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Bailments - Effect of Statute Imputing Negligence of Conditional Vendee, Bailee, or Negligence of Agents, Servants, or Employees of Said Vendee or Bailee to Conditional Vendor or Bailor

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take a fee simple in part of the land devised, there would be a possibility that this part would pass to some stranger to the blood of the testator. The Kentucky court believes that such a result would be contrary to the testator's intention.¹⁶

In contrast to the above reasons for repudiating the second resolution in Wild's Case, there are three main reasons advanced for adherence to the rule. They are: (1) such a construction is in conformity with the plain import of the words;¹⁷ (2) if a life estate and remainder were intended, it would have been natural and easy to expressly say so;¹⁸ (3) public policy, favoring the free alienation of land, is against the life estate and remainder construction.¹⁹

However, because of the importance of effectuating the intent of the grantor or testator, the life estate and remainder construction appears to be more reasonable than the concurrent ownership construction. One ordinarily thinks of parent and children enjoying property successively and not concurrently. Since the average grantor or testator probably has this in mind and since he also probably wants to benefit all of A's children, whenever born, his probable intention is more likely to be carried out by the life estate and remainder construction.²⁰

The problem of construction involved in a conveyance or devise to A and his children has never been before the Wisconsin Supreme Court. Careful drafting of deeds and wills eliminates the problem, but if it ever does arise, it is suggested that the life estate and remainder construction be adopted for the reasons given above.

WILLIAM A. FIGURE

Bailments—Effect of Statute Imputing Negligence of Conditional Vendee, Bailee, or Negligence of Agents, Servants or Employees of said Vendee or Bailee to Conditional Vendor or Bailor—Plaintiff brought an action against defendant for damages to plaintiff's automobile which damages resulted from a collision between defendant's automobile and plaintiff's automobile, the latter being driven by an employee of plaintiff's bailee. The bailor-bailee relationship arose out of the commonly known "rent-a-car" contract, but it

¹⁶ *Shelman & Co. v. Livers' Exec'r*, 229 Ky. 90, 16 S.W. 2d 800 (1929); *Lacey's Exec'r v. Lacey*, 170 Ky. 160, 185 S.W. 495 (1916); *Davis v. Hardin*, 80 Ky. 672 (1880).

¹⁷ *Moore v. Ennis*, *supra*, note 12. Also, see Note, L.R.A. 1917 B 49, 50, 51.

¹⁸ *Graham v. Fowler*, 13 Serg. & R. 439 (Pa. 1826). Also, see Note, L.R.A. 1917 B 49, 51.

¹⁹ *Ewing v. Ewing*, 198 Miss. 304, 22 So. 2d 225, 227, 228, 161 A.L.R. 606, 610, 611 (1945).

²⁰ *Casner*, *supra*, note 2, at 459. The life estate and remainder construction is embodied in PROPOSED UNIFORM PROPERTY ACT SEC. 13. However, the RESTATEMENT, PROPERTY sec. 283 (a) (1940) follows the second resolution in Wild's Case.

appeared to be immaterial whether the bailment was gratuitous or for profit. The employee of plaintiff's bailee was contributorily negligent. The employee was taking his children to a barbershop for haircuts. Defendant relied on a statute to prevent recovery. Said statute, R.S. 46:36-1, N.J.S.A., provides:

"Whenever a conditional vendor, bailor, or owner of the general property in goods or chattels or the assignee or assignees of said conditional vendor, bailor or owner of the general property in goods or chattels, shall institute suit for damages to said goods or chattels, while the same are in the custody, control or possession of the conditional vendee, bailee, or owner of the special property in said goods or chattels or the agents, servants, or employees of said conditional vendee, bailee, or owner of the special property in said goods and chattels, against a third party or parties, or against the agents, servants, or employees of said third party or parties, or both, based on the negligence of the said third party or parties, or the agents, servants, or employees of said third party or parties, the contributory negligence of the conditional vendee, bailee, or owner of the special property in said goods or chattels, or of the agents, servants, or employees of said conditional vendee, bailee or owner of the said special property in said goods or chattels shall constitute a proper and valid defense to said action and be a complete bar to recovery in the same manner as though suit were brought by the conditional vendee, bailee, or owner of the special property in said goods or chattels or by the agents, servants or employees of the conditional vendee, bailee, or owner of the special property in said goods and chattels."

Held: Judgment for the defendant. The bailor's suit was barred by the contributory negligence of the employee of the bailee, notwithstanding the employee was driving the automobile on an errand unrelated to his employment. *Motorlease Corp. v. Mulroony*, 66 A.2d 765 (N.J. 1952).

The statute relied on by the defendant is unusual in regard to the majority rule obtaining throughout the United States. The reason given for the enactment of the statute is that it is unjust to allow a third party a defense against a bailee, yet deny him that defense in a suit by a bailor based on the same set of circumstances.¹ Therefore a third party, under the statute, is now able to use the same defense in both actions. It is to be observed, however, that the statute does not impose liability upon the bailor for the negligence of the bailee or his agent.

The primary aim of this article is to examine the general policy of a statute of the kind applied in the principal case, and not to discuss the rather unusual broadening of the term "employee" accomplished by the New Jersey court.

¹ *Motorlease Corp. v. Mulroony*, 13 N.J. Super. 556, 81 A.2d 25 (1951).

The court stated that the defense of contributory negligence is available if the agent, servant or employee of the bailee is in lawful custody, control or possession of the vehicle, irrespective of the fact that at the moment of collision the car was *not* being used in the scope of the bailee's business.² This appears to extend, for purposes of the particular statute in issue, the ordinary legal definition of the term "employee." From the general trend of Wisconsin decisions, assuming that Wisconsin had a statute comparable to the New Jersey law in the instant case, the courts would probably hold that the employee of the bailee was outside the scope of employment and that the statute, therefore, would not apply.³ If the Wisconsin legislature sees fit to pass a statute comparable to the one in question, it would be well to express clearly what is meant to be covered by the term "agent," "servant" and "employee."

The New Jersey statute quite clearly changes the law generally followed in other jurisdictions. The old rule pertaining to the bailor-bailee relationship was that the negligence of the bailee would be imputed to the bailor to prevent the bailor from recovering damages from a third party for damage to a bailed article.⁴ This conception was changed around the turn of the century. The weight of modern authority favors the rule that in a bailor-bailee relationship, without any element of partnership, principal and agent, or master and servant, the contributory negligence of the bailee cannot be imputed to the bailor to bar his recovering against a negligent third party for damage to the bailed property.⁵

The rule in Wisconsin follows the above rule closely as to the relationship of bailor and bailee, conditional vendor and vendee. The negligence of the bailee cannot be imputed to the bailor unless said bailor has some right of control, supervision or direction over the acts of the bailee. The doctrine of imputed negligence applies only in cases where the act of negligence can be said to be that of the party injured.⁶ A good example of the application of this reasoning is contained in the handling of the problem of the family relationship. The relationship of itself is not sufficient to impute negligence. The negligence of a member of the family must be in the prosecution of the business of the owner of the property. In other words, the owner must have some right of control over the member of the family who is negligent.⁷

At first glance, the statute seems inequitable in that it prevents a party, who is free of fault, recovering from a party whose negligent act

² *Supra*, note 1.

³ *Fireman's Fund Insurance Company v. Schreiber*, 150 Wis. 52, 135 N.W. 507, 511 (1912).

⁴ See Note 6 A.L.R. 316 (1920); 30 A.L.R. 1248 (1924).

⁵ *Spelman v. Delano*, 177 Mo. App. 28, 163 S.E. 300 (1913).

⁶ *Calumet Auto Co. v. Ding*, 190 Wis. 84, 208 N.W. 927 (1926).

⁷ *Crossett v. Goelzer*, 177 Wis. 455, 188 N.W. 627 (1922).

was a proximate cause of the damage to the property. However, a number of cases, generally involving automobiles, made a change necessary. In a typical case, a man would allow a member of the family to use his automobile under circumstances which prevented any agency or employee relationship from being established and under circumstances such that a third party could not prove the owner negligent in placing the automobile in the hands of an incompetent. The member of the family would become involved in an accident in which both he and the third party were causally negligent. Under prevailing rules, the owner can recover the full amount of property damage to the automobile from the third party even though the negligence of the third party was small compared to that of the person driving the owner's automobile. The New Jersey statute provides a remedy for this situation. Nevertheless, the statute by itself is not entirely desirable from the standpoint of complete justice. Supposing the bailee to be guilty of a *small* degree of negligence, the bailor is prevented from recovering for any of the damage to his automobile in a state where contributory negligence is a complete defense to an action of this type.⁸

The Wisconsin statute on comparative negligence can remedy the injustice resulting in certain cases which would arise under a law comparable to that of New Jersey. WIS. STATS. (1951), sec. 331.045 states:

"Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

Under this statute, where both parties to a collision are negligent and there is a counterclaim, one of the parties may recover when there is a finding that his negligence is less than that of the other, but his recovery must be reduced in proportion to his negligence.⁹ This means that a person can recover only for the amount of damage which is not due to any fault of his.

Wisconsin, by the enactment of a statute modeled after that of New Jersey, would increase the fairness of decisions rendered in cases similar to the one in the instant case and the hypothetical case described herein. The courts and the legislature should always attempt to improve the inherent fairness and justice of their decisions and statutes.

It would therefore seem that a similar statute would be a step forward for Wisconsin. However, certain points should be kept in mind.

⁸ 5 AM. JUR. AUTOMOBILE § 503; 38 AM. JUR. NEGLIGENCE § 233.

⁹ Paluczak v. Jones, 209 Wis. 640, 245 N.W. 655 (1932); Walker v. Kroger Grocery and Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

First, a statute should expressly limit its effect so as to prevent recovery by a third party based upon the imputed negligence. It should not be used as a basis for a suit or counterclaim by a third party against a person who has no right of control over his bailee, vendee, or the agent, servant or employee of such bailee or vendee. Secondly, the legislature should frame the statute so that there can be no misunderstanding of the meaning of "agent," "servant" or "employee" within the act. If this is done, Wisconsin courts will be able to handle such situations, which have come under much criticism, in a fair and equitable manner.

DOUGLAS J. McCLELLAND

Judgments—Equitable Relief from Judgments Obtained by Fraud, Intrinsic and Extrinsic—The deceased had been sued for divorce by the plaintiff in 1946 and in his answer set for his property with particularly. The plaintiff at that time had no knowledge of the amount of property owned by the deceased and was not guilty of negligence in ascertaining the facts. The court relied on the defendant's representations and confirmed a pre-trial stipulation as to the apportionment of the defendant's property. On learning of the actual holdings of the decedent at an inventory and appraisal filed after his death, the plaintiff sued the executor of the decedent's estate in equity praying for relief from the property settlement on the ground that it was based on the decedent's fraud perpetrated on the court. The relief was not granted by the trial court. *Held*: Judgment reversed. The power of a court of equity to relieve against unconscionable judgments for fraud will not be strictly confined to those that are characterized by extrinsic fraud. *Weber v. Weber et al*, 260 Wis. 420, 51 N.W. 2nd 18 (1952).

The general rule in the United States is that the acts for which a court of equity will grant relief from a judgment because of fraud must relate to extrinsic or collateral fraud and that intrinsic fraud is not sufficient.¹

The United States Supreme Court followed that rule in *United States v. Throckmorton*, and defined extrinsic fraud as that relating to matter not tried by the court rendering the judgment and intrinsic fraud as that relating to matter on which the decree was rendered, and stated that:

"Where the unsuccessful party had been prevented from exhibiting full his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by acts of the

¹ 31 AM. JUR. JUDGMENTS §654 (1940).