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Death—Imputation of Contributory Negligence Among Parents

instruct them thus: "The court instructs the jury that if, under the evidence and under the other instructions given you by the court, you find defendant guilty herein, then it is your duty under the law of this state, to determine and to assess the punishment which the defendant herein shall suffer; but the court further instructs you that if, under the evidence herein and under the other instructions given you by the court, you find the defendant guilty herein, but you are unable to agree upon the punishment to be assessed, then you shall so state in your verdict, and in that event, but not otherwise, the court will assess the punishment."

On the one hand it would seem that the jury should know the law under which it is to function and hence that the instruction should be given before the jury retires. Moreover, if the jurors knew that they did not absolutely have to fix the punishment it would eliminate those cases in which a juror refuses to find the accused guilty because the others think he should receive a heavier penalty than this particular juror thinks he should. The one question would be separate and distinct from the other. On the other hand it seems that the instruction, given before the jury retires, would in some measure defeat the purpose of the statute, which obviously is to have the jury fix the punishment if possible and yet to prevent a mistrial if they cannot agree. If the jury know from the first that they do not have to fix the punishment the likelihood is greater that they will not do so.

In *State v. Adams* (Mo. 1929) 19 S. W. (2d) 671, the trial court gave almost the exact instruction proposed and it was approved by the Supreme Court of Missouri. However, the circumstances under which the instruction was given were as follows: The jury retired at 1:00 P. M. and at 3:20 P. M. announced that they had agreed on the guilt of defendant but could not agree on the punishment. The court sent the jury back to deliberate further. They again returned at 3:50 P. M. and announced that there was no possibility of agreeing on the punishment. The court then gave the instruction. Hence the important question of the time at which the instruction may be given has yet to be passed upon by the highest court of the state. B. L. W., '31.

DEATH—IMPUTATION OF CONTRIBUTORY NEGLIGENCE AMONG PARENTS.—The parents of a boy nineteen years old sued for his wrongful death caused by defendant railroad. The sum asked was the maximum amount allowed under the statute providing a penalty which is recoverable by the father and mother, each of whom shall have an equal interest in the judgment, or by the survivor, if either be dead. R. S. Mo. (1919) sec. 4217. The father's negligence had contributed to the accident. *Held,* the father's negligence, which would bar a judgment in his favor alone, should not be imputed to the mother, and the full penalty should be recovered because there can be no apportionment of damages. *Herrell v. St. Louis-San Francisco Ry. Co.* (Mo. 1929) 23 S. W. (2d) 102.

Many cases have held that the negligence of one parent which results in injury to their children must be imputed to the other. *O'Flaherty v. Union Ry. Co.* (1869) 45 Mo. 70; *Darbinsky v. Pennsylvania Co.* (1915) 248 Pa.

503, 94 Atl. 269; *Crevelli v. Chicago M. & St. P. Ry. Co.* (1917) 98 Wash. 42, 166 Pac. 66. But the more modern view seems to be that the marriage relation is insufficient for the imputation of liability except where the negligent person acted as agent for the other. *Phillips v. Denver City Tramway Co.* (1912) 53 Colo. 458, 128 Pac. 460; *Love v. Detroit, J. & C. R. Co.* (1912) 170 Mich. 1, 135 N. W. 963; *Macdonald v. O'Reilly* (1904) 45 Ore. 589, 78 Pac. 753. In the light of the dissolution of the common-law unity of husband and wife, the latter view seems preferable, and the Missouri court in the principal case decided to adopt it and overrule its previous view. *O'Flaherty v. Union Ry. Co.*, above.

The decision that there could be no apportionment of damages seems to be based almost entirely upon the fact that the statutory sum is described as a penalty. The full amount was awarded despite the many cases in other jurisdictions which abate the award to the extent of the interest of persons contributorily negligent. This view seems to be accepted in all other states where contributory negligence is considered a defense to the statutory action and where the negligence of one parent is not to be imputed to the other. *Phillips v. Denver City Tramway Co.*, above; *Wolf v. Lake Erie & W. R. Co.* (1896) 55 Ohio St. 530, 45 N. E. 708; 8 R. C. L. 786; 17 C. J. 1244; 23 A. L. R. 670, 690. The opinion indicates that the decision is based upon a desire to limit the application of the doctrine of contributory negligence in statutory actions. The court does not assume to overrule the previous cases under the statute in which contributory negligence has been a good defense; but because of its disapproval of the principle, refuses to apply it to facts not clearly covered by the decisions. The court might have justified the result it reached by completely reversing its former position and holding that in an action for a statutory penalty contributory negligence is no defense. *McKay v. Syracuse Rapid Transit R. Co.* (1913) 208 N. Y. 359, 101 N. E. 885; *Wilmot v. McPadden* (1905) 78 Conn. 276, 61 Atl. 1069; *Watson v. Southern R. Co.* (1903) 66 S. C. 47, 44 S. E. 375. Absent such a basis, the decision lacks both logic and authority. J. A. G., '31.

JUDGMENTS—EFFECT OF FAILURE TO SERVE ALL JOINT DEFENDANTS.—Three defendants were sued as joint tort-feasors, but only one was served. Plaintiff proceeded to judgment without dismissing as to the two not served. On appeal the judgment was declared void as against all defendants. *Cunningham v. Franke* (Mo. A. 1929) 18 S. W. (2d) 106. The decision was put on the ground that it did not settle the rights of all parties to the action, and that R. S. Mo. (1919) sec. 4223, which provides for contribution among joint tort-feasors, would give defendants properly served rights against the other defendants without service on them, unless this result was reached.

A number of cases follow what seems to be the more conservative view in holding that failure of service against some joint defendants causes the judgment to be void against all. *Boutwell v. Grayson* (1918) 118 Miss. 80,