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Negligence -- Imputed Negligence -- Joint Enterprise -- Liability of Passenger in Automobile for Negligence of Driver

Franklin S. Clark

that a release of the grantee from personal liability by his grantor without the mortgagee's consent is a valid defense unless the mortgagee has accepted the promise before the release.[18] At least two states have reached an opposite result upon the reasoning that, as the promise is beneficial to the mortgagee, his immediate acceptance is presumed.[19]

If the purchaser assumes payment of the mortgage debt, subject expressly to the defenses available to the vendor, he may attack the validity of that debt in an action by the mortgagee;[20] however he is ordinarily estopped from availing himself of this type of defense.[21] The theory is that as he has been credited with the value of the mortgage debt upon the purchase price, it would be unfair to permit him to deny the legality of either the debt or mortgage.[22] It is because of this reasoning that defenses such as usury,[23] defective execution of the mortgage,[24] lack of consideration for the debt,[25] and fraud in procuring the mortgage,[26] are unavailable to the purchaser.

EMMETT C. WILLIS, JR.

Negligence—Imputed Negligence—Joint Enterprise—Liability of Passenger in Automobile for Negligence of Driver.

Plaintiff's intestate offered, purely as an accommodation, to drive a car, which a dealer was repossessing, from a distant part of the city back to the dealer's garage. While he was being driven to the location by an employee of the dealer, he was killed when the car in which he was riding was wrecked in a collision with a bus, caused by the concurring negligence of the drivers of both vehicles. Suit against the bus driver who pleads contributory negligence by imputa-

[17] Hagman v. Williams, 228 N. W. 811 (S. D. 1930); *cf.* Holloway v. Hendrick, 98 N. J. Eq. 713, 129 Atl. 702 (1925) (distinguishable on the grounds that here the vendor performed his contract although he did so in such a manner as to warrant a counterclaim had the action been between him and the purchaser).

[18] Thacker v. Hubbard & Appleby, *supra* note 6.

[19] Bay v. Williams, 112 Ill. 91, 1 N. E. 340 (1884); Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652 (1897).

[20] Erwin v. Morris, 137 N. C. 48, 49 S. E. 53 (1904).

[21] Caldwell v. Comm. Bank of Waynoka, 80 Okla. 115, 194 Pac. 898 (1921).

[22] Chenoweth v. Nat. Building Ass'n., 59 W. Va. 653, 53 S. E. 559 (1906); Midland Sav. & Loan Co. v. Neighbor, 54 Okla. 626, 154 Pac. 506 (1916).

[23] Caldwell v. Comm. Bank of Waynoka, *supra* note 21.

[24] Hill v. Longe, 95 Vt. 411, 115 Atl. 237 (1921).

[25] Peoples Trust Co. v. Doolittle, 178 App. Div. 802, 165 N. Y. Supp. 813 (1917).

[26] Curry v. Lafon, 133 Mo. App. 163, 113 S. W. 246 (1908).

tion from the intestate's driver to the intestate. *Held,* judgment for plaintiff affirmed; there was no master and servant or agency relationship, and while there was a joint enterprise the intestate had no such control over the car as to impute the driver's negligence to him.[1]

This case raises directly the problem of when will the negligence of a driver of an automobile be imputed to a passenger riding with him.[2] The question arises most often in cases in which the injured passenger, or his representative, sues the negligent third party who attempts to defeat recovery on the ground of contributory negligence by imputation as in the instant case. The problem may also arise where the passenger is the defendant and a third party seeks to hold him liable for the negligence of the driver.[3] A passenger, of course, may be guilty of negligence separate and distinct from any negligence on the part of his driver, and in such case there is no need to apply the doctrine of imputed negligence.[4]

The courts are in general accord that wherever the relationship of agency, master and servant,[5] or joint enterprise can be established

[1] Gilmore v. Grass, 68 F. (2d) 150 (C. C. A. 10th, 1933).

[2] The doctrine of imputed negligence may be considered to have originated in England with the case of Thorogood v. Bryan, 8 C. B. 115 (C. P. 1849). It was subsequently repudiated in Mills v. Armstrong (The "Bernina"), 13 A. C. 1, 58 L. T. 425 (1887). It was repudiated by the United States Supreme Court in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652 (1886), and is now generally discredited. Ga. Pac. R. Co. v. Hughes, 87 Ala. 610, 6 So. 413 (1889); Colo. & So. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801 (1905); State v. Boston & M. R. Co., 80 Me. 430, 15 Atl. 36 (1888); (1921) 19 MICH. L. REV. 858.

[3] Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921) (pedestrian injured by negligence of son driving father, held son's negligence not imputable to father). It is sometimes attempted to invoke the doctrine of imputed negligence in a suit between passenger and driver, but it is held to have no application as there is a duty of care owed between joint enterprisers just as there is between principal and agent, master and servant, or host and guest. Yanco v. Thon, 108 N. J. L. 235, 157 Atl. 101 (1931); see (1929) 77 U. OF PA. L. REV. 676, at 682. See also TORTS RESTATEMENT (Am. L. Inst. 1933) §30.

[4] Most jurisdictions hold a passenger responsible for exercising reasonable care for his own safety. For definitions of what constitutes such negligence on the part of a passenger as will defeat his recovery from the negligent third party: Birmingham Ry. Light & Power Co. v. Barranco, 203 Ala. 639, 84 So. 839 (1920); Sharp v. Sproat, 111 Kans. 735, 208 Pac. 613 (1922); Graham's Adm'r. v. Ill. Cent. R. Co., 185 Ky. 370, 215 S. W. 60 (1919); Cotton v. Willmar & S. F. R. Co., 99 Minn. 366, 109 N. W. 835 (1906); Brubaker v. Iowa County, 174 Wis. 574, 183 N. W. 690 (1921); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1926) (riding with drunken driver, held contributory negligence). *Contra:* Tyree v. Tudor, 183 N. C. 340, 111 S. E. 714 (1922) (young girl killed returning from dance with drunken escort, held not contributorily negligent either personally or by imputation, as there was no joint adventure although she had said "get me home in a hurry").

[5] The servant's negligence while driving the master's car will be imputed to

the doctrine will be applied. Master and servant relations are relatively easy to prove; agency may present a slightly more difficult problem; but it is in the determination of joint enterprise that true confusion exists.[6] There has been a total failure on the part of the courts to lay down any definite tests or definitions by which this last may be determined.

There are a few general types of relationships that the courts seem unanimously to hold do not constitute joint enterprise unless other factors exist. The driver's negligence will not be imputed; to a mere guest in an automobile who has no particular control over the driver;[7] to a passenger in a public conveyance;[8] between husband and wife from the mere fact of their marital relationship;[9] on ac-

the master riding with him. Markowitz v. Metropolitan St. Ry. Co., 186 Mo. 350, 85 S. W. 351 (1904); Schofield v. Director General of Railroads, 276 Pa. 508, 120 Atl. 449 (1923); Hepps v. Bessemer & L. E. R. Co., 284 Pa. 479, 131 Atl. 279 (1925). But if employer is riding in employee's car by choice of employee, then it will not be imputed. County Com'rs of Dorchester County v. Wright, 138 Md. 577, 114 Atl. 573 (1921). The master's negligence will generally be imputed to a servant riding with him. Robertson v. United Fuel & Supply Co., 218 Mich. 271, 187 N. W. 300 (1922). *Contra:* Compagna v. Lyles, 298 Pa. 352, 148 Atl. 527 (1929); (1930) 30 COL. L. REV. 581. Chauffeur's negligence will be imputed to employer but not necessarily to other members of the employer's family. Bullard v. Boston Elevated Ry. Co., 226 Mass. 262, 115 N. E. 294 (1917).

[6] The courts talk about agency, master and servant, and joint enterprise as three entirely separate and distinct relationships. The reason for this is unexplainable, other than by historical development, as all of these are a phase of agency and rest ultimately on the same fundamental principle, namely, action for another by representation.

[7] Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Meyers v. Southern Pac. Co., 63 Cal. App. 164, 218 Pac. 284 (1923); Withey v. Fowler Co., 164 Iowa 377, 145 N. W. 923 (1914); Pusey v. Atl. C. L. R. Co., 181 N. C. 137, 106 S. E. 452 (1921). This is not changed because guest may indicate or direct the way he wants to go. Cram v. City of Des Moines, 185 Iowa 1292, 172 N. W. 23 (1919). Michigan is the only state which reaches the opposite result still adhering to the original theory that by electing to ride with the driver the passenger adopts the driver's acts as his own. Gates v. Landon, 216 Mich. 417, 185 N. W. 723 (1921); Holsaple v. Superintendents of Poor of Menominee County, 232 Mich. 603, 206 N. W. 529 (1925). But it is not applied to passengers in private carriers for hire, nor to those paying for their ride. Lachow v. Kimmich, 263 Mich. 1, 248 N. W. 531 (1933); Johnson v. Mack, 263 Mich. 10, 248 N. W. 534 (1933). Wisconsin was the first American state to endorse the doctrine of imputed negligence, and one of the last to discard it. See Prideaux v. Mineral Point, 43 Wis. 513 (1878); Reiter v. Grober, *supra* note 3.

[8] Little v. Hackett, *supra* note 2.

[9] Withey v. Fowler, *supra* note 7; Kokesh v. Price, 136 Minn. 304, 161 N. W. 715 (1917); Brubaker v. Iowa County, *supra* note 4 (even though both are travelling together to take up a new residence in a new city, both to enter separate businesses there); *cf.* Langley v. Southern R. Co., 113 S. C. 45, 101 S. E. 286 (1919) (where wife influenced husband to drive at high speed, his negligence imputed to her). For collection of cases see Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193, at 203.

count of family or blood relation in general.[10] Nor will a pleasure trip alone make a joint enterprise.[11]

It is more difficult to say when the doctrine will be applied. Community of interest in the common purpose,[12] anticipation of sharing in any profits, mutual ownership of the conveyance, and the right to direct and control its operation are all factors which must be weighed. The degree of control which the passenger has, though not necessarily exercises, is the test most favored by students and critics on the subject, and the one on which the case is most likely to turn.[13] Ownership in itself implies a certain element of control even though the actual control may be in the hands of another.[14] Sharing expenses will generally be held to create joint enterprise, though the jury may find otherwise;[15] and if the conveyance is

[10] Bryant v. Pac. Elec. R. Co., 174 Cal. 737, 164 Pac. 385 (1917) (father and son); Wessling v. Southern Pac. Co., 116 Cal. App. 455, 3 P. (2d) 25 (1931) (two brothers); Kokesh v. Price, *supra* note 9 (husband, wife, and children); Lomis v. Abelson, 101 Vt. 459, 144 Atl. 378 (1929) (brother and sister). *Contra:* Wiley v. Dobins, 204 Iowa 174, 214 N. W. 529 (1927). Where the relationship is that of parent and minor child there is a stronger tendency to hold that the negligence is imputed. Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174 (1921), but even in this situation the majority of courts refuse to impute the negligence. Mullinax v. Hord, 174 N. C. 607, 94 S. E. 426 (1917); note (1921) 15 A. L. R. 414.

[11] Parker v. Ullom, 84 Colo. 433, 271 Pac. 187 (1928) (going to a poker game is not a joint adventure); Withey v. Fowler, *supra* note 7; Tyre v. Tudor, *supra* note 4; St. L. & San F. R. Co. v. Bell, 58 Okla. 84, 159 Pac. 336 (1916); Swartz v. Johnson, *supra* note 4. *Contra:* Wiley v. Dobins, *supra* note 10.

[12] (1929) 78 U. OF PA. L. REV. 270 ("A 'common purpose' is but an element of a 'joint enterprise'").

[13] This is illustrated in the cases where sharing expenses is held to constitute joint enterprise. In law the splitting of expense on gas and oil may give one a joint right or control, but practically courtesy, politeness, or personal relations may readily prevent the passenger from telling host or owner how to operate his automobile. For review of tests employed, see Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence* (1930) 6 NOTRE DAME LAW. 172; notes (1926) 12 VA. L. REV. 341; (1928) 62 AM. L. REV. 261, at 264 ("It is not so much actual control, nor actual possibility of control that is the deciding factor, but rather a possibility of control by implication of law.").

[14] Masterton v. Leonard, 116 Wash. 551, 200 Pac. 320 (1921); Tannehill v. Kans. City C. & S. R. Co., 279 Mo. 158, 213 S. W. 818 (1919) (joint ownership of automobile, held joint adventure).

[15] Beaucage v. Mercer, 206 Mass. 492, 92 N. E. 774 (1910); Derrick v. Salt Lake & O. R. Co., 50 Utah 573, 168 Pac. 335 (1917); *cf.* Coleman v. Bent, 100 Conn. 527, 124 Atl. 224 (1924) (sharing expenses does not show "joint adventure" as a matter of law for it is not inconsistent with the defendant's rights as owner). Joint enterprise is a question of fact to be found by the jury under proper instructions from the court. The court defines what facts will constitute joint enterprise, and if the jury find those facts to have existed the negligence of the driver is imputed as a matter of law according to the jurisdiction. Crescent Motor Car Co. v. Stone, *supra* note 7 (Holding valid a charge to the effect that if the jury found both drivers were acting in a

rented by several persons, whether it be for business or social use, each sharing in the expense of the rental, then all are deemed to have a mutual right of control and are joint enterprisers.[16]

"Joint enterprise," or "joint adventure," is a term that was unknown at common law. It is a recent American invention, still in the process of formation, by which the courts are attempting to distinguish a group of relationships that are too informal and loose to be accurately described as partnerships,[17] but which, nevertheless, bear most of the same incidents.[18] It is suggested that this association with business and economic profits is perhaps responsible for the reluctance of the courts to apply it to social relations.[19] For although a purely social purpose may constitute a joint enterprise,[20] the courts are much more inclined to apply the doctrine if some kind of business basis can be shown.[21] In general there must be community of interest and purpose in the undertaking, and a joint or equal right to govern and control the conduct of the other and the agencies employed.

In the principal case the court in refusing to impute the negligence reached the correct result under the most approved test since the

common purpose, each having right to drive or control, then the jury might find it was a joint enterprise and negligence would be imputable); Meyers v. So. Pac. Co., *supra* note 7.

[16] Christopherson v. Minneapolis, etc. R. Co., 28 N. D. 128, 147 N. W. 791 (1914); Coleman v. Bent, *supra* note 15; Grand Trunk R. Co. v. Dixon, 51 D. L. R. 576 (1920). The fact that the parties take turns driving will not make a joint adventure. Hollister v. Hines, 150 Minn. 185, 184 N. W. 856 (1921); *cf.* Washington & O. D. R. Co., v. Zell's Adm'x, 118 Va. 755, 88 S. E. 309 (1916) (Where two friends went together often, the driver's negligence held imputed.).

[17] Note (1927) 48 A. L. R. 1055.

[18] The term is less definite than partnership. Connellee v. Nees, 266 S. W. 502 (Tex. Civ. App. 1924). It generally relates to a single transaction though it may be for a business to extend over a period of years. Finney v. Terrell, 276 S. W. 340 (Tex. Civ. App. 1925). Where the parties agree to share in profits it will be a joint adventure. Houston v. Dexter & Carpenter, Inc., 300 Fed. 354 (E. D. Va. 1924). But participation in profits does not of itself prove joint adventure. Hill v. Curtis, 154 App. Div. 662, 139 N. Y. Supp. 428, 430 (1913). Where there is no agreement to share in profits there can be no joint adventure. Columbian Laundry v. Hencken, 203 App. Div. 140, 196 N. Y. Supp. 523 (1922).

[19] Coleman v. Bent, *supra* note 15.

[20] Beaucage v. Mercer, *supra* note 15.

[21] Even though a business relationship exists, the element of control may still be necessary. Wren v. Suburban Motor Transfer Co., 241 S. W. 464 (Mo. App. 1922) (Passenger in real estate agent's car going to inspect house had no such control over driver as to impute negligence.). It should be remembered that joint enterprise springs from a contractual relation, and must eventually rest on contract. The contract does not have to be express; it may be implied. In re Taub, 4 F. (2d) 993 (C. C. A. 2nd, 1924).

intestate had no control over the driver, even though it varied the conventional definition by saying, in absence of such control, that there was a joint enterprise.

FRANKLIN S. CLARK.

Procedure—Federal Procedure—Minimum Jurisdictional Amount.

A citizen of Kentucky, beneficiary under a $15,000 accident insurance policy, brought suit in the state courts against the insurer, a non-resident company. To avail itself of the fact that the Federal courts would enforce the provision of the policy requiring suit to be brought within two years from the expiration of the time within which proofs of loss were to be made whereas the Kentucky courts would not, defendant removed the case to the Federal District Court. Plaintiff took a non-suit without prejudice and brought a new suit in the state courts but limited his prayer for relief to $2,999.99. Defendant again removed the cause and plaintiff, after his motion to remand was overruled, allowed a judgment by default in favor of defendant. Plaintiff appealed, and the Circuit Court of Appeals held that the prayer for relief determined the amount involved for jurisdictional purposes, and since it was less than $3,000, the motion to remand should have been granted.[1]

For reasons similar to those motivating the plaintiff in the principal case there are frequent resorts to devices either to confer[2] jurisdiction on the Federal courts or to prevent its attaching.[3] It is generally deducible from the decisions that the device will be approved provided it is bona fide and some substantial right is in fact relinquished. Since the principal case involves a liquidated claim, it presents, it seems, merely a more obvious variation of the generally sanctioned limitation of unliquidated claims.[4] But since the amount

[1] Brady v. Indemnity Ins. Co. of North America, 68 F. (2d) 302 (C. C. A. 6th, 1933); see also Brown *et al* v. House, 20 F. (2d) 142 (S. D. Idaho, 1927); Woods v. Massachusetts Protective Ass'n., 34 F. (2d) 501 (E. D. Ky. 1929); Henderson *et al* v. Maryland Casualty Co., 62 F. (2d) 107 (C. C. A. 5th, 1932); *cf.* Smith v. Traveller's Protective Ass'n., 200 N. C. 740, 158 S. E. 402 (1931).

[2] Williamson v. Osenton, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. ed. 758 (1914); Black and White Taxicab Co. v. Brown and White Taxicab Co., 276 U. S. 518, 48 Sup. Ct. 404, 72 L. ed. 681 (1929); note (1930) 43 HARV. L. REV. 320; note (1934) 34 COL. L. REV. 311.

[3] Richardson v. Southern Idaho Waterpower Co., 209 Fed. 949 (D. Idaho 1913); Kraus v. Chicago B. and Q. R. R., 16 F. (2d) 79 (C. C. A. 8th, 1926).

[4] Swann v. Mutual Res. Fund Life Ass'n., 116 Fed. 232 (W. D. Ky. 1902); Barber v. Boston and Maine R. Co., 145 Fed. 52 (D. Vt. 1906); Harley v. Firemen's Fund Ins. Co., 245 Fed. 471 (W. D. Wash. 1913).