Torts: Joint Enterprise: Imputed Negligence

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RECENT DECISIONS

heir at law in the estate of the decedent by virtue of the adoption. Held, A and B are both heirs of the natural parent, adoption is not a bar to inheritance by B. In re Estate of Martha Sauer (Wis., 1934) 257 N.W. 28.

Adoption, a practice unknown and unrecognized by the common law, has existed among the nations of continental Europe from time immemorial. See, Abney v. De Loach, 84 Ala. 393, 45 S.W. 750, 757, 759 (1888); Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, 325 (1880). It was widely practiced, not only by ancient peoples with high standards of civilization, but by the semi-barbaric German tribes. See, Succession of Unforsake, 48 La. Ann. 546, 19 So. 602, 603 (1896). Under the Roman Law the adopted child was permitted to inherit from his natural parents as well as from the parents by adoption. See, Sandar's "Institutes of Justinian," Lib. I, Tit. XII, XIII, pp. 113-120 (1st Am. Ed., 1876).

The adoption of children and strangers to the blood exists in this country only by virtue of statute. See, Albing v. Ward, 137 Mich. 352, 100 N.W. 609, 610 (1904). In the absence of common law authority, the various states have invaded the legal systems of continental Europe in search of nuclei about which to build their statutory scheme. See, Power v. Hafley, 85 Ky. 671, 4 S.W. 683, 684 (1887). In most American jurisdictions the courts have recognized that these statutory schemes permitting the adopted child to take by descent from the parents by adoption have not affected his right to inherit from his natural parents. Patterson v. Browning, 146 Ind. 160, 44 N.E. 993 (1896); Wagner v. Varner, 50 Ia. 532 (1879); contra, Young v. Bridges, (N.H., 1933), 165 Atl. 272.

It was argued by the appellant in the principal case that the local legislature had by its adoption statute indicated that the adopted child was not to take by inheritance from its natural parents. Wis. Stats., (1933) § 322.07. The court met this contention by pointing out that the legislature had deleted from the original bill before it a specific provision purporting to deny the right of the adopted child to take by inheritance from its natural parents. See, Assembly Bill No. 237A, Session of 1929. The court said that this indicated that the legislature did not mean that the adoption statute as eventually passed was to affect the right of inheritance from the natural parents. Had the legislature literally purported to affect the right of inheritance from the natural parents there is reason to believe that the Wisconsin court would have refused to uphold the statute. The court has suggested several times that such statutes interfering with the descent of property are subversive to the beneficent purposes of adoption, that they are contrary to the natural and the common law, and are an unauthorized invasion by the legislature of the rights of the individual. See, Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906); Estate of Bradley, 185 Wis. 393, 201 N.W. 973 (1925). It is submitted, too, that an attempted enforcement of such a statute might raise a federal question under the due process clause of the Fourteenth Amendment. See Meyer v. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 96, 69 L.Ed. 1070 (1925).

RICHARD B. JOHNS.

TORTS—JOINT ENTERPRISE—IMPUTED NEGLIGENCE.—A husband and wife jointly owned an automobile and both were the named assureds in the liability policy issued thereon. In returning from a visit to their daughter's home and while the husband was driving, they collided with a freight car belonging to the defendant railway company. In the plaintiff wife's action against the defendant husband and the defendant railway company, the jury found the plaintiff free from contributory negligence and that she had assumed no risk; it found both de-
fendants negligent. From adverse judgments, both defendants appeal. Held, judgment against the defendant husband affirmed; against the defendant railway company reversed. The husband was driving not only in the exercise of his right as joint owner, but on behalf of his wife, who was also an owner and equally interested in the trip. Plaintiff and defendant were engaged in a joint enterprise and his negligence is imputed to her. Archer v. Chicago, M., St. P. & P. Ry. So. et al., (Wis., 1934) 255 N.W. 67.

Originally, the remedy of the passenger of a private vehicle against a negligent third party was barred if the driver of the vehicle was negligent. Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558 (1878). With the development of the host-guest doctrine the negligence of the driver was not imputed to a passenger who (1) could exercise no control over the driver, (2) was not engaged in a joint enterprise with him, (3) was guilty of no negligence himself, or, (4) stood in no other relation to the driver requiring that his negligence be imputed to him. Reiter v. Grober, 173 Wis. 493, 181 N.W. 739, 18 A.L.R. 362 (1921).

The joint enterprise doctrine was borrowed from the principles of agency as applied to associations contractual in nature and formed for mutual financial benefit. For this reason it was held that joint enterprisers had the power to control each other’s movements. Mere marital relationship was not sufficient to indicate joint enterprise where there was no joint financial understaking. Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690, 18 A.L.R. 303 (1921); Kokesh v. Price, 136 Minn. 304, 161 N.W. 715, 23 A.L.R. 643 (1917). Mutuality of interest in a purely social adventure was not sufficient to take the case out of the host-guest category. Kraus v. Hall, 195 Wis. 565, 217 N.W. 290 (1928); Somerfield v. Flury, 198 Wis 163, 223 N.W. 408 (1929); Denham v. Taylor, 15 La. App. 545, 131 So. 614 (1930). Where the defendant allowed a prospective purchaser to drive his car and he testified that he sat alongside to give instructions in case of emergency (although the car was similar to the one the prospective purchaser had been driving for some time) the court disregarded the possibility of a joint enterprise and held the defendant responsible as principal to an injured third party. Lott v. Grant, Imp., 198 Wis. 291, 223 N.W. 846 (1929); Beaudoin v. W. F. Mahaney, Inc., (Me., 1932) 15 Atl. 567. And where the husband, owner of the car, asked his wife to drive, her negligence barred his recovery against a negligent third party on the doctrine of respondeat superior. Wilcott v. Ley, 205 Wis. 155, 236 N.W. 593 (1931); Gochee v. Wagner, 257 N.Y. 344, 178 N.E. 553 (1931). But where the wife was injured while riding in a car driven by her husband but registered in her name, the courts regard it as a bailment, and his negligence does not bar her recovery against a negligent third party. Virginia R. & Power Co. v. Gorsuch, 120 Va. 655, 91 S.E. 632 (1917); Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166, 80 A.L.R. 280 (1931).

In the instant case the court holds that there are two circumstances that vitally affect the legal relations of the parties: first, joint ownership of the car; and, second, joint interest in the enterprise. In holding that the Brubaker case, supra, is not in point here it is obvious that the court lays a great deal of stress on the joint ownership of the car. This is in accord with the later cases. Seiden v. Reimer, et al., 190 App. Div. 713, 180 N.Y.S. 345 (1920) affirmed in 232 N.Y. 593, 134 N.E. 535 (1922); Tannehill v. Kansas City C. & S. R. Co., 279 Mo. 158, 213 S.W. 818 (1919) (business partners on a business trip); Clark v. Town of Hampton, (N.H. 1929) 145 Atl. 265; Lindquist v. Thieman, et al., 216 Iowa 170, 248 N.W. 504 (1933); Restatement, Torts (Tent. Draft, 1933) § 30, comment f.

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