THE LIABILITY OF AN OWNER OF A VEHICLE WHEN, DUE TO HIS NEGLIGENCE, HIS GUEST IS INJURED

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A great deal has been written and there has been much discussion on the question as to whether a third person is liable to an automobile passenger who is injured by the concurrent negligence of the driver of the automobile and the third person. In answering this question, we must obviously determine whether the negligence of the driver can be imputed to his passenger so as to bar recovery against the third person. Every court, with the exception of the Michigan courts, has held that if the driver and his passenger are not engaged in a common or joint enterprise, and if the passenger is not guilty of contributory negligence, then the negligence of the driver is not imputable to the passenger so as to bar recovery against the third person.[1]

Blashfield[2] says on this point:

> "In order that the negligence of one person may be imputed to another, they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies. In other words, before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other in respect to the matter then in progress, as that, in contemplation of law, the negligent act of the third person was upon the principles of agency or co-operation in the common or joint enterprise the act of the person injured."

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[1] Small v. Chicago R. Co. (1881), 55 Ia. 582, 8 N. W. 437; Kopletz v. St. Paul (1902), 86 Minn. 573, 90 N. W. 794; Mott v. Hudson River R. Co. (1861), 21 N. Y. Super. 345; Chicago Union Tract Co. v. Leach (1904), 117 Ill. App. 169; Simonds v. N. Y. Ry. Co. (1884), 52 Conn. 264, 52 Am. Rep. 587; Richmond v. Va. Bonded Warehouse Corp. (1927), 148 Va. 60, 138 S. E. 503.

Contra, Kneeshaw v. Detroit United Ry. Co. (1912), 169 Mich. 697, 135 N. W. 903; Granger v. Farrant (1914), 179 Mich. 19, 146 N. W. 218; Jewell v. Rogers (1919), 208 Mich. 318, 175 N. W. 151; Gates v. Landon (1921), 216 Mich. 417, 185 N. W. 723.

[2] 1 CYC. OF AUTOMOBILE LAW 1000.

However, the courts, with the exception of the Texas courts, have uniformly held that where persons are engaged in a *common enterprise* in the use of an automobile, and one of them is injured while so engaged in such enterprise by the concurrent negligence of a third person and the driver, the negligence of the driver will bar a recovery for such injury against the third person.[3] Where persons are associated together in the execution of a common purpose or undertaking, it is held that each is the agent of the other in carrying out their plans, so that the negligence of one is attributable to the other. This doctrine seems to have been rejected by the Court of Civil Appeals of Texas,[4] the court saying:

> "We know of no authority for such a proposition of law, and appellant has cited none."

Of course, the question always arises in such a case as to whether the parties were actually engaged in a joint enterprise. This question in many cases is very hard to determine. Berry[5] says:

> "The test in determining the question is whether the persons were jointly operating or controlling the movements of the vehicle in which they were riding."

Now let us assume an entirely different set of facts. Instead of the passenger suing a negligent third person, he sues the negligent driver. Has he a cause of action against him?

The authorities are in accord with the proposition that ordinarily when the occupant of an automobile is injured through the operation of the machine, and it is shown that the driver was negligent, and that the occupant was not guilty of contributory negligence, the latter can maintain an action against the driver and recover compensation for his injury.[6]

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[3] Tannehill v. K. C. C. and S. R. Co. (1919), 279 Mo. 158, 213 S. W. 818; Hanser v. Youngs (1920), 212 Mich. 508, 180 N. W. 409; Beaucage v. Mercer (1910), 206 Mass. 492, 92 N. E. 774; Meyers v. So. Pac. Co. (Cal., 1923), 218 P. 284.

[4] K. C. M. and O. Ry. Co. v. Durrett (Tex., 1916), 187 S. W. 427.

[5] Berry, AUTOMOBILES, p. 502.

[6] Huddy, AUTOMOBILES, 5th Ed., Sec. 678; Blashfield, CYC. OF AUTOMOBILE LAW, p. 1483; Hemington v. Hemington (1922), 221 Mich. 206, 190 N. W. 683; Mayberry v. Sivey (1877), 18 Kans. 291; Clay v. Mo. Pac. Ry. Co. (1928), 5 S. W. (2d) 409.

But suppose the passenger and the driver of an automobile are engaged in a joint enterprise. Can the passenger sue the driver if the former sustains injury due to the negligence of the latter? This is the problem to which this paper is addressed.

The digests and the text writers make the broad statement that if the passenger and driver are engaged in a joint or common enterprise, and if the passenger is injured due to the negligence of the driver, the negligence of the driver is imputed to the passenger so as to bar recovery. If this statement is to be taken literally, then the answer to our question would be that the negligence of the driver would be imputed to his passenger, and the passenger barred from recovery against the driver.

Huddy,[7] says:

> "It may be stated as a general rule that when the driver and an occupant of a motor vehicle are engaged in a common purpose or joint enterprise, the negligence of the driver may be imputed to the occupant. If they are so engaged and the driver is negligent, the occupant may be precluded from recovery for his injuries either *from the driver* or a third person."

Such a proposition of law is not and cannot be based upon any reasonable, logical or justifiable grounds.

In going through the decided cases, one will find very few decisions on this point; in fact, most of our courts and text writers have failed to see that there was a distinction between the case where the passenger sues a negligent driver, and where he sues a co-negligent third party. Most of our courts and writers make no distinction between the two cases, but lump them together under one general statement. The law on the question as to the liability of a driver to his passenger when both are engaged in a common enterprise, is in a period of formation, and the courts should, if an analysis is properly made of the case, draw a distinction between the two types of cases.

Let us take a typical example: Suppose A and B decide to buy an automobile and drive from St. Louis to Los Angeles; each has a one-half interest in the car and they agreed to split the expenses of the trip. It is agreed that each is to do part of the driving. Suppose A is driving, and due to his negligence

[7] Huddy, AUTOMOBILES, Sec. 811.

B is injured without any fault on his part. Has B a cause of action against A?

Of course, we must first determine whether the parties were engaged in a joint enterprise. If it could be said that these parties were not engaged in a joint or common enterprise, then there is no question that the negligence of A would not be imputed to B so as to bar B's recovery against A. This already has been pointed out.

But assuming that A and B were engaged in a joint enterprise, is it proper in such case to say that A's negligence is to be imputed to B so as to bar recovery by B? The writer believes that it should not.

In *Wilmes v. Fournier*,[8] plaintiff had asked defendant to go on a deer hunt with several other men. The defendant consented and plaintiff and defendant, together with two others, started out in defendant's car on this deer hunt. While on their trip the plaintiff was injured, due to the negligence of the defendant. Plaintiff sued for his injuries and verdict was rendered in his favor, defendant appealing. The contention of the defendant was that these men were engaged in a joint enterprise, and, therefore, that the negligence of the defendant was to be imputed to the plaintiff so as to bar recovery. The court in a very forceful and emphatic opinion, answers defendant in this way:

> "In every case cited by counsel upon the question of whether there existed in the instant case a joint adventure or enterprise, the action was an action against a third party, and the question of whether the plaintiff was at the time of the accident complained of engaged in a joint enterprise was important only as it affected the liability of the plaintiff for the negligence of his companion or companions; that is, the case turned upon the question of imputed contributory negligence. . . . No case has been cited by counsel in which one person concededly engaged in a common enterprise has sought to maintain an action against one of his associates. The fact whether there is a joint enterprise is one of importance in the class of cases cited, when the action is against a third person; but as between themselves, I know of no rule of law that throws a mantle of protection over the tortious acts of an associate in a joint enterprise

[8] (1920), 111 Misc. Rep. 9, 180 N. Y. S. 860, *Aff'd* 185 N. Y. S. 958.

or in a partnership. Suppose one person assaulted his co-partner; shall the wrong-doer be immune from liability because they were engaged at the time of the assault in the partnership business? Suppose that while engaged in the partnership business, one party conducts himself so carelessly as, except for such partnership relations, would give a right of action; is the wrong-doer not liable to the injured partner? True, they are, in a sense, each acting as agent for the other, but does not one agent owe the duty of care towards his principal and a principal towards his agent?

"A joint enterprise or partnership is not for the purpose of permitting one of the parties thereto to commit a tort upon his associates. Suppose this hunting party had reached its destination and a member of the party had carelessly shot one of his associates. Would the fact that they, to some extent, were engaged in a common enterprise render the defendant sued for the shooting immune? I think not. Motion for new trial denied."

The New York court's reasons seem to be logical and reasonable.

However, in Illinois one of the courts seems to have taken exactly a contrary position in *Barnett v. Levy*.[9] The Illinois court did not make the distinction which should properly be made between the two types of cases, as made by the New York court. The action was brought by the occupant of an automobile against the owner, for injuries alleged to have been caused by the latter's negligent operation of the car. Defendant was the owner of the automobile; the plaintiff and defendant and two others had agreed to take a trip to New York and to divide the expenses among them; the plaintiff was agreed upon as cashier, and he paid all the expenses incurred during the trip, including the hotel bills, meals, gasoline, and oil, up to the time of the accident. Due to the negligence of the defendant, the driver, the plaintiff was injured. Defendant contended that plaintiff and himself were engaged in a joint enterprise, and that his negligence was to be imputed to the plaintiff so as to bar recovery. The court instructed the jury that if the persons riding in the automobile were engaged at the time of the accident in a joint enterprise, and each of them had agreed to pay one-fourth of the expenses of the trip, then the plaintiff could not recover.

[9] (1919), 213 Ill. App. 129.

Judgment was rendered for the defendant, and the plaintiff appealed. The upper court held:

> "The authorities are numerous that where two persons sustain personal injuries while engaged in a joint enterprise, if the negligence of one of them proximately contributed to the accident, then such negligence becomes a bar to an action brought by the other against a third person for such injuries. Judgment affirmed."

Obviously, the court failed to recognize that this action was not brought against a third person, but was brought against a joint adventurer. It seems to the writer that the lower court's instruction was erroneous.

However, a case which came to the appellate court of Illinois sometime later seems to overrule *Barnett v. Levy* in its dictum. In *Lasley v. Crawford*,[10] the defendant asked the decedent to accompany him in the defendant's automobile in order to get a large car to go riding, and while riding with defendant the decedent was killed in an accident due to the negligence of the defendant. This action was brought for damages. Judgment was for the plaintiff, and the defendant appealed, contending that as he and the decedent were engaged in a joint enterprise, his negligence was to be imputed to the decedent as to bar recovery. The court held that the parties were not engaged in a joint enterprise, and, therefore, that the negligence of the driver could not be imputed to his guest. By way of dictum, the court said:

> "And we do not think that there is any merit in counsel's further contention that plaintiff cannot recover against Crawford because at the time of the accident defendant and the decedent were engaged in a joint enterprise."

The court cited *Wilmes v. Fournier, supra,* but did not allude to *Barnett v. Levy, supra.* In the case of *Roy v. Kirn*,[11] there is dictum to the effect that one joint adventurer is liable to the other if the former is negligent. In this case the plaintiff was a guest in the defendant's automobile, and due to defendant's negligence sustained injuries. The appellate court in affirming judgment for the plaintiff says:

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[10] (1923), 228 Ill. App. 590.
[11] (1919), 208 Mich. 571, 175 N. W. 475.

"There is no claim here that any negligence of the defendant would be imputable to the plaintiff. This is not an action against other parties, but against the driver of the automobile."

It can be seen that this Michigan court recognizes that a distinction must be drawn between the case where one engaged in a joint enterprise sues his joint adventurer for negligence, and the case where he sues a third party.

The digests disclose only one more case on this proposition. In *Bushnell v. Bushnell*,[12] the plaintiff was riding in an automobile with her husband and was injured due to his negligence. She brought an action to recover for personal injuries. One of the defendant's contentions was that the parties were engaged in a joint enterprise at the time of the injury, that therefore his negligence was to be imputed to her, and that she was thus guilty of contributory negligence so as to bar recovery. Judgment was rendered for the plaintiff, however, and on appeal the court, in discussing the question of joint enterprise, says:

"It is generally agreed that, if two persons are engaged jointly in a common enterprise requiring for its purpose that they use and occupy a conveyance of some sort—a wagon, boat or other vehicle—in the management and control of which both have equal authority and rights, each assumes a responsibility for his colleague's conduct; and, if either is injured by the negligence of a third party and the concurring negligence of his companion, the mere fact that he was not at the time driving the common conveyance will not enable him to recover of the wrong-doer. . . . He, who, in the process of a joint enterprise, is engaged in operating a vehicle, represents in so doing, all who are associated with him in that enterprise, and if he is negligent, any one of them may look to him for damages upon the same basis as that upon which a principal holds that agent liable for his negligent conduct. However it might have been, were the plaintiff suing the third party for injuries due to his negligence concurrent with that of her husband, here, where she was charging him with responsibility for injuries due to his own failure in duty, there was no place for any imputation of his want of care to her, and the sole issues were those having to do with his negligence and her own contributory negligence. The doctrine of joint enterprise was wholly inapplicable to such a situation."

[12] (1925), 103 Conn. 583, 131 A. 432.

Let us draw an analogous case. Suppose A and B are co-servants engaged in a joint enterprise and working for C. Suppose A is injured due to the negligence of B while in the course of such employment. Our courts have always held that merely because the individuals involved were engaged in joint or common purpose, negligence of one is not to be imputed to the other so as to bar recovery. In the case of *Brower v. Northern Pacific Railway Company*,[13] the plaintiff sued the Northern Pacific Railway Company and one Klovstadt for personal injuries caused by the negligence of the defendants. The plaintiff and Klovstadt were fellow-servants working for the defendant Railway Company. Klovstadt contended that as he was a fellow-servant, he could not be held liable, but the lower court overruled Klovstadt's demurrer. On this point, the upper court said on appeal:

> "Whether a negligent servant is liable in an action for damages by another servant in the employ of the same master depends upon the common law obligation to so conduct himself as to not cause injury to another, and does not rest upon any duty imposed by privity of contract."

In another case, *Griffiths v. Wolfram*,[14] the court in a very clear opinion says that the mere fact that two men are working together in a joint enterprise does not excuse one if he acts carelessly towards the other. In this case, the plaintiff was working with defendants in erecting a machine shop, and was injured due to the defendants' carelessness. The court held that

> "The liability of defendants does not rest upon any duty imposed by privity of contract, for in such cases there may not be and frequently is not any such privity. But the duty of each to do the work with proper care grew out of the relation which existed between them as persons engaged in the same work; for where several persons are engaged in the same work, in which the negligent and unskilful performance of his part by one may cause danger to the others, in which each must necessarily depend for his safety upon the good faith, skill and prudence of each of the others in doing his part of the work, then it is the duty of each of the others engaged in the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances."

[13] (1910), 109 Minn. 385, 124 N. W. 10.
[14] (1875), 22 Minn. 185.

In *Atkins v. Field*,[15] the plaintiff and defendant were in the common employ of the United States government in constructing a battery. Due to the negligence of the defendant in handling a mast, the plaintiff received personal injuries, for which he sued. Judgment was for plaintiff in the lower court. The defendant appealed, contending that he was only a co-servant with the plaintiff under a common master, the United States government; that both were taking orders from a common superior; that the duty of furnishing safe machinery and appliances was upon the government, the common employer, acting through the officer in charge; and that all he (the defendant) did in setting up the derrick was done as an employee under the supervision of, and with the approval of, that officer. He argued that this approval by his superior relieved him from any responsibility therefor to his fellow servants. The upper court, in affirming judgment for the plaintiff, stated that an employee is responsible to a co-employee for injuries caused by his negligence in the line of his duty to the common employer.

In the case of *Cameron v. Nystrom*,[16] the defendant was a stevedore employed in discharging a vessel. The ship furnished the gear, but the stevedore set it up. This was done so negligently that a part of the gear broke, letting fall a coil of wire on the plaintiff, a seaman on the same ship, to his injury. It was argued that the plaintiff and defendants were co-servants and, therefore, that the defendant should not be held liable to the plaintiff. The court held this to be no defense, as the defendant was responsible to the plaintiff for the defendant's negligence in setting up the gear.

In *Osborne v. Morgan*,[17] the plaintiff and defendant were co-servants. Due to the negligence of the defendant, plaintiff was injured. On the question of whether a co-servant is liable for his negligence to this fellow employee, the court says:

> "One servant is liable to an action by another servant in the employment of the same master for damages occasioned by the negligence of the first in such employment. . . . The plaintiff's action is an action of tort for injuries which,

[15] (1896), 89 Me. 281, 36 A. 375.
[16] [1893], A. C. 308.
[17] (1881), 130 Mass. 102, 39 Am. Rep. 437.

according to the common experience of mankind, was a natural consequence of defendant's negligence."

Our digests are full of cases which say that one negligent servant is liable to his co-servant, providing, of course, that there is no contributory negligence, and this notwithstanding the fact that both may be doing the same work in a joina enterprise. In legal contemplation there should not be any distinction drawn between a case where the parties engaged in the joint enterprise that both may be doing the same work in a joint enterprise. are fellow servants and a case where the parties are not fellow servants but yet are engaged in a joint or common purpose.

The mere fact that the parties are engaged in a common or joint enterprise should not bar recovery by one of them against the other if the latter be negligent in the doing of a certain act. Such a position is based upon reason and logic, and the writer sees no soundness to the proposition that merely because the parties are engaged in a common enterprise, or doing an act for their common good, one may be as negligent as he likes towards the other, and yet not suffer the consequences of any damage the latter may sustain as a result of such negligence.

It is hoped that the general proposition of law applied by the Illinois court in *Barnett v. Levy, supra,* will not be hardened into a precedent which courts will follow blindly.