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Torts—Liability of Automobile Owner for Negligence of Driver—Statutory Presumptions of Agency and Consent

TORTS—LIABILITY OF AUTOMOBILE OWNER FOR NEGLIGENCE OF DRIVER—STATUTORY PRESUMPTIONS OF AGENCY AND CONSENT—[Federal].—Plaintiff sued to recover for injuries caused by an automobile owned by defendant but driven by another. Defendant testified that the driver had taken the car without his knowledge, authority, or consent. A statute made an owner of a motor vehicle liable for the negligence of a driver using the car with his knowledge and consent, and made proof of ownership *prima facie* evidence that the driver had the consent of the owner.[1] The jury rendered a verdict in favor of plaintiff. *Held*, that uncontradicted testimony by defendant alone was sufficient to overcome the statutory presumption, and that there should have been a directed verdict for defendant. Rutledge, J., dissented on the ground that, since the statute made proof of ownership evidence of consent, it was proper to send the case to the jury to determine the credibility of defendant. *Rosenberg v. Murray*.[2]

At common law the owner of an automobile is liable for the negligence of a driver other than himself only if the driver is his agent acting within the scope of his authority at the time of the accident.[3] Because of the large increase in automobile accidents in recent years, most of the states have modified the common law by statute or by judicial decision.[4] Many jurisdictions have adopted statutes which make an owner liable if the driver has the owner's express or implied consent.[5] In addition, some of these statutes expressly make proof of ownership *prima facie* evidence that the driver had the owner's consent and knowledge,[6] while the remaining statutes, as interpreted, make proof of ownership the basis for a presumption of consent and knowledge.[7] The majority of jurisdictions retain the agency basis of liability, but by decision have established that proof of ownership raises a presumption that the driver was the agent of the owner and was acting within

1. D. C. Code Supp. V (1939) tit. 6, sec. 255b.
2. (App. D. C. 1940) 116 F. (2d) 552.
3. 2 Mechem, *Agency* (2d ed. 1914) 1487, sec. 1912n.
4. See Notes: (1926) 42 A. L. R. 898; (1931) 74 A. L. R. 951; (1919) 4 A. L. R. 361; (1929) 61 A. L. R. 866; (1933) 83 A. L. R. 878; (1934) 88 A. L. R. 174; (1935) 96 A. L. R. 634; (1938) 112 A. L. R. 416.
5. Cal. Codes (1937) Vehicle Code, sec. 402; D. C. Code Supp. V (1939) tit. 6, sec. 255b; Iowa Code (1939) sec. 5037.09; Mass. Gen. Laws (1932) c. 231 sec. 85A; Mich. Comp. Laws (1929) sec. 4648; Minn. Mason's Stats. (Supp. 1936) sec. 2720-104; N. Y. Thompson's Laws (1939) Pt. II, c. 71, sec. 59; R. I. Gen. Laws (1938) c. 98, sec. 10; Tenn. Code (1932) sec. 2701. See Notes: (1919) 4 A. L. R. 361; (1929) 61 A. L. R. 866; (1933) 83 A. L. R. 878; (1934) 88 A. L. R. 174; (1938) 112 A. L. R. 416. See also Comment (1935) 19 Minn. L. R. 241, on effect of these statutes in Michigan, Minnesota, and New York.
6. D. C. Code Supp. V (1939) tit. 6, sec. 255b; Mass. Gen. Laws (1932) c. 231, sec. 85A; R. I. Gen. Laws (1938) c. 98, sec. 10; Tenn. Code (1932) sec. 2701.
7. Day v. General Petroleum Corp. (1939) 32 Cal. App. (2d) 220, 89 P. (2d) 718; Mitchell v. Automobile Underwriters (1938) 225 Iowa 906, 281 N. W. 832; Pulford v. Mouw (1937) 279 Mich. 376, 272 N. W. 713; Behrens v. Hawkeye Oil Co. (1922) 151 Minn. 478, 187 N. W. 605; St. Andrassy v. Mooney (1933) 262 N. Y. 368, 186 N. E. 867.

the scope of his authority.[8] One state, Connecticut, has a statute expressly raising this presumption.[9]

These presumptions are binding in the absence of rebutting testimony.[10] They are not evidence, however, and it is the general rule that the presumptions disappear as soon as any substantial evidence to the contrary is introduced.[11] If the rebutting testimony is unequivocal and uncontradicted, the court may direct a verdict for the defendant.[12] New York and Washington have held that the testimony of interested witnesses is insufficient to overcome the presumption conclusively, and that such cases must go to the jury.[13] In Connecticut, where the burden of rebutting the presumption is placed on the defendant by statute, it is held that the jury must determine the credibility of the defendant's witnesses.[14] Missouri, however, holds that the defendant's own uncontradicted testimony conclusively rebuts the presumption.[15] In Massachusetts and Rhode Island, which have statutes like that involved in the principal case, making proof of ownership *prima facie* evidence of consent, it has been held that the truth of the controverting evidence is for the jury and that it is usually error to direct a verdict for defendant.[16]

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8. William E. Harden, Inc. v. Harden (Ala. 1940) 197 So. 94; Manion v. Waybright (1938) 59 Idaho 643, 86 P. (2d) 181; Home Laundry Co. v. Cook (1939) 277 Ky. 8, 125 S. W. (2d) 763; McDowell, Pyle & Co. v. Magazine Service (1933) 164 Md. 170, 164 Atl. 148; Ross v. St. Louis Dairy Co. (1936) 339 Mo. 982, 98 S. W. (2d) 717; Kavanaugh v. Wheeling (1940) 175 Va. 105, 7 S. E. (2d) 125. See Notes: (1919) 4 A. L. R. 361; (1929) 61 A. L. R. 866; (1933) 83 A. L. R. 878; (1934) 88 A. L. R. 174; (1938) 112 A. L. R. 416.

9. Conn. Gen. Stats. (Supp. 1935) sec. 1661c.

10. Pulford v. Mouw (1937) 279 Mich. 376, 272 N. W. 713.

11. Flores v. Tucson Gas, Electric L. & P. Co. (1939) 54 Ariz. 460, 97 P. (2d) 206; Union Trust Co. v. American Commercial Car Co. (1922) 219 Mich. 557, 189 N. W. 23; Ross v. St. Louis Dairy Co. (1936) 339 Mo. 982, 98 S. W. (2d) 717; Saltas v. Affleck (Utah 1940) 102 P. (2d) 493; Kavanaugh v. Wheeling (1940) 175 Va. 105, 7 S. E. (2d) 125; Laurent v. Plain (1938) 229 Wis. 75, 281 N. W. 660. Oregon by statute makes presumptions indirect evidence and therefore the question must go to the jury. Ore. Laws (1920) sec. 793. Judson v. Bee Hive Auto Service Co. (1930) 136 Ore. 1, 294 Pac. 588 (1931), 297 Pac. 1050, 74 A. L. R. 944.

12. Walsh v. Rosenberg (App. D. C. 1935) 81 F. (2d) 559; Manion v. Waybright (1938) 59 Idaho 643, 86 P. (2d) 181; Mitchell v. Automobile Underwriters (1938) 225 Iowa 906, 281 N. W. 832; McDowell, Pyle & Co. v. Magazine Service (1933) 164 Md. 170, 164 Atl. 148; Union Trust Co. v. American Commercial Car Co. (1922) 219 Mich. 557, 189 N. W. 23; Ross v. St. Louis Dairy Co. (1936) 339 Mo. 982, 98 S. W. (2d) 717; Kavanaugh v. Wheeling (1940) 175 Va. 105, 7 S. E. (2d) 125.

13. Piwowarski v. Cornwell (1937) 273 N. Y. 226, 7 N. E. (2d) 111; Steiner v. Royal Blue Cab Co. (1933) 172 Wash. 396, 20 P. (2d) 39; McMullen v. Warren Motor Co. (1933) 174 Wash. 454, 25 P. (2d) 99.

14. Conn. Gen. Stats. (Supp. 1935) sec. 1661c; Lockwood v. Helfant (1940) 126 Conn. 584, 13 A. (2d) 136.

15. Frohoff v. Adams (Mo. App. 1937) 108 S. W. (2d) 615.

16. Thomes v. Meyer Store Inc. (1929) 268 Mass. 587, 168 N. E. 178; Legarry v. Finn Motor Sales (Mass. 1939) 23 N. E. (2d) 1011; Hill v. Cabral (R. I. 1938) 2 A. (2d) 482.

The majority of the court in the instant case took the position that the statute creates a mere presumption despite the fact that the statute expressly states that proof of ownership shall be *prima facie* evidence of consent. The court also overlooked the fact that the other jurisdictions with similar statutes have construed them consistently as requiring cases like the instant one to go to the jury. It would appear, therefore, that the dissenting opinion of Judge Rutledge is more in line with established principles.

D. C.

TRUSTS—POWER OF TRUSTEE—INVESTMENT IN STOCK OF PRIVATE CORPORATIONS—[Missouri].—At the instance of the life beneficiary of a testamentary trust, the plaintiff trust company as trustee sought instructions with respect to permissible investment of the trust funds. The estate was invested almost wholly in railroad, public utility, industrial, and first mortgage real estate bonds. The annual income from them was less than 3% of their market value. The life beneficiary asked that about 20% of the estate be invested in such common and preferred stocks as the trustee might deem desirable investments. The pertinent clause of the will gave the trustee power to sell and to "invest the proceeds in such property or securities as in its judgment" would "yield a safe and regular income and to change investments and make new investments from time to time as it may deem necessary and proper." The lower court decreed that the trustee was authorized to invest "in corporate preferred and common stocks; provided, however, that it" should "exercise reasonable care in the selection of such stocks as" were "to be purchased." From this decree, the remainderman under the trust appealed. In the St. Louis Court of Appeals, this judgment was *affirmed. Toberman v. St. Louis Union Trust Co.*[1]

In another recent case the trustees of a charitable trust came into court asking instructions as to investment and approval of investments already made. The question was whether investments in the common and preferred stocks of private corporations were proper. The lower court decided that such investments were proper. In the Missouri Supreme Court, this judgment was *affirmed. Rand v. McKittrick.*[2]

That the trustee's loyalty is divided between life tenant and remainderman, between producing income and conserving capital, is clear. Stock is one of the most common forms of income-producing investment. However, authority is divided as to whether the trustee with general powers of investment may purchase stock.[3] The New York rule is that he has no such power.[4] On the other hand, by the Massachusetts rule, he has.[5] In many

1. (Mo. App. 1940) 140 S. W. (2d) 68. Another issue was whether the trustee might invest in a common trust fund. It was held that such was also a permissible investment.

2. (Mo. 1940) 142 S. W. (2d) 29. See Comment (1940) 9 U. Kan. City L. Rev. 44.

3. For a collection of cases pro and con see 2 Scott, *The Law of Trusts* (1939) sec. 227.11.

4. King v. Talbot (1869) 40 N. Y. 76.

5. Harvard College v. Amory (1830) 26 Mass. (9 Pick.) 446.