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Torts--Contributory Negligence of Passenger in Automobile

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It would seem that the most important effect of the renunciation of a will by a widow arises in connection with the acceleration of remainders. With the general rule as applied to vested remainders we have no quarrel. However, the theory of election, when applied to contingent remainders, frequently results in the total disruption of the testator's plans for the disposition of his estate. It must be taken into consideration that the electing party has the power in himself or herself to alter the disposition of the residue of the estate, and such power is dangerous. There is a possibility that the electing spouse may be influenced by those who would be benefited by an immediate vesting of the contingent remainders.[5] It is entirely possible, for instance, for a widow to elect to take against a will with which she is entirely satisfied, merely to insure the vesting of a contingent remainder to a son and away from other legatees.[6]

The courts of Massachusetts, though distinctly in the minority, have announced what we consider to be the sounder rule. This court holds that a different rule obtains in the case of a vested remainder from that when it is contingent. In the latter case, the remainder is not accelerated by the election of the surviving spouse to take against the will.[7]

From the viewpoint of both law and logic, the better way to treat this problem, in order to reach the sounder conclusion of the minority, is to consider the death of the surviving spouse as a physical event upon which the contingency is to be decided. Considered thus, the election could not have the effect of accelerating the contingent remainders.

PHILLIP SCHIFF.

TORTS—CONTRIBUTORY NEGLIGENCE OF PASSENGER IN AUTOMOBILE

The deceased and two others were riding with defendant in his car late at night and as his guests. Defendant complained to the others of being very sleepy and requested them to stay awake and talk to keep him from going to sleep. Shortly afterwards all of the occupants of the car, except the defendant, went to sleep and he was unable to arouse them. A few minutes later he also fell asleep, the car ran off the road, and one of the guests was killed. Deceased's administratrix brought suit against the driver for damages, alleging negligence in the driver's operation of the car. The court sustained the defendant's motion for a directed verdict. Plaintiff appealed. *Held:* The deceased was guilty of contributory negligence as a matter of law. No recovery. Affirmed. *Rennolds Admx.* v. *Waggener*, 271 Ky. 300, 111 S. W. (2d) 647, (1937).

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[5] Hauk v. McComas, 98 Ind. 460 (1884).

[6] Disston's Estate, 257 Pa. 537, 101 Atl. 804 (1917).

[7] Sawyer v. Freeman, 161 Mass. 543, 37 N. E. 942 (1894). See also Compton v. Rixey, 124 Va. 548, 98 S. E. 651 (1919).

The court enunciated the rule fundamental in cases of this type when it said:—"Ordinarily a duty is imposed upon the driver of an automobile to use ordinary care for the safety of his guests, and unless a danger is known . . . he (the guest) may rely upon the assumption that the driver will exercise such care; but there is a point where passive reliance upon the driver ends and the duty of a guest to exercise ordinary care for his own safety begins."[1] This is based upon the theory that every man must exercise ordinary care for his own safety.

If a guest does not exercise for his own safety the care of a reasonably prudent man under the circumstances, he is guilty of contributory negligence and can not recover for injuries sustained by his failure to exercise such care;[2] and likewise, such contributory negligence of a guest will prevent recovery for his death by his personal representative.[3]

The main question in the decision of the Waggener case was: Did the deceased use the care required of him under the circumstances?

It is a well settled Kentucky rule that a guest who enters a car with knowledge that the driver is intoxicated to such an extent that he will probably not use due care in, or is not capable of, handling the car is guilty of contributory negligence and can not recover for injuries resulting from the negligence of the driver.[4]

After a discussion of the above rules, the court clarified the all important question by analogy between a drunken driver and greatly fatigued driver. It decided, very logically, that there was little, if any, difference, and held that the above rule making it contributory negligence to ride with one known to be drunk applied also in the case of a driver known to be sleepy and greatly fatigued. This was the first case in Kentucky in which such a rule has been applied.

Generally, the question of contributory negligence is one for the jury.[5] But there is a well recognized exception in cases where one

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[1] Central of Georgia Ry. Co. v. Watkins, 37 F. (2d) 710 (1930); Switzler v. Atchison, T. & S. F. R. Co., 104 Cal. App. 138, 285 Pac. 918 (1930); Wallis v. Ill. C. R. Co., 247 Ky. 70, 56 S. W. (2d) 715 (1933); Schieck v. New York C. R. Co., 233 App. Div. 121, 251 N. Y. Supp. 564 (1931); Oppenheim v. Barkin, 262 Mass. 281, 159 N. E. 628 (1928) (a case very similar in facts and holding to the present case); 5 Am. Jur., Automobiles, Secs. 475, 476.

[2] Rebillard v. Minneapolis, St. P. & S. Ste. M. Ry. Co. (C. C. A., 6th), 216 F. 503, L. R. A. 1915B, 953 (1914); Boscarello v. N. Y., N. H. & H. R. Co., 112 Conn. 279, 152 Atl. 61 (1930); Sharp v. Sproat, 111 Kan. 735, 208 Pac. 613, 26 A. L. R. 1421 (1922); Toppass v. Perkins' Admrx., 268 Ky. 186, 104 S. W. (2d) 423 (1937); 5 Am. Jur., Automobiles, Secs. 476, 479.

[3] Smith's Admr. v. Nat. Coal & Iron Co., 135 Ky. 671, 117 S. W. 280 (1909); C. N. O. & T. P. R. Co. v. Lovell's Admr., 141 Ky. 249, 132 S. W. 569 (1910).

[4] Winston's Admr. v. City of Henderson, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918C, 646 (1918); Archer v. Bourne, 222 Ky. 268, 300 S. W. 604 (1927); Toppass v. Perkins' Admrx., 268 Ky. 186, 104 S. W. (2d) 423 (1937).

[5] Nelson v. Meyers, 94 Cal. App. 66, 270 Pac. 719 (1928); Stephenson's Admrx. v. Sharp's Exrs., 222 Ky. 496, 1 S. W. (2d) 957 (1927);

conclusion only can be fairly drawn from the evidence, and in such cases the question becomes one of law for the courts.[6] In the Waggener case the court applied the latter rule.

RICHARD BUSH, JR.

WILLS—CONSTRUCTION—GIFT TO ONE DURING WIDOWHOOD.

Testator devised his entire estate to his wife, "to be hers and subject to her use and for her benefit, so long as she shall remain a widow, after my death, and until she shall remarry." Other paragraphs disposed of the estate in the event of such remarriage. An action was brought by the executrix-widow for construction of the will to determine her power to execute a coal lease binding upon the estate, collect rents and royalties, and hold same under the will. *Held*, that the widow took a fee simple title subject to defeasance upon the event of her remarriage. Thomas, J., dissenting. *Davis* v. *Bennet's Exrx. et al.*, 272 Ky. 674, 114 S. W. (2d) 1150 (1938).

As is ably pointed out in the dissenting opinion, there are two well-defined classes of cases of this general nature, the first arising where there is a devise of a fee simple title without qualifying or modifying words, but to which is added a defeasance clause taking effect in case of remarriage, or other words indicating an intention to create a fee;[1] the second where the devise is coupled with words providing for a limitation over in the event of a subsequent remarriage.[2] It seems essential that any given case be regarded with this classification in mind. This the Kentucky Court has done in previous cases,[3] but seems to have

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Deshazer v. Cheatham, 233 Ky. 59, 24 S. W. (2d) 936 (1930); Schrader v. New York C. R. R. Co., 254 N. Y. 148, 172 N. E. 272 (1930); Lanstein v. Acme White Lead & Color Works, 285 Mass. 328, 189 N. E. 44 (1934).

[6] Hines v. May, 191 Ky. 493, 230 S. W. 924 (1921); McMurtry's Admrx. v. Kentucky Utilities Co., 194 Ky. 294, 239 S. W. 62 (1932); Taecker v. Pickins, 58 S. D. 177, 235 N. W. 504 (1931); Tapp v. Tennessee Electric Power Co., 9 Tenn. App. 632 (1929).

[1] Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970 (1910); Gaven v. Allen, 100 Mo. 293, 13 S. W. 501 (1889); Weiss v. Mt. Vernon, 157 App. Div. 383, 142 N. Y. Supp. 250 (1913); Redding v. Rice, 171 Pa. St. 301, 33 Atl. 330 (1895); Squier v. Harvey, 16 R. I. 226, 14 Atl. 862 (1888); *In re* Weymouth's Will, 165 Wis. 455, 161 N. W. 373 (1917).

[2] Belt v. Gay, 142 Ga. 366, 82 S. E. 1071 (1914); Brunk v. Brunk, 157 Ia. 51, 137 N. W. 1065 (1912); Cowman v. Glos, 255 Ill. 377, 99 N. E. 586 (1912); Hibbits v. Jack, 97 Ind. 570, 49 Am. Rep. 478 (1884); Nash v. Simpson, 78 Me. 142, 3 Atl. 53 (1886); Hale v. Neilson, 112 Miss. 291, 72 So. 1011 (1916).

[3] (a) In the following cases an intention to create a fee is reasonably clear, there being a defeasance clause operating in the event of subsequent remarriage: Lehfart v. Scharre, 143 Ky. 849, 137 S. W. 775 (1911); Huerkamp v. Huerkamp, 145 Ky. 194, 140 S. W. 182 (1911); Prindible v. Prindible, 186 Ky. 280, 216 S. W. 583 (1919); Hutter v. Crawford, 225 Ky. 215, 7 S. W. (2d) 1043 (1928).

(b) In the following cases the words of the devise are so restrictive as to create a life estate, subject to termination in the event of a subsequent remarriage: Napier, et ux. v. Davis, 7 J. J. Marsh. 283 (Ky.,