race shall not be unintentionally assumed. Where it appears that the parties never had the intention of fulfilling the obligations of the contract, it would seem to be more just to both the state and to the parties to restore them to *statu quo*.

C. E. REITZEL.

Negligence—Automobiles—Duty of Guest

Two actions (consolidated by consent) were brought against the owner of an automobile and his wife, who was driving, to recover damages for personal injuries sustained by a guest, and caused by the alleged negligence of the driver while operating the car. Judgment against the wife was sustained, the court holding that the owner was relieved of any liability by the finding of the jury that his wife was not operating the car as his agent. Testimony of caution by the guest to the driver was held competent on the question of the driver's negligence.[1]

The above statement of the owner's liability raises serious doubt in view of the court's previous adoption of the "family purpose" doctrine.[2] There is no indication that the court is overruling the previous holding of modifying the doctrine, although the language would seem to restore the owner's liability to an agency basis.[3]

The testimony as to the warning is admissible either to show a compliance with the guest's duty to warn, if any,[4] or as evidence tending to show negligence on the part of the driver.[5] Such a state-

[11] Crouch v. Wartenberg, *supra* note 9.
[12] McClurg v. Terry, *supra* note 10; Hall v. Hall, 24 Times L. R. 756 (1908).
[13] Brooke v. Brooke, 60 Md. 524 (1883); Macri v. Macri, 164 N. Y. Supp. 112, 177 App. Div. 292 (1917); Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28 (1917); Martin v. Otis, 233 Mass. 491, 124 N. E. 294 (1919); Americus Co. v. Coleman, 16 Ga. App. 17, 84 S. E. 493 (1915).
[14] Note (1921) 11 A. L. R. 215.
[1] Teasley *et al.* v. Burwell *et al.*, 199 N. C. 18, 153 S. E. 607 (1930).
[2] Goss v. Williams, 196 N. C. 213, 145 S. E. 119 (1928); (1927) 5 N. C. L. REV. 252; (1928) 6 N. C. L. REV. 78; McCall, *The Family Automobile* (1930) 8 N. C. L. REV. 256.
[3] Linville v. Nissen, 162 N. C. 96, 77 S. E. 1096 (1913); Tyree v Tudor, 183 N. C. 340, 111 S. E. 714 (1922); Watts v. Lefler, 190 N. C. 722, 130 S. E. 630 (1925).
[4] McAdd v. Shea, 10 La. App. 733, 122 So. 879 (1929).
[5] Hiller v. De Sautels, 169 N. E. 494 (Mass. 1929).

ment is not hearsay, for it is offered, not to prove the truth of the facts asserted, but merely to show that the assertion was made.

The rulings relative to the duty which a guest in an automobile must discharge to entitle him to sue his host or a negligent third party,[6] range all the way from holding that he must exercise a degree of care coextensive with that of the driver[7] to holding that he must remain silent and passive.[8] Between these two extremes lie more moderate interpretations of the duty to exercise ordinary care under the circumstances.[9] Opposite theories exist as to his duty to maintain a lookout. A New York holding[10] denies recovery to a guest who failed to keep a lookout at a railroad crossing, while an Oregon case[11] permits a guest to recover, although he gave the driver a mistaken direction. The application of this question is often resolved into the issue of whether the guest may read,[12] sleep,[13] or converse.[14] Even though the duty to keep a lookout may be denied,

[6] McGeever v. O'Byrne, 203 Ala. 266, 82 So. 508 (1919).

[7] Read v. New York Cent. & H. R. R. Co., 219 N. Y. 660, 114 N. E. 1081 (1915).

[8] Alost v. J. Moock Wood and Drayage Co., Inc., 10 La. App. 57, 120 So. 791 (1929); Lawrason v. Richard, 129 So. 250 (La. 1930); Bolton v. Wells, 225 N. W. 791 (N. D. 1929); Telling Belle Vernon Co. v. Krenz, 34 Ohio App. 499, 171 N. E. 357 (1928); Schlossstein v. Bernstein, 293 Pa. 245, 142 Atl. 324 (1928); Yturria v. Everton, 4 S. W. (2d) 210 (Tex. 1928); see Southern Pacific Co. v. Wright, 248 Fed. 261, 264 (C. C. A. 9th, 1918).

[9] Wicker v. Scott, 29 F. (2d) 807 (C. C. A. 6th, 1928); McDermott v. Sibert, 218 Ala. 670, 119 So. 681 (1928); Graves v. Jewel Tea Co., 23 S. W. (2d) 972 (Ark. 1930); Switzler v. Atchison, T. & S. F. Ry. Co., 285 Pac. 918 (Cal. 1930); Fairchild v. Detroit, G. H. & M. Ry. Co., 250 Mich. 252, 230 N. W. 167 (1930); Lewis v. Kansas City Public Service Co., 17 S. W. (2d) 359 (Mo. 1929); Hocking Valley Ry. Co. v. Wykle, 122 Ohio St. 391, 171 N. E. 860 (1930).

[10] Read v. N. Y. C. & H. R. R. Co., *supra* note 7. *Accord:* Norfolk & W. Ry. Co. v. Wellons' Adm'r., 154 S. E. 575 (Va. 1930).

[11] Peters v. Johnson, 264 Pac. 459 (Ore. 1928).

[12] Kilpatrick v. Philadelphia Rapid Transit Co., 290 Pa. 288, 138 Atl. 830 (1927) (Held not to be contributory negligence for guest to be reading a paper, though the automobile was on the trolley track).

[13] Oppenheim v. Barkin, 159 N. E. 628 (Mass. 1928) (Held contributory negligence for guest to sleep, knowing driver had been without sleep for a long time); Krueger v. Krueger, 197 Wis. 588, 222 N. W. 784 (1929) (same, knowing driver had been subjected to extreme hardships). But in the absence of special circumstances it is generally held that the mere fact that the guest was asleep does not constitute contributory negligence. Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785 (1925); McAndrews v. Leonard, 134 Atl. 710 (Vt. 1926).

[14] Semellie v. Southern Pacific Co., 269 Pac. 657 (Cal. 1928) (guest held contributorily negligent when he said at railroad crossing, "it's all clear; let's go," and an accident ensued); McAdd v. Shea, *supra* note 4 (statement by guest, "it is pretty fast for a new car," held to relieve him of contributory negligence); Peters v. Johnson, *supra* note 11 (guest allowed to recover although he mistakenly directed driver).

there is a clear duty to warn of perceived dangers[15] or violations of the law,[16] unless the driver appears to be aware of the same or striving to avoid them.[17]

In actions by a guest against the host, the guest assumes the risk of defects, not known to the host.[18] In actions either against the host or negligent third parties, the guest assumes the dangers incident to the known incompetency or inexperience[19] or habits[20] of the driver. All the authorities are to the effect that it is contributory negligence, precluding recovery, for one to ride knowingly with an intoxicated driver, if he is injured as a result of the driver's negligence.[21] Whether or not the passenger knew of the driver's condition is a question for the jury.[22] A guest is also bound by his acquiescence in obvious negligence or recklessness in handling the car,[23] and he assumes the risks naturally incident to the purpose and character of the trip.[24]

The various factual aspects which bring up the general question suggest the inadvisability of crystallized rules. It is impractical to try to limit the duty of a guest to exercise due care under the circumstances by any fixed rules of law. To attempt to lay down any rule requiring a guest to give warning would undoubtedly prove in-

[15] Minnich v. Easton Transit Co., 267 Pa. 200, 110 Atl. 273, 18 A. L. R. 296 (1920); Kilpatrick v. Phila. Rapid Transit Co., *supra* note 12.

[16] Renner v. Tone, Rec'r., 273 Pa. 10, 116 Atl. 512 (1922) (driving on wrong side of street against the current of traffic); Wagenbauer v. Schwinn, 285 Pa. 128, 131 Atl. 699 (1926) (driving recklessly and in disregard of circumstances); Morningstar v. Northeast Pennsylvania R. Co., 290 Pa. 14, 137 Atl. 800 (1927) (crossing railroad track without stopping); Alperdt v. Paige, 292 Pa. 1, 140 Atl. 555 (1928) (driving in front of a rapidly approaching automobile which has the right of way).

[17] United States Can Co. v. Ryan, 39 F. (2d) 445 (C. C. A. 8th, 1930); Jerko v. Buffalo R. & P. Ry. Co., 275 Pa. 459, 119 Atl. 543 (1923).

[18] Lewellyn v. Shott, 155 S. E. 115 (W. Va. 1930); O'Shea v. Lavoy, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008 (1921).

[19] Cleary v. Eckhart, 191 Wis. 114, 210 N. W. 267, 51 A. L. R. 576 (1926); Thomas v. Steppert, 228 N. W. 513 (Wis. 1930).

[20] Livaudias v. Black, 127 So. 129 (La. 1930).

[21] Lynn v. Goodwin, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915 E, 588 (1915); Kirmse v. Chicago, T. H. & S. E. Ry. Co., 73 Ind. App. 537, 127 N. E. 837 (1920); Winston Adm'r. v. City of Henderson, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918 C, 646 (1918); Jensen v. Chicago, M. & St. P. Ry. Co. *et al.*, 133 Wash. 208, 233 Pac. 635 (1925). To the effect that voluntary intoxication does not relieve of contributory negligence, see Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1926).

[22] Fitzpatrick v. Civitis, 139 Atl. 639 (Conn. 1927).

[23] Joyce v. Brockett, 237 N. Y. 561, 143 N. E. 743 (1923); Hill v. Philadelphia Rapid Transit Co., 271 Pa. 232, 114 Atl. 634 (1921); Krause v. Hall, 195 Wis. 565, 217 N. W. 290 (1928).

[24] Sommerfield v. Flury, 198 Wis. 163, 223 N. W. 408 (1929).

advisable. Experience tells us that back seat suggestions as to the handling of a car are disconcerting and irritating to the driver (more so as between husband and wife). Indeed this is one case where silence is generally golden. At present the cases seem to make no distinction between the liability of a host and that of a third party. The burdens of generosity should not be so great. It is submitted that the legislature should relieve the situation by a statutory change, and thereby relieve the host of part of his present burden.[25]

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Procedure and Practise—Relation Between Survival and Wrongful Death Statutes Where Death Follows Injury

Two recent decisions construing the North Carolina survival[1] and wrongful death[2] statutes have aroused speculation as to what actions for personal injuries survive to the personal representative. In both cases the decedent was injured by the defendant's alleged negligence. In the state case[3] decedent died before the termination of his suit, but did not die from the injuries sustained by the defendant's negligence. In the federal case[4] the jury found that the decedent was injured by the defendant's negligence, and awarded damages, but found, also, that the decedent's death was not caused by the injuries inflicted by the defendant's negligence. In these cases it was held that the cause of action for personal injuries not resulting in death survived.

At common law no right of action for personal injuries survived the death of the injured or injuring party. Our survival statute[5] provides that all causes of action survive except those specifically declared not to survive. Since the amendment[6] of our survival statute, it is now clear that if the injured party dies without a recovery, compromise, or settlement, and not as a result of the defendant's negligence, the cause of action survives.[7] Also, the cause of action

[25] For discussion of proposed statute to meet this situation, see p. 47.
[1] N. C. ANN. CODE (Michie, 1927) §§159, 162, 163.
[2] *Ibid.*, §§160, 161.
[3] Fuquay, Adm'x v. A. & W. R. R. Co., 199 N. C. 499 (1930).
[4] James Baird Co., Inc., v. Boyd, 41 F. (2d) 578 (C. C. A. 4th, 1930).
[5] *Supra* note 1.
[6] REV. (1905) §157 (2), as amended by N. C. PUB. LAWS (1915), c. 38. *Infra* note 16.
[7] Fuquay, Adm'x v. A. & W. R. R. Co., *supra* note 3; *cf.* Bolick v. R. R. Co., 138 N. C. 370, 50 S. E. 689 (1905).